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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| ALLEN W. GELBARD,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>AB INVESTMENTS, LLC, et al.,<br><br>Defendants and Respondents. | B233155<br><br>(Los Angeles County<br>Super. Ct. No. LC088263) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Bert Glennon, Judge. Affirmed in part and reversed in part.

Allen W. Gelbard, in pro. per.; Fuchs & Associates, Inc., John R. Fuchs and Gail S. Gilfillan for Plaintiff and Appellant.

Dion-Kindem & Crockett, William E. Crockett and Steven R. Skirvin for Defendants and Respondents.

Allen Gelbard (Gelbard) and Lisa Du Boise (Du Boise)[1] sued (1) Gelbard's former business partners, Rodney Unger (Unger), individually and through his company, Manatee Design Group, Inc.[2] (Manatee), and Robert Beaton (Beaton); (2) the company that they owned, AB Investments, LLC (ABI); and (3) several other parties representing the business partners in some way, including Michael Littman, an attorney who previously represented ABI and Beaton.[3] The complaint was based on ten causes of action born of the business dealings between the parties. Defendants Unger,[4] Beaton, ABI, Littman, and Manatee[5] demurred to Gelbard's First Amended Complaint (FAC), the operative complaint in this appeal. The trial court sustained the demurrer without

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[1] