Filed 12/21/16 Turner v. Scicon Technologies Corp. CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

**California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| PETER SCOTT TURNER,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SCICON TECHNOLOGIES CORP. et al.,<br><br>Defendants and Respondents. | B260881<br><br>(Los Angeles County Super. Ct. No. BC513709) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Reversed and remanded with directions.

Law Offices of Gary M. Weinstein, Gary M. Weinstein, Caryn Brottman Sanders; Pine Pine Freeman Tillet, Norman Pine and Stacy Freeman, for Plaintiff and Appellant.

Garrett & Tully, Stephen J. Tully, Efren A. Compeán, and John C. Tully, for Defendants and Respondents Thomas J. Bulger, Bradley S. Bulger, and Marie Bulger.

Robert J. McKay for Defendant and Respondent Scicon Technologies Corporation.

In this case involving allegations of minority shareholder oppression, plaintiff Peter Scott Turner appeals from a judgment of dismissal after the trial court sustained a demurrer to his fourth amended complaint in its entirety and without leave to amend. Turner alleged claims for breach of fiduciary duty, breach of contract, and conversion against respondents Scicon Technologies Corporation (Scicon), Thomas J. Bulger, Bradley S. Bulger, and Marie Bulger. He also sought declaratory relief and an accounting. We conclude the operative complaint alleges facts sufficient to state viable causes of action for breach of fiduciary duty, breach of contract, and conversion. We therefore reverse the judgment of dismissal and remand with directions.

## FACTUAL AND PROCEDURAL SUMMARY

On review of an order sustaining a demurrer, we take as true the well-pleaded facts of the complaint. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 152, fn. 1.) Turner filed his original complaint in June 2013. He resubmitted it a few days later as the first amended complaint (FAC) to include exhibits that were omitted from the original complaint. The following summary is taken from allegations in the FAC and its attached exhibits.

In January 1990, Turner was hired as director of engineering at Scicon, a provider of advanced 3D printing and stereolithography services for rapid prototyping and manufacturing applications. Thomas J. Bulger is a director and majority shareholder of Scicon. His son, Bradley S. Bulger,[1] and

---

[1] For the sake of clarity and convenience, we refer to the Bulger respondents by their first names. We also refer to the Bulger respondents and Scicon collectively as the defendants.

Turner were and remain the only minority shareholders in the company. Marie Bulger was an officer and/or director of the corporation.

Turner was hired pursuant to a written employment agreement with Scicon. The term of the agreement was three years. After the agreement's expiration in January 1993, Turner's subsequent employment at Scicon was governed by an oral agreement until he was terminated in 2009. As part of his compensation package, the employment agreement awarded Turner shares of common stock representing five percent of the ownership interest in Scicon. The employment agreement provides that Turner's shares "shall be restricted and subject to a buy-sell agreement[2] requiring that they be sold back to employer in the event of a termination of the Employer and Employee Relationship." (Fn. added.)

In January 1991, the parties amended the employment agreement to immediately increase Turner's shares to 15 percent of the ownership interest in Scicon. All three shareholders of Scicon also entered into a shareholder buy and sell agreement (BSA) in January 1991. The BSA stated that Thomas owned shares of common stock representing 70 percent of Scicon's outstanding shares, while Bradley and Turner each owned common stock representing 15 percent of the company's

---

[2] The buy-sell agreement is a contract by which the shareholders of a closely held corporation seek to maintain control over the ownership and management of their business by restricting the transfer of shares. (*Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1173.) A closely held corporation is one "whose stock is not freely traded and is held by only a few shareholders (often within the same family)." (Black's Law Dict. (10th ed. 2014) p. 416, col. 1.)

outstanding shares.

The BSA provides that, in the event a shareholder desires to sell all or any part of his shares during his lifetime, a right of refusal is to be granted first to Scicon and then to each remaining shareholder. The BSA otherwise restricts each shareholder from transferring any of his Scicon shares without the prior written consent of the corporation and the other shareholders. The BSA provides that "[a]ny purported transfer in violation of any provision of this Agreement shall be void and ineffectual, shall not operate to transfer any interest or title in the purported transferee, and shall give the Corporation and other Shareholders an option to purchase such shares" as provided by the right of first refusal provisions. However, there is an exception allowing a shareholder to freely transfer shares to his spouse, children, grandchildren, custodians, or trustees.

The BSA's right of first refusal provisions include several notice and meeting requirements. At least 30 days prior to a proposed transfer of shares, the offering shareholder must give written notice of the proposed transfer to Scicon's secretary and all other shareholders. Scicon's directors and shareholders must meet within 15 days from the date the notice is delivered in order to afford the corporation and the remaining shareholders the option to purchase the offered shares. Written notice of the meeting must be given to all directors and remaining shareholders. The BSA also states that the purchase price of shares in Scicon shall be determined by the shareholders at the end of each fiscal year. If the shareholders are unable to agree on a share price, the valuation is to be determined through formal arbitration.

Turner alleged the BSA was violated when Bradley sold

part of his minority interest to his father, Thomas, without notice or providing Turner with the option to purchase the shares as required under the agreement. The FAC did not specify the date of this alleged transaction.

In August 2009, an acquisition agreement was prepared following extensive negotiations for Scicon's acquisition by 3D Systems, Inc. for $6.3 million or $1,260 per share. However, before the acquisition was finalized, Scicon's majority shareholder, Thomas Bulger, decided to back out of the deal. Three days later, Turner was discharged from his position at Scicon. Following his termination, Turner repeatedly asked to be bought out of his minority ownership interest in Scicon. His requests were denied by Thomas, who assured him that "the company's doing well" and "your investment is safe."

The FAC alleges that during and after Turner's employment at Scicion, defendants denied Turner his right as a shareholder to inspect the corporation's books and records, and failed to adhere to corporate formalities. It further alleges that following the aborted acquisition in August 2009, Thomas mismanaged Scicon and engaged in various unlawful activities. Scicon fired 10 to 15 quality employees, and hired incompetent Bulger family members in their place. Scicon did not acquire equipment necessary to compete in the market and failed to keep up with industry standards. Thomas depleted Scicon's assets by allowing family members to use corporate funds for personal expenses and by paying excessive salaries and bonuses to family members. As a result of this misconduct, the fair market value of Turner's minority ownership interest in Scicon decreased significantly.

The FAC alleged causes of action for breach of fiduciary

duty, breach of contract, failure to observe corporate formalities, corporate mismanagement, conspiracy, negligence, lack of independence and misstatement of company financial statements. Turner named Scicon, the Bulgers, accounting firm Bates, Coughtry and Reiss (BCR) and Scicon officer and attorney Leslie McAfee as defendants. BCR demurred to the FAC, arguing that Turner's claims were barred by the statute of limitations, Turner lacked standing to bring his claims in an individual action, and the complaint failed to allege facts sufficient to state a cause of action. In October 2013, the trial court sustained BCR's demurrer in its entirety and granted Turner leave to amend.

Turner filed his second amended complaint (SAC) in October 2013. In it he re-alleged all causes of action except the conspiracy claim. The SAC also included several new allegations. It clarified that Scicon is a closely held Subchapter S corporation.[3] It alleged that Turner was unaware of any actual harm or damages until he first received financial documents and accounting records from Scicon in November or December 2012.

Defendants demurred to the SAC, arguing the complaint was uncertain, failed to state facts sufficient to constitute a cause of action, and that Turner lacked standing to sue for harm to the corporation. The trial court sustained BCR's demurrer in its entirety and granted Turner leave to amend. In doing so, the

---

[3] A corporation may elect to be taxed under Subchapter S of the Internal Revenue Code. (26 U.S.C. §§ 1361-1379.) The effect is that the corporation will be taxed like a partnership: income and expenses are "'passed through'" directly to the shareholders rather than being taxed at the corporate level. (Friedman et al., Cal. Practice Guide: Corporations (The Rutter Group 2016) 2:119, p. 2-91.)

court found Turner's breach of fiduciary duty, negligence, lack of independence, and misstatement of company financial statements claims to be time-barred. The court also determined that Turner lacked standing to assert a claim for breach of fiduciary duty.

In March 2014, Turner filed his third amended complaint (TAC), which added claims for negligent misrepresentation and intentional misrepresentation and removed claims for negligence, lack of independence, and misstatement of company financial statements. The TAC also included new factual allegations. In the FAC, Turner had alleged that defendants breached the BSA when Bradley sold part of his minority interest to Thomas in violation of the right of first refusal provisions in the agreement. The TAC alleged that in July 2013, Scicon announced that it deemed the prior transfer of shares between Bradley and Thomas to be void and in violation of the BSA, and transferred the shares back to Bradley without recognizing Turner's right of refusal and option to purchase. The TAC also alleged that in January 2014, Scicon informed Turner that it was repurchasing his shares, and if he did not agree to the repurchase, payment for the shares would be placed in an escrow account. Turner alleged this arrangement violated the BSA.

Defendants demurred to the TAC. The trial court again sustained the demurrer and granted Turner leave to amend except as to the causes of action for failure to observe corporate formalities and corporate mismanagement, as to which the demurrer was sustained without leave to amend by stipulation. All claims against BCR were deleted.

Turner filed his fourth amended complaint in May 2014. This is the operative complaint. It retained the claims for breach

of fiduciary duty and breach of contract, dropped other claims, and added a claim for conversion and a request for declaratory relief and an accounting. The operative complaint clarified that the first alleged breach of the BSA, when Bradley sold part of his minority interest in Scicon to Thomas, occurred sometime between 1997 and 2000. Defendants demurred. Following a hearing, the trial court sustained defendants' demurrer to the operative complaint in its entirety, this time without leave to amend. Judgment was entered in favor of the defendants.

This timely appeal followed.

## DISCUSSION

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) "[W]e assume the truth of all facts properly pleaded in the complaint and its exhibits or attachments, as well as those facts that may fairly be implied or inferred from the express allegations. [Citation.] 'We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law.' [Citation.]" (*Cobb v. O'Connell* (2005) 134 Cal.App.4th 91, 95 (*Cobb*).) The plaintiff's pleadings must be construed "liberally . . . with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

A judgment of dismissal must be affirmed if any of the grounds for demurrer raised by the defendant is well-taken and

disposes of the entire complaint. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) However, if the complaint states a cause of action under any possible legal theory, we must reverse the trial court's order dismissing the complaint. (*Ibid.*) We review an order denying leave to amend by determining "whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

In this appeal, Turner argues the trial court erred in sustaining defendants' demurrer because the operative complaint alleges facts sufficient to state three distinct causes of action: (1) breach of fiduciary duty, (2) breach of contract, and (3) conversion. For the first time on appeal, Turner also argues that the facts alleged in the complaint are sufficient to constitute a valid claim for involuntary dissolution under Corporations Code section 1800. We examine each argument in turn to determine whether the complaint alleges sufficient facts to state a cause of action under any legal theory.

