COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP929

Cir. Ct. No. 2002CV2336

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

JOSEPH BALISTRIERI AND JOHN BALISTRIERI,

PLAINTIFFS-JOINT-APPELLANTS,

V.

JENNIE ALIOTO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 DYKMAN, J. John and Joseph Balistrieri appeal from a judgment dismissing their action to enforce an option to purchase a property owned by Jennie Alioto. Alioto's defense was that the contract was obtained by fraud and

was therefore unenforceable. The matter was tried to the court, which found in Alioto's favor.

¶2 The Balistrieris first contend that Alioto's defense of fraudulent misrepresentation was time-barred by WIS. STAT. § 893.14 (2003-04).,[1] an argument rejected by the trial court in its denial of the Balistrieris' motion for summary judgment. We need not address this contention. We conclude instead that the Balistrieris' motion for summary judgment was properly denied because the affidavits raise a triable issue as to whether the Balistrieris should be equitably estopped from asserting the statute of limitations against Alioto. Further, the trial court's factual findings establish the elements of estoppel as a matter of law. We conclude that on these findings the Balistrieris are estopped from asserting § 893.14 to defeat Alioto's defense of fraud.

¶3 The Balistrieris also contend that the trial court improperly admitted a transcript of a one-party consent tape into evidence because the tape was not admissible under WIS. STAT. §§ 885.365(1) and 968.29 We do not reach this question because we conclude that even if admission of the tape was error, it was not prejudicial to the Balistrieris' case. The Balistrieris further assert that the trial court erred when it determined that they: (1) had a fiduciary duty to Alioto; (2) obtained the contract by misrepresentation; and (3) were joint venturers. We disagree and affirm.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

BACKGROUND

¶4 The trial court made the following factual findings which are uncontested. John and Joseph Balistrieri are brothers, and Jennie Alioto is a blood relative of the Balistrieris. Alioto, who has a high school education, worked for John and Joseph's father, Frank Balistrieri, as a bookkeeper for many years.

¶5 John and Joseph Balistrieri have had a long personal and professional relationship with Alioto over the past fifty years. Joseph and John Balistrieri, both former attorneys, performed legal services for Alioto at various times between 1966 and 1984 for no compensation because she was a relative. John Balistrieri also took a personal interest in Alioto's business affairs, and the trial court found that for many years Alioto relied upon his advice and support. In 1978, John Balistrieri helped Alioto to purchase a rental property at 1601 North Jackson Street in Milwaukee. Since the purchase, John Balistrieri has assisted Alioto in managing the property.

¶6 In 1991, John Balistrieri and Alioto discussed the future status of the property. Alioto told John Balistrieri that she did not wish to sell because she needed the income from the rental units for her retirement. Alioto told Balistrieri that she would be willing to give him and his brother the option to purchase the property before any other buyer if she ever decided to sell it.

¶7 On February 14, 1992, Alioto and the Balistrieris met and signed a contract giving the Balistrieris an option to purchase the Jackson Street property after ten years for $125,000. Alioto signed the document, but testified that she believed that she was signing an agreement providing the Balistrieris with the first opportunity to purchase the property should she decide to sell it. She also testified that she did not read the contract prior to signing it.

¶8 Three months later, Alioto read the contract for the first time and understood that its terms provided the Balistrieris with an option to purchase. Alioto then phoned John Balistrieri and recorded the conversation. A transcript of the exchange was admitted into evidence at trial for impeachment purposes as to John Balistrieri.[2] Alioto also testified to her own recollection of the conversation:

> I told him that that wasn't what I was supposed to be—have been signing, that I thought I was signing an offer—what—offer—I can't think of the phrase, and he told me not to worry about it, he would do right by me, and I said, you put the price in, you put the date in, and I didn't know anything about it.

¶9 The Balistrieris and Alioto did not discuss the contract again for nearly ten years. In early 2002, the brothers served Alioto with notice of their intention to exercise their option to purchase the property. Alioto refused to sell, and the Balistrieris sued Alioto for specific performance of the contract.