I

Our first inquiry is whether the complaint's first cause of action states a viable claim for breach of fiduciary duty. The elements of this cause of action are "'the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. [Citation.]'" (*Daly v. Yessne* (2005) 131 Cal.App.4th 52, 64.) "[C]orporate officers and directors have fiduciary duties of due care and loyalty to the corporation and its shareholders

collectively [citation]. And controlling shareholders have fiduciary duties to exercise their corporate influence fairly for the benefit of the corporation and the other shareholders [citation]." (Friedman et al., Cal. Practice Guide: Corporations, *supra*, ¶ 2:19.1, p. 2-5, italics omitted.) Our Supreme Court in *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108 (*Jones*) described the scope of this "extensive" fiduciary duty in the context of a closely held corporation: "Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business. [Citations.]" (*Ibid.*)

Defendants do not dispute that Thomas, as a director and controlling shareholder of Scicon, owed a fiduciary duty to Turner by virtue of Turner's minority shareholder status. (See *Jones*, *supra*, 1 Cal.3d at p. 108; see also *Stephenson v. Drever, supra,* 16 Cal.4th at p. 1178.) Rather, defendants argue that even if Turner has stated a claim for breach of fiduciary duty, the claim can only be pursued as a derivative action on behalf of Scicon. They also maintain Turner's claim is time-barred. The trial court agreed with defendants, dismissing the first cause of action for breach of fiduciary duty because Turner "has not adequately alleged facts demonstrating that he is the real party in interest in this action as the pleaded facts demonstrate that he is improperly seeking damages allegedly done to a corporation, not plaintiff, individually." The court also held the claim was time-barred as a matter of law. Turner argues he has standing to pursue an individual action because he is not seeking recovery for the

corporation, but rather for individualized injuries that he personally suffered. We conclude that Turner has standing to pursue his claim for breach of fiduciary duty in an individual action, and that the claim is not barred by the statute of limitations.

A. *Standing to Bring an Individual Shareholder Action*

"Shareholders may bring two types of actions, 'a direct action filed by the shareholder individually . . . for injury to his or her interest as a shareholder,' or a 'derivative action filed on behalf of the corporation for injury to the corporation for which it has failed or refused to sue.'" (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 311-312, italics omitted.) Under longstanding precedent, "a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity." (*Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530.) A claim alleging injury to the corporation must be asserted in a derivative action in which the shareholder is "a mere nominal plaintiff, the corporation is the real party in interest, and any judgment recovered inures to its benefit. [Citation.]" (*Thomson v. Mortgage Investment Co.* (1929) 99 Cal.App. 205, 212.)

*Jones* is the leading case on the distinction between claims that must be asserted in a derivative action and those that may be asserted in an individual action. Our Supreme Court explained that an action is derivative "'if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among

individual holders . . . .' . . . 'The stockholder's individual suit, on the other hand, is a suit to enforce a right against the corporation which the stockholder possesses as an individual.' [Citation.]" (*Jones*, *supra*, 1 Cal.3d at pp. 106-107.) This distinction applied to the facts presented in *Jones*. The plaintiff, a minority shareholder in a closely held savings and loan association, alleged that the majority shareholders breached their fiduciary duty by creating an independent holding company to which they transferred their controlling block of shares, making their own interests more marketable and destroying the market value of the shares held by the minority. (*Id.* at pp. 102-105.) Under these circumstances, the court explained, plaintiff "does not seek to recover on behalf of the corporation for injury done to the corporation by defendants. Although she does allege that the value of her stock has been diminished by defendants' actions, she does not contend that the diminished value reflects an injury to the corporation and resultant depreciation in the value of the stock. Thus the gravamen of her cause of action is injury to herself and the other minority stockholders." (*Id.* at p. 107.)

*Jones* held that majority shareholders of a closely held corporation owe fiduciary duties to the minority, and that a minority shareholder may bring an individual action for the diminished value of his or her shares. (See *Jones*, *supra*, 1 Cal.3d at pp. 107-108.) However, it is unclear how to apply the distinction between individual and derivative actions articulated in *Jones* where, as here, the defendant is both a director and controlling shareholder of a small, closely held corporation, and the plaintiff alleges misconduct resulting in harm to both the individual shareholder and to the corporate entity. As one treatise notes, "the distinction between direct and derivative

actions sometimes blurs, especially in corporations with only a few shareholders where the acts of one officer/shareholder directly impact both the corporation and the other shareholders." (Friedman et al., Cal. Practice Guide: Corporations, *supra*, ¶ 6:598.2, p. 6-268, italics omitted.) Subsequent case law in this area is highly fact-specific and sometimes difficult to fully reconcile. (See *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1252-1258 (*Jara*) [analyzing the numerous and often inconsistent decisions applying the distinction between individual and derivative actions].)

Following *Jones*, several courts have upheld the individual standing of a minority shareholder to bring suit against controlling shareholders alleging a breach of a fiduciary duty that deprives the minority of a proportionate share of the corporation's value. In *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338, a parent corporation filed a consolidated tax return with its subsidiary while it engaged in liquidating the subsidiary. (*Id.* at pp. 341-342.) The filing had the effect of appropriating tax benefits for the parent corporation and reducing the distribution to the single minority shareholder in the subsidiary. (*Id.* at pp. 345-346.) The court held that the gravamen of the complaint was injury to the plaintiff as the only minority shareholder arising from an alleged breach of fiduciary duty by the majority shareholder. (*Id.* at p. 343.)