¶10 Alioto answered that the Balistrieris fraudulently induced her to sign the contract. The Balistrieris moved for summary judgment, arguing that Alioto's defense of fraud was barred by the six-year limitation in WIS. STAT. § 893.93(1)(b)[3] on claims of fraud, made applicable to defenses by WIS. STAT.

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[2] John Balistrieri had averred that this conversation never happened. Because the tape was admitted for impeachment purposes, we confine our discussion of the conversation to the parties' testimony of their recollections of the conversation.

[3] WISCONSIN STAT. § 893.93 provides, in relevant part:

> (1) The following actions shall be commenced within 6 years after the cause of action accrues or be barred:
>
> ....

(continued)

§ 893.14.[4] The court denied the Balistrieris' motion, concluding that § 893.14 did not apply to defenses. It also stated that, when viewing the facts most favorably to Alioto, the Balistrieris could be estopped from asserting that the defense was time-barred:

> [T]he defense has pled estoppel…. [The] conduct that they are referring to is the representation not to worry, in light of the relationship between the parties, the family relationship, the fiduciary relationship that they allege, the longstanding reliance of the defendant upon the plaintiff for guidance in matters both financial and legal, historically, and because of that relationship, she accepted that assurance and did not act upon trying to rescind the contract or to withdraw from it at that time or to seek an action based on fraud.
>
> ....
>
> I would agree with the defense, that as to the statute of limitations, estoppel could apply, given the facts in this case.

> (b) An action for relief on the ground of fraud. The cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud.

[4] WISCONSIN STAT. § 893.14 provides:

> **Limitation on use of a right of action as a defense or counterclaim**. Unless otherwise specifically prescribed by law, the period within which a cause of action may be used as a defense or counterclaim is computed from the time of the accrual of the cause of action until the time that the plaintiff commences the action in which the defense or counterclaim is made. A law limiting the time for commencement of an action is tolled by the assertion of the defense or the commencement of the counterclaim until final disposition of the defense or counterclaim. If a period of limitation is tolled under this section and the time remaining after final disposition in which an action may be commenced is less than 30 days, the period within which the action may be commenced is extended to 30 days from the date of final disposition.

> And it's not the court's position—It's not for the court to weigh the weight of those facts, but certainly, that the facts would support, looking at them in the light most favorable to the defense, could support an … estoppel in regard to the statute of limitations.

Following a bench trial, the court rendered a decision which determined that the Balistrieris had a fiduciary duty to Alioto, that they obtained the contract by fraud and that Alioto was justified in relying on John Balistrieri's assurance that she had nothing to worry about. The court concluded the option to purchase was unenforceable. The Balistrieris appeal.

DISCUSSION

Defense of Fraud and Equitable Estoppel

¶11 The Balistrieris first contend that the trial court erred in its conclusion that WIS. STAT. § 893.14 does not apply to defenses and thus did not defeat Alioto's defense of fraud. They assert that the plain language of the statute makes statutes of limitation on claims applicable to defenses as well as counterclaims. The trial court decided this issue at summary judgment. We review a grant or denial of summary judgment de novo, applying the same methodology as the trial court. ***Claypool v. Levin***, 209 Wis. 2d 284, 290, 562 N.W.2d 584 (1997). Summary judgment is appropriate when there are no disputed issues of material fact, and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶12 The summary judgment materials contain the following assertions of fact. Alioto avers in a March 2002 affidavit that her cousins, the Balistrieris, have assisted her in her financial affairs, that she has relied on them and trusted them, and that they helped her to purchase her current home and the Jackson Street

property. She avers that she is retired and her only source of income other than social security is $3,000 per month in rental proceeds from the property. She avers its fair market value in 2002 was over $250,000. She avers that in early 1992 her cousins asked if she would be willing to sell them the Jackson Street property.[5] She avers that she told them she was not interested in selling, and that they then asked if she would be willing to give them a right of first refusal in the event she were to sell the property. She avers that she agreed to give them such a right because she never intended to sell the property. Then, Alioto continues, on February 14, 1992, at the behest of the Balistrieris, she signed what she believed to be a contract giving the Balistrieris a right of first refusal on the Jackson Street property.

¶13 In a September 2002 affidavit, Alioto avers that she never discussed an option to purchase with her cousins before signing the contract. She further avers that she later discovered that the contract did not, in fact, provide a right of first refusal but an option to purchase for a price of $125,000. She avers that she called John Balistrieri immediately thereafter to ask about the document. She avers that Balistrieri told her not to worry, and that because "he had advised [her] in [her] financial and legal affairs, [she] relied on what he said and trusted that [she] did not need to worry … that the document appeared to be an option to purchase."

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[5] At trial, Alioto testified that John Balistrieri asked her if she would sell the Jackson Street property to him and his brother. When asked when this conversation took place, Alioto could not recall but testified that it may have occurred one to two years prior to the execution of the contract, contradicting this affidavit. However, when determining whether summary judgment was properly granted or denied, we do not look to the truth or falsity of factual allegations, only whether those allegations, if taken to be true, raise an issue of fact.

¶14 We need not consider whether the trial court misconstrued WIS. STAT. § 893.14. The trial court correctly denied the Balistrieris' summary judgment motion because there were disputed issues of fact concerning whether they should be estopped from asserting the statute of limitations against Alioto.

¶15 There are four elements to equitable estoppel: "(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Milas v. Labor Ass'n of Wisconsin, Inc.***, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656. In the context of summary judgment, if the affidavits show facts that if true would establish each of these elements, then whether equitable estoppel may be applied is an issue for trial.

¶16 Our review of the affidavits shows that they assert facts that fulfill the four elements of estoppel. The affidavits meet the first two elements by asserting that the Balistrieris: asked Alioto to sell her property to them; drew up and induced Alioto to sign a contract providing them with an option to purchase when Alioto had only agreed to an offer of first refusal; and John made subsequent verbal assurances to Alioto that she need not worry about the contract's terms. The fourth element, detriment, is obvious: Alioto stands to lose the rental income she relied on in her retirement and would be forced to sell the Jackson Street property for less than half of the current market value, a loss of $125,000.

¶17 The only arguably close question is whether Alioto's reliance on Balistrieris' assurances was reasonable. We conclude that this element, too, is established, or at least placed in dispute, on the affidavits. John and Jospeph Balistrieri were close relatives of Alioto, and the affidavits assert they were attorneys who advised Alioto, a high school graduate, in many legal and financial

matters. A factfinder could find facts that would support the legal conclusion that the Balistrieris had a fiduciary duty to Alioto. *See* ***Production Credit Ass'n of Lancaster v. Croft***, 143 Wis. 2d 746, 755-56, 423 N.W.2d 544 (Ct. App. 1988). (A fiduciary relationship requires "an inequality, dependence, weakness of age, of mental strength, of business intelligence, knowledge of facts involved, or other conditions giving to one an advantage over the other."). Thus, the affidavits support a view that Alioto's reliance on the Balistrieris was reasonable.

¶18 The trial court stated in its denial of summary judgment: "[T]o the statute of limitations, estoppel could apply, given the facts in this case" and "certainly … the facts would support, looking at them in the light most favorable to the defense, could support an … estoppel in regard to the statute of limitations." We agree. Because the facts asserted in the affidavits, if true, fulfilled the elements of estoppel concerning the Balistrieris' assertion of the statute of limitations against Alioto, we conclude the trial court properly denied the Balistrieris' motion for summary judgment.

¶19 We move now to the trial. The Balistrieris do not contest the trial court's findings. Our review of these findings shows that the undisputed findings fulfill the elements of estoppel. As with our analysis of estoppel based on the summary judgment materials, three of the four elements of estoppel were easily demonstrated, and the only issue is whether Alioto's reliance on the Balistrieris was reasonable. Reasonableness is a question of law, but one in which an appellate court gives some weight to the trial court's decision. *See* ***Chen v. Warner***, 2005 WI 55, ¶38, 280 Wis. 2d 344, 695 N.W.2d 758.