In *Crain v. Electronic Memories & Magnetics Corp.* (1975) 50 Cal.App.3d 509, the majority shareholder exercised control over the company to sell the entire business to a third party for cash and to loan the cash back to itself in return for an unsecured promissory note payable to the company. (*Id.* at pp. 513-514.) Minority shareholders sued the majority, alleging that the effect

of the transaction was to leave the company as a shell corporation with an unsecured note as its principal asset. (*Id.* at p. 521.) The court held that the complaint alleging breach of fiduciary duty entitled plaintiffs to individual relief against the majority shareholder. (*Id*. at pp. 524-525.)

Similarly, in *Jara*, the court held that a minority shareholder had an individual cause of action for breach of fiduciary duty against the other shareholders in a closely held corporation for allegedly paying themselves excessive compensation. (*Jara*, *supra*, 121 Cal.App.4th at p. 1258.) The court recognized that, unlike *Jones*, where "the manipulation of stock values by the defendants had no effect whatever on the underlying business . . . " in *Jara*, "the alleged payment of excessive compensation did have the potential of damaging the business." (*Ibid.*) However, the record showed that the company was thriving, and plaintiff alleged that "the payment of generous executive compensation was a device to distribute a disproportionate share of the profits to the two officer shareholders during a period of business success." (*Ibid.*) The court read *Jones* as "allowing a minority shareholder to bring a personal action alleging 'a majority stockholders' breach of a fiduciary duty to minority stockholders, which resulted in the majority stockholders retaining a disproportionate share of the corporation's ongoing value.'" (*Id*. at pp. 1257-1258, quoting *Pareto v. F.D.I.C.* (9th Cir. 1998) 139 F.3d 696, 699-700.) In addition, the court reasoned that the policy justifications underlying the derivative action requirement were inapplicable to a compensation dispute between shareholders of a closely held corporation. (*Jara*, at pp. 1258-1259.)

On the other hand, several decisions have held that a

minority shareholder lacks standing to bring an individual action for alleged misfeasance or mismanagement by majority shareholders leading to the corporation's demise. (See, e.g., *Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1115 [plaintiffs' "core claim" was that defendants mismanaged the corporation and entered into self-serving deals to sell its assets to third parties]; *Pareto v. F.D.I.C.*, *supra*, 139 F.3d at pp. 698-700 [directors breached their fiduciary duties by failing to safeguard the bank's assets, mismanaging its operations, improperly placing it into voluntary receivership, and failing to exercise due diligence during merger attempts].)

Here, defendants rely extensively on *Nelson v. Anderson* (1999) 72 Cal.App.4th 111 (*Nelson*). In that case, the plaintiff formed a corporation with an actress for the purpose of marketing a line of skin care products, but the venture was a failure. (*Id.* at pp. 118-122.) The plaintiff, who was the sole minority shareholder, sued the actress for breach of fiduciary duty. (*Id.* at p. 117.) The trial court erroneously put this equitable claim before a jury without any instruction on the scope of the majority shareholder's fiduciary duties, and plaintiff was permitted to argue that anything she considered disadvantageous to her constituted a breach of fiduciary duty. (*Id.* at pp. 122-123.) On appeal from a judgment entered in favor of the plaintiff, the court concluded that "[b]ecause all of the acts alleged to have caused [plaintiff's] injury amount to alleged misfeasance or negligence in managing the corporation's business, causing the business to be a total failure," plaintiff lacked standing to bring the claim as an individual. (*Id.* at p. 125.) "Because the gravamen of the complaint is injury to the whole body of its stockholders, it was for the corporation to institute and maintain

a remedial action." (*Id.* at pp. 125-126.)

The parties disagree on the application of these precedents to the instant case. Defendants maintain that the gravamen of Turner's complaint is corporate mismanagement resulting in injury to Scicon; therefore, he lacks standing to bring an individual action. (See *Nelson*, *supra*, 72 Cal.App.4th at p. 125.) Turner, on the other hand, points to numerous allegations in his pleadings of misconduct that exclusively injured his interests as an individual: defendants' intentional misrepresentation regarding the value of his shares, violations of the BSA, and defendants' conversion of his shares. He maintains that injuries to Scicon resulting from defendants' misconduct do not outweigh his individual injuries such that the gravamen of his complaint is personal harm.

We conclude that the gravamen of Turner's complaint is the damage he suffered personally, rather than injury to the corporation; therefore, he is entitled to maintain his claims in an individual action. (See *Jones*, *supra*, 1 Cal.3d at pp. 106-107.) The complaint does include allegations that Thomas's misconduct injured Scicon. For example, it alleges that Thomas "intentionally depleted the assets of the corporation through the payment of unearned salaries and other expenditures . . . ." The complaint also alleges that defendants fired qualified employees, engaged in nepotistic hiring practices, paid family members' personal expenses with corporate funds, and awarded excessive compensation and bonuses to family members. However, it ignores the obvious to suggest that all of the shareholders suffered equally from the corporation's diminishing value. Rather, the complaint's core allegation is that Thomas abused his authority as the manager and majority shareholder of Scicon to

siphon off a disproportionate share of the corporation's earnings for the benefit of himself and his family members and to Turner's exclusive detriment.

The complaint also includes numerous allegations of misconduct by defendants constituting breach of fiduciary duty, breach of contract, and conversion that injured Turner's interests as an individual. For example, it alleges that Thomas denied Turner his right as a shareholder to inspect the corporation's books and records, and intentionally misled him regarding the diminishing value of his shares. Defendants also allegedly breached the BSA by concealing share transfers between Bradley and Thomas and denying Turner's right of first refusal on several occasions. Finally, it alleges that defendants converted Turner's shares through an unauthorized and unilateral "repurchase" in January 2014, which also constitutes a breach of fiduciary duty. (See *Schneider v. Union Oil Co.* (1970) 6 Cal.App.3d, 987, 992 [when a corporation transfers stock without authorization, "it commits an action which is both one of conversion and breach of trust"].) Because we must construe a plaintiff's pleadings liberally "with a view to substantial justice between the parties" (Code Civ. Proc., § 452), we find that the gravamen of Turner's complaint is the injury that he suffered individually.

A case heavily relied upon by defendants, *Nelson*, *supra*, 72 Cal.App.4th 111, does not convince us otherwise. Both that case and the present one involve alleged mismanagement of a corporation by a majority shareholder. However, the plaintiff's breach of fiduciary duty claim in *Nelson* was based entirely on defendant's alleged misfeasance or negligence in managing the business. (*Id.* at 125.) By contrast, Turner's complaint alleges several claims that are unrelated to Thomas's mismanagement of

Scicon that affected him solely as an individual. Indeed, the court in *Nelson* "agree[d] that in some cases, the same facts regarding injury to the corporation may underlie a personal cause of action, such as intentional infliction of emotional distress, breach of contract, fraud, or defamation, [plaintiff] has not alleged or proved the elements of any such cause of action." (*Id.* at pp. 124-125, citing *Sutter v. General Petroleum Corp.*, *supra*, 28 Cal.2d at p. 531 [suggesting that certain claims may be brought either as derivative or individual causes of action].) Here, Turner alleges misconduct resulting in injury to Scicon that also underlie his personal causes of action for breach of fiduciary duty, breach of contract, and conversion. We do not read *Nelson* to foreclose an individual action under these circumstances.

Moreover, as in *Jara*, our conclusion that Turner should be allowed to maintain an individual action is reinforced by the absence of policy considerations favoring a derivative action. (*Jara*, *supra*, 121 Cal.App.4th at pp. 1258-1259.) The traditional purposes for requiring shareholders to file such claims derivatively include avoiding multiplicity of suits and encouraging intracorporate resolution of disputes. (*Ibid.*) These policies are inapplicable to the present case. The threat of multiple lawsuits is minimal because the only other minority shareholder in Scicon is Bradley, Thomas's son, and allegedly he either has abandoned his duties entirely or acted in concert with Thomas to oppress Turner's minority shareholder rights. The objective of intracorporate resolution of internal disputes is absent where, as alleged here, the corporation has disregarded corporate formalities.

B. *Statute of Limitations*

The trial court sustained defendants' demurrer to Turner's cause of action for breach of fiduciary duty on the ground that it is time-barred as a matter of law. The parties agree this claim is governed by a four-year statute of limitations. (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 ["[b]reach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code Civ. Proc., § 343"].) Because Tuner filed his original complaint on June 28, 2013, he must establish a claim for breach of fiduciary duty that accrued after June 28, 2009 to avoid the four-year statute of limitations bar.

The operative complaint alleges that defendants' breaches of their fiduciary duties—commingling of funds, excessive compensation, ignoring corporate formalities, etc.—occurred after Turner's termination in August 2009. Thus, according to the operative complaint, the cause of action is timely. Defendants argue it is time-barred because Turner "admitted" in prior versions of the complaint that he knew of the misconduct before his August 2009 termination. Defendants accurately note that in the three prior verified pleadings, Turner alleged breaches of fiduciary duty "during and after" his employment at Scicon in addition to his specific allegations of post-August 2009 breaches. However, in every version of the complaint since the SAC, Turner has stated he was unaware of any actual harm or damage resulting from defendants' misconduct until he first received financial documents and accounting records in November or December 2012.

A plaintiff cannot avoid the statute of limitations by substantially revising his or her verified allegations concerning

discovery of the cause of action in an amended complaint. (See *CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1540-1541.) "Where a party amends a verified pleading to avoid the effect of a damaging factual allegation, a court may disregard the new inconsistent allegations. [Citations.]" (*Acuna v. San Diego Gas & Electric Co*. (2013) 217 Cal.App.4th 1402, 1416.) The purpose of this rule is to prevent an abuse of process, not to prevent honest complainants from correcting ambiguous facts in their pleadings. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751.)

Defendants claim that the discrepancy between Turner's pleadings reveals that he has been aware of the breaches and harm he alleges throughout his employment at Scicon going back to 1990. We are not persuaded. Defendants are conflating Turner's allegations of harm "during and after" his employment with contemporaneous knowledge of such harm. The fact that Turner removed the "during and after" language when he amended the TAC does not necessarily constitute an abuse of process. Given that we are required to construe the pleadings liberally (Code Civ. Proc., § 452.), the amendment may be read as a clarification of Turner's lack of awareness of the alleged harm until late 2012. However, even were we to disregard the operative complaint and take as true the fact that defendants breached their fiduciary duties "during and after" Turner's employment at Scicon, Turner has satisfied the pleading requirements for delayed discovery.