¶20 With the benefit of the trial court's analysis, we conclude that, given the fiduciary nature of Alioto's relationship with the Balistrieris, *see* ¶¶24-29,

infra, her reliance on the assurances of John Balistrieri not to worry was reasonable. The trial court found: "The plaintiffs had a longstanding role in Ms. Alioto's affairs overseeing her legal and financial matters and they had an obligation to ensure that [Alioto] fully understood the terms and the effect of the document …." Because Alioto was long accustomed to the Balistrieris looking out for her best interests in legal and business dealings, what would otherwise be unreasonable—belatedly reading a contract and trusting assurances that the other party would not attempt to enforce that contract—was reasonable under the circumstances. We therefore conclude that factual findings establish the elements of equitable estoppel.

¶21 Generally, when the existence of the elements of estoppel is established as a matter of law, we remand to the trial court to exercise its discretion as to whether to actually apply estoppel, as we did in ***Nugent v. Slaught***, 2001 WI App 282, ¶30, 249 Wis. 2d 220, 638 N.W.2d 594. However, here, unlike ***Nugent***, the facts were sufficiently developed and the trial court made unambiguous factual findings that support the application of estoppel. *See* ***Nugent***, 249 Wis. 2d 220, ¶36. Moreover, as we noted in ***Nugent***, our supreme court has on at least one occasion applied equitable estoppel after determining as a matter of law that all of the elements of estoppel were present. ***Id.*** (*citing* ***Milas***, 214 Wis. 2d at 13-15). We therefore conclude that the Balistrieris are equitably estopped from asserting WIS. STAT. § 893.14 to defeat Alioto's assertion of fraud as a defense.

Admissibility of the Tape and Its Effect on the Judgment

¶22 The Balistrieris contend that the trial court erred by admitting into evidence the one-party consent tape of a conversation between Alioto and John

Balistrieri. They claim this error was prejudicial, asserting that the tape provided the sole evidentiary basis for the trial court's ruling.

¶23 We conclude that even if the trial court erred by admitting the tape, the error was not prejudicial to the outcome. Alioto testified to her independent recollection of the conversation as follows: "I told him that … I thought I was signing a [right of first refusal] … and he told me not to worry about it, he would do right by me." This testimony provided a sufficient basis for the court's finding that Alioto was "justified in not pursuing matters further" after the 1992 phone conversation with John Balistrieri.

Fiduciary Relationship

¶24 The Balistrieris contend that the evidence at trial does not support the court's conclusion that they had a fiduciary relationship with Alioto. Alioto admits she did not read the contract before signing it. Whether this failure to read the contract was justifiable or negligent may depend upon whether the Balistrieris had a heightened duty of care to Alioto. *See* ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 732-34, 456 N.W.2d 585 (1990). If the contract was the product of an arms-length transaction between equals, Alioto's failure to read it would likely bind her to its terms. *See* ***Ritchie v. Clappier***, 109 Wis. 2d 399, 405-406, 326 N.W.2d 131 (Ct. App. 1982).

¶25 The Balistrieris do not dispute the facts as found by the trial court. Rather, they assert that these undisputed facts do not meet the legal standard of fiduciary duty. To determine whether a fiduciary duty existed, we apply the uncontested facts found at trial to the law. ***Century Capital Group v. Bartels***, 196 Wis. 2d 806, 812-813, 539 N.W.2d 691 (Ct. App. 1995). We do so without deference to the trial court's legal conclusion. ***Id.***

¶26 Generally, there are two types of fiduciary relationships: 1) those specifically created by contract or a formal legal relationship; and 2) "those implied in law due to the factual situation surrounding the transactions and relationships of the parties to each other and to the questioned transactions." ***Production Credit Ass'n of Lancaster v. Croft***, 143 Wis. 2d 746, 752, 423 N.W.2d 544 (Ct. App. 1988); *see also* ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck***, 127 Wis. 2d 127, 136, 377 N.W.2d 605 (1985) ("A fiduciary relationship arises from a formal commitment to act for the benefit of another (for example, a trustee) or from special circumstances from which the law will assume an obligation to act for another's benefit."). A court will find an implied fiduciary relationship when "there exists an inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of facts involved, or other conditions giving to one an advantage over the other." ***Croft***, 143 Wis. 2d at 755-56.

¶27 The factual findings of the trial court support its conclusion that the Balistrieris had a fiduciary duty to Alioto. First, the trial court found that both Balistrieris "from time to time acted as attorney for [Alioto] between 1966 to 1984" and that they "had a longstanding role in Ms. Alioto's affairs overseeing her legal and financial matters." An attorney-client relationship is a fiduciary relationship as a matter of law. *See* ***State v. Knight***, 232 Wis. 2d 305, 312, 606 N.W.2d 291 (Ct. App. 1999). Alioto was a former client of both Balistrieris, and while the trial record shows that both Balistrieris were no longer practicing attorneys at the time of the transaction, they nonetheless owed a higher standard of care to Alioto, particularly in a transaction adverse to her interests. *See* S.C.R. 20:1.8. Alioto's history as a longstanding client of John Balistrieri justified her reliance on Balistrieri, regardless of the status of his bar membership at the time.

¶28 Moreover, the court's finding that John Balistrieri took "a personal interest in the defendant's affairs and provided her with business advice and support for many years" and her status as a longtime employee of the Balistrieris' father with only a high school education also indicate an implied fiduciary relationship based on inequality, dependence, and knowledge of facts which gave the Balistrieris an advantage over Alioto. For these reasons, we conclude that the trial court did not err in determining that the Balistrieris had a fiduciary duty to Alioto.

¶29 The Balistrieris argue that Alioto's ability to understand the contents of the agreement three months later demonstrates that she was an equal to the Balistrieris. However, Alioto's ability to understand the agreement is not dispositive of whether the Balistrieris had a distinct advantage over her. In this case, the Balistrieris' active role in Alioto's legal and financial affairs over many years obligated the Balistrieris to exercise a heightened standard of care toward Alioto.

Misrepresentation

¶30 The Balistrieris next contend that the trial court's factual findings and the trial record do not support the trial court's legal conclusion that the Balistrieris obtained the contract by misrepresentation. Whether the uncontested trial evidence shows misrepresentation is a matter of law that we review de novo. ***Williams v. Rank & Son Buick, Inc.***, 44 Wis. 2d 239, 246, 170 N.W.2d 807 (1969). The supreme court explained the required elements of intentional misrepresentation in ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶13, 270 Wis. 2d 146, 677 N.W.2d 233:

> (1) the defendant must have made a representation of fact to the plaintiff; (2) the representation of fact must be false; (3) the plaintiff must have believed and relied on the misrepresentation to his detriment or damage…; (4) the defendant must have made the misrepresentation with knowledge that it was false or recklessly without caring whether it was true or false; and (5) the defendant must have made the misrepresentation with intent to deceive and to induce the plaintiff to act on it to his detriment or damage.

Additionally, "failure to disclose a fact constitutes a misrepresentation if the defendant has a duty to disclose that fact." ***Hennig v. Ahearn***, 230 Wis. 2d 149, 165, 601 N.W.2d 14 (Ct. App. 1999) (citation omitted).

¶31 The trial court made the following factual findings that are relevant here:

> 7. Sometime in 1991 …. [Alioto] informed John Balistrieri that she did not wish to sell the property ….
>
> 8. [Alioto] informed John Balistrieri that she would agree to give John and Joe the option to purchase the property before any other buyer when and if she decided to sell the property.
>
> 9. On February 14, 1992, the parties met and executed a document that was a ten-year option for the [Balistrieris] to buy the property at the price of $125,000.
>
> 10. Attorney Greg Gramling prepared … the document at the request of the [Balistrieris] …. He testified that he read the document to the defendant in the meeting …
>
> 11. The defendant signed the document during the meeting, but testified that she relied upon earlier conversations with John Balistrieri and believed she was giving the plaintiffs a "right of first refusal" and not an option to buy ….