C. *Delayed Discovery Rule*

A statute of limitations begins to run when the cause of action accrues. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005)

35 Cal.4th 797, 806 (*Fox*).) Generally, the accrual date is "'when the cause of action is complete with all of its elements.' [Citations.]" (*Ibid.*) The elements of breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. (*Daly v. Yessne*, *supra*, 131 Cal.App.4th at p. 64.) An "exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (*Fox*, at p. 807.) "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.]" (*Ibid.*) In other words, "[t]he discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. . . . [P]laintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Id.* at pp. 807-808.)

In order to rely on the delayed discovery rule, "'[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' [Citation.]" (*Fox*, *supra*, 35 Cal.4th at p. 808, italics omitted.) Once properly pleaded, delayed discovery becomes a question of fact, and may be decided as a matter of law only when reasonable minds can draw only one conclusion from the evidence. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007)

153 Cal.App.4th 1308, 1320 (*E-Fab*).) "'In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred.' [Citations.]" (*Id.* at pp. 1315-1316.)

Even if we disregard the operative complaint and focus instead on Turner's prior pleadings, we cannot say that his breach of fiduciary duty claim is time-barred as a matter of law. Turner consistently has pleaded facts showing that he first discovered defendants' breaches of their fiduciary duties when he received financial documents and accounting records in November or December 2012. Assuming defendants were engaged in misconduct "during and after" Turner's employment at Scicon, it does not necessarily follow that Turner had reason to discover his cause of action before June 2009. His allegations center around events that occurred in August 2009, specifically the aborted acquisition of Scicon by 3D Systems *before* Turner was terminated, that is, "during" his employment. In sum, the claimed statute of limitations defect does not clearly and affirmatively appear on the face of Turner's pleadings and hence is not an issue we can resolve as a matter of law. (See *E-Fab*, *supra*, 153 Cal.App.4th at pp. 1315-1316.)

Defendants also argue that because Turner was a director of Scicon at the time of the alleged breaches "during and after" his employment, he is charged with knowledge of facts that a proper discharge of his duties would have disclosed. For this proposition, defendants rely on *Vertex Investment Co. v. Schwabacher* (1943) 57 Cal.App.2d 406. That case is inapposite to the facts alleged in Turner's pleadings. In *Vertex*, a family-owned corporation sued the widow of its deceased president,

treasurer and general manager to recover funds that he had allegedly misappropriated over a 24-year period. (*Id.* at pp. 410-413.) The trial court entered judgment in favor of the widow after sustaining her demurrer on statute of limitation grounds. (*Id.* at pp. 408-409.) The appellate court concluded that the complaint's allegations established the corporation knew that its former president was commingling funds and that such knowledge was sufficient to create a duty of inquiry on the part of the other shareholders and commence the running of the statute of limitations. (*Id.* at pp. 415-421.) Here, on the other hand, there is no indication in the pleadings that Turner had actual knowledge of any wrongdoing.

We conclude the trial court erred in sustaining the demurrer to Turner's first cause of action for breach of fiduciary duty. There is nothing on the face of the operative complaint or the prior pleadings establishing that Turner's claim is barred by the statute of limitations as a matter of law.

II

The trial court sustained the demurrer to the second cause of action for breach of contract on the ground that the complaint failed to state facts sufficient to constitute a cause of action and because the claim is time-barred as a matter of law. Turner's brief on appeal focuses on three distinct breaches of the BSA alleged in the operative complaint: (1) the sale of Bradley's shares in Scicon to Thomas sometime between 1997 and 2000; (2) Scicon's determination that this prior sale was void and subsequent transfer of the shares back to Bradley in July 2013; and (3) Scicon's unilateral "repurchase" of Turner's shares in January 2014. Defendants argue the first claim is barred by the

statute of limitations and the latter two claims are based on an erroneous application of the BSA to the factual allegations in the complaint. We examine each alleged breach of the BSA in turn to determine whether there is a valid cause of action.

A. *Alleged Sale of Bradley's Shares to Thomas Between 1997 and 2000*

The operative complaint alleges defendants violated the BSA when Thomas purchased shares from Bradley sometime between 1997 and 2000 without providing notice to Turner and without allowing him to exercise his right of first refusal as required under the agreement. Defendants do not dispute that this alleged transaction constitutes a material breach of the BSA. Rather, they argue the claim is time-barred and Turner failed to satisfy the pleading requirements for delayed discovery.

The statute of limitations for breach of a written contract is four years. (Code Civ. Proc., § 337, subd. 1.) The alleged breach of the BSA sometime between 1997 and 2000 is thus facially time-barred without the benefit of the delayed discovery rule. As previously discussed, the discovery rule postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (*Fox*, *supra*, 35 Cal.4th at pp. 806-807.) As a general rule, delayed discovery does not apply to breach of contract actions, which ordinarily accrue at the time of breach regardless of whether any harm is apparent to the injured party. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 520, pp. 664-666, § 529, pp. 678-680.) However, the discovery rule has been applied in situations where the breach of contract is committed in secret, and the resulting harm is not reasonably discoverable. (See *April Enterprises, Inc. v. KTTV* (1983) 147

Cal.App.3d 805 (*April Enterprises*); see also *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1 (*Gryczman*).)

*April Enterprises*, *supra*, 147 Cal.App.3d at page 827, involved the "clandestine" destruction of videotapes in the defendant's exclusive possession. The court dealt with what it described as "unusual facts" calling "for an exception to the general rule" and held that "the discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Id.* at p. 832.) *April Enterprises* extended the discovery rule to the breach of contract claim because, as in other cases where the delayed discovery rule is applied, (1) the injury was "difficult for the plaintiff to detect"; (2) the defendant was in "a far superior position to comprehend the act and the injury"; and (3) the defendant "had reason to believe the plaintiff remained ignorant he had been wronged." (*Id.* at p. 831.)

In *Gryczman*, *supra*, 107 Cal.App.4th at pages 3-4, the plaintiff had a contractual right of first refusal to buy real property from the defendant on the same terms contained in any bona fide offer from a third party that the owner was willing to accept. The defendant sold the property without giving plaintiff the contractually-required notice that the right of first refusal had been triggered. (*Id.* at p. 4.) After the statute of limitations had run, the plaintiff discovered that the property had been sold and sued for breach of contract. (*Ibid.*) Applying *April Enterprises*, the court found "an even stronger case for applying the delayed discovery rule . . . [because] the act which constituted the breach—failure to give notice of the option offer—was the very act which prevented plaintiff from discovering the breach."

(*Gryczman*, at p. 5.)

*April Enterprises* and *Gryczman* are instructive. We find the delayed discovery rule applies to Turner's breach of contract claim based on the same rationale. Both the present case and *Gryczman* involve a contractual right of first refusal including a notice requirement. Here, the operative complaint states that Bradley sold a portion of his minority interest to Thomas without notice to Turner and without allowing him to exercise his right of first refusal under the BSA. The complaint also alleges Turner "did not become aware of any actual harm or damage" until he received financial documents from Scicon in "November/December 2012 and attended the Shareholder Meeting in July, 2013. Before this time, Plaintiff was unaware of documents evidencing . . . the share violations . . . ." As in *Gryczman*, the Bulgers' failure to provide Turner with notice of the transaction both constituted a breach of contract and was the very act preventing him from discovering the breach. (*Gryczman*, *supra*, 107 Cal.App.4th at p. 5.)

Because the delayed discovery rule applies to this alleged breach of the BSA, we conclude that the trial court erred in dismissing Turner's cause of action for breach of contract based on the statute of limitations.

B. *Alleged Unwinding of the Prior Share Transfer in July 2013*

Turner also argues that Scicon's purported "unwinding" of the prior share transfer constitutes an independent breach of the BSA. The complaint alleges that "[a]t a Shareholder Meeting in July, 2013, defendants . . . declared the prior sale of shares by Bradley Bulger to be void and transferred [the] shares back to

him." Turner maintains that this act effectively transferred ownership of the shares in question back to Bradley, again in breach of the right of first refusal provisions in the BSA. Defendants describe this event as a rescission of the prior sale of shares from Bradley to Thomas, which they argue has the legal effect of extinguishing *ab initio* the original contract for sale of Bradley's shares.

We need not address defendants' rescission argument because Turner's allegation fails for a more straightforward reason. Even if the 2013 "unwinding" operated to transfer the shares from Thomas to Bradley as Turner claims, this transaction would not violate the agreement. The BSA includes an exception allowing a shareholder to freely transfer shares to his spouse, children, grandchildren, or custodians or trustees. The alleged transfer in this case was from Thomas to his son, Bradley, and therefore falls within this exception to the right of first refusal provisions of the BSA. Accordingly, this claim fails to state a cause of action as a matter of law.

C. *Alleged "Repurchase" of Turner's Shares in January 2014*

Finally, Turner argues that Scicon's unauthorized and unilateral "repurchase" of his shares in January 2014 violated the BSA. The operative complaint states "the Corporation informed Plaintiff that it was repurchasing his shares and that if Plaintiff did not agree with the repurchase, the money would be placed in an escrow account." Turner "did not agree to the repurchase of his shares of [Scicon], did not agree to the valuation of the shares, and has not been provided with proof that any money has been deposited in an escrow account." This alleged transaction, which Turner also characterizes as conversion,

constitutes a breach of the BSA. The agreement provides for transfer of shares in Scicon under only three circumstances: (1) where there is prior written consent of the corporation and all other shareholders, (2) where all provisions regarding notice and rights of first refusal have been satisfied, or (3) where the transferee is the spouse, child, grandchild, custodian, or trustee of the transferor. Defendants' alleged conversion of Turner's shares clearly violated these restrictions against transfer.

Defendants characterize this alleged conversion of Turner's shares in violation of the BSA as an exercise of their contractual rights under the 1990 employment agreement to repurchase Turner's shares upon his termination. This argument is unavailing because the 1990 employment agreement expired and thus could not have authorized the 2014 "repurchase." The operative complaint states that "[t]he Employment Agreement expired on its own terms and was not renewed." The term of the agreement was three years. Because we must assume the truth of plaintiff's pleadings (*Cobb*, *supra*, 134 Cal.App.4th at p. 95), the employment agreement expired in 1993, was not renewed, and therefore defendants cannot maintain that it authorized the stock "repurchase" in 2014.

We conclude that the facts alleged in the operative complaint regarding the January 2014 "repurchase" sufficiently state a cause of action for breach of contract.

III

We next determine whether the operative complaint's third cause of action states a viable claim for conversion of Turner's shares in Scicon. The tort of conversion is generally described as the wrongful exercise of dominion over the personal property of

another. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119 (*Fremont*).) Its basic elements are: "(1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages. [Citation.]" (*Ibid.*) "It is the uniform rule of law that shares of stock in a company are subject to an action in conversion." (*Id.* at p. 122; see also 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 702, pp. 1025-1026.)