The Balistrieris assert that no evidence was presented that the Balistrieris made any sort of representation, whether false or otherwise, to Alioto regarding the

contents of the contract. They note that Alioto testified that she remembered little of what the Balistrieris said to her about the contract at the signing.

¶32 The evidence at trial and the trial court's findings fulfill the elements of misrepresentation. The Balistrieris' fiduciary duty to Alioto required more than abstention from active misrepresentation of the facts; it included a duty to disclose to Alioto that she was entering into an agreement providing the Balistrieris an option to purchase. *See* ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶50, __ Wis. 2d __, 700 N.W.2d 180 (stating that if a fiduciary relationship exists between the parties, failure to disclose may be actionable as both an intentional misrepresentation and a breach of fiduciary duty). We therefore conclude that the uncontested facts found by the trial court fulfill the elements of misrepresentation.

Joint Venture

¶33 Finally, the Balistrieris argue that the trial court's findings do not support its conclusion that they were involved in a joint venture, whereby John's misrepresentations to Alioto could be imputed to Joseph. Thus, they assert that absent a joint venture, Joseph Balistrieri may enforce the contract. Once again, we review de novo a trial court's legal conclusions based on uncontested facts. ***Century Capital Group***, 196 Wis. 2d at 812-813.

¶34 "A joint adventure is similar to a partnership but is usually confined in its scope to a single transaction." ***Employers Mutual Liability Insurance Company of Wausau v. Parker***¸ 266 Wis. 179, 181, 63 N.W.2d 101 (1954). Wisconsin applies the test set out in the *Restatement (Second) of Torts, sec. 491* (1965) to determine whether a joint venture has been established. ***Spearing v. County of Bayfield***, 133 Wis. 2d 165, 173, 394 N.W.2d 761 (Ct. App. 1986). The essential elements are: (1) an agreement, express or implied, among the members

of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to voice in the direction of the enterprise, which gives an equal right of control. ***Id***.

> A joint venture exists when two or more parties agree to contribute money or services in any proportion towards a common objective, exercise joint ownership and control and share profits but not necessarily losses. Control need not be shared equally between members of a joint venture but may be delegated to one member.

Bulgrin v. Madison Gas & Electric Company, 125 Wis. 2d 405, 412, 373 N.W.2d 47 (Ct. App. 1985) (citations omitted).

¶35 The trial court stated: "Both plaintiffs signed the option. In this particular joint venture they were partners and agents of each other." The Balistrieris assert that this statement "provides little for [us] to review." We disagree. The trial record supports the trial court's conclusion. Most significantly, the contract, which was entered into evidence at trial, provides an option to purchase for the Balistrieris: "Jennie Alioto, an unmarried woman, Seller, hereby grants to Joseph P. and John Balistrieri (brothers) or the survivors, Buyer ...." This demonstrates that the brothers entered into an express agreement for a common purpose in which they shared a pecuniary interest. Though Alioto testified to discussing the property only with John, Joseph's testimony established that he was an equal partner in the venture from the beginning:

> Well, when we came back from our sabbatical in 1989, things were very bad, personally and financially. We no longer had a source of income. We were practicing lawyers, and we had to put our affairs together. John got married. Now he had a wife, and we were just trying to keep what we had from going under.

> I finally said, look, with the Jackson Street—that's how we referred to it—I'm not going to pull this wagon anymore without some kind of compensation. I mean, no more.
>
> We used the term no more, niente per niente. That means no more nothing for nothing. I'm not going to charge her a fee, but we have to have some kind of arrangement where we're going to see the light at the end of the tunnel, because every day she would call, and she—I don't want to say bother, because to John it wasn't a bother, but she called.
>
> In fact, he'd come to me with her problems. My life at that time wasn't a bed of roses either. I had litigation of my own to contend with. I had my own problems that I was going through, and I said enough. Things weren't as rosy as they used to be. Now we're convicted felons. We've got to take care of business, here.

We conclude that the trial court correctly determined that John and Joseph Balistrieri were joint venturers in their plans to purchase Alioto's property.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.