Turner first argues that defendants converted his shares in Scicon through their unilateral and unauthorized "repurchase" in January 2014. This allegation sufficiently states a cause of action for conversion. Each element of conversion is satisfied based on the allegations in the complaint: (1) Turner had an ownership interest in his shares; (2) defendants transferred those shares without his consent and thereby in a manner inconsistent with his property rights; and (3) he suffered damages because he received no payment for the shares. (See *Fremont*, *supra*, 148 Cal.App.4th at p. 119.) Defendants parse the language of the complaint in an effort to argue that Turner failed to allege a repurchase of his shares ever actually occurred. According to defendants' reasoning, because the complaint merely states that Scicon "informed" him of the repurchase, he has failed to allege facts sufficient to show actual interference with his property rights. This narrow reading is at odds with the requirement that we liberally construe allegations in the complaint and assume the truth of all facts that fairly may be inferred from those allegations. (Code Civ. Proc., § 452; *Cobb*, *supra*, 134 Cal.App.4th at p. 95.) We conclude the operative complaint's factual

allegations regarding the January 2014 "repurchase" also are sufficient to state a cause of action for conversion.

Turner also maintains there is a separate basis to find a valid cause of action for conversion based on the transfer of shares between Bradley and Thomas in violation of the BSA. The complaint alleges that the denial of Turner's right of first refusal under the BSA constitutes conversion of his contractually-bestowed right to possess additional shares in Scicon. This argument is essentially duplicative of Turner's breach of contract claim. It also fails to state a cause of action for conversion because Turner cannot demonstrate that he had a right to possess additional shares in Scicon by virtue of the BSA. To satisfy the right to possession element of conversion, "[n]either legal title nor absolute ownership of the property is necessary. [Citation.] A party need only allege it is 'entitled to immediate possession at the time of conversion. [Citations.]' [Citation.] However, a mere contractual right of payment, without more, will not suffice." (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452, italics omitted.) Here, Turner alleges conversion based solely on a contractual right to purchase shares, and therefore fails to state a valid cause of action as a matter of law.

Nonetheless, we conclude the trial court erred in sustaining the demurrer to the third cause of action for conversion because the complaint alleges facts regarding the January 2014 "repurchase" that are sufficient to state a cause of action.

IV

The operative complaint's fourth cause of action sought declaratory relief and an accounting to determine the parties'

respective rights and the fair market value of Turner's shares in Scicon. The trial court sustained defendants' demurrer to this claim without leave to amend on the ground that it failed to state facts sufficient to constitute a cause of action and the allegations were uncertain. On appeal, Turner seeks to refashion his request for declaratory relief and an accounting into a new cause of action for involuntary dissolution of Scicon under Corporations Code section 1800.[4] This effort, if successful, would permit Scicon to avoid dissolution through a buy-out of Turner's shares for their "fair value" price as determined by the parties or through an appraisal process. (See Corp. Code, § 2000, subds. (a)-(c).) Turner maintains the operative complaint "could reasonably be amended to plead . . . involuntary dissolution (with an accounting)" and effectively seeks this relief in lieu of his previous request for declaratory relief and an accounting.

Defendants object, arguing primarily that Turner's request for declaratory relief and an accounting cannot be reasonably construed as action for involuntary corporate dissolution. Turner concedes he is raising a new theory on appeal, but correctly notes that he is permitted to do so from a judgment of dismissal after a

---

[4] Any shareholder of a small, closely held corporation may petition for its involuntary dissolution under Corporations Code section 1800, subdivision (a)(2). (See *Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1112.) Grounds for involuntary dissolution include: "[t]hose in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness toward any shareholders or its property is being misapplied or wasted by its directors or officers." (Corp. Code, § 1800, subd. (b)(4); see, e.g., *Buss v. J. O. Martin Co.* (1966) 241 Cal.App.2d 123.)

demurrer is sustained without leave to amend. (See *20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139, fn. 3. ["When a demurrer is sustained without leave to amend the petitioner may advance on appeal a new legal theory why the allegations of the petition state a cause of action."].)

Generally, we review a trial court's failure to grant leave to amend under an abuse-of-discretion standard, and reverse if the plaintiff shows a reasonable possibility of curing a defective pleading by amendment. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) However, it is unnecessary for us to consider whether there is a reasonable possibility of amending Turner's complaint to allege a new cause of action for involuntary corporate dissolution. We already have determined that the complaint is not defective; rather, it states viable causes of action for breach of fiduciary duty, breach of contract, and conversion. Accordingly, the determination of whether Turner should be granted leave to amend in order to assert this new cause of action is properly made by the trial court in the first instance. (See *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 371 [concluding that because plaintiff's complaint was not defective, the issue of "[w]hether the pleadings can or should be amended is for the trial court to decide on remand"].)

Because Turner reformulated his request for declaratory relief and an accounting into a new cause of action for involuntary dissolution, the parties have not briefed the issue of whether the trial court erred in sustaining defendants' demurrer to the original fourth cause of action. We therefore reverse the judgment of dismissal and remand to the trial court with directions to reconsider the demurrer to the fourth cause of action in light of this opinion.

## DISPOSITION

The judgment of dismissal is reversed. The order sustaining the demurrer to the fourth amended complaint's causes of action for breach of fiduciary duty, breach of contract, and conversion is reversed. The order sustaining the demurrer to the fourth cause of action for declaratory relief and an accounting is reversed with directions to the trial court to reconsider the demurrer in light of this opinion. On remand, the trial court will have discretion to consider Turner's request for leave to amend to add a new cause of action for involuntary corporate dissolution, should he choose to file one. Turner shall recover his costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.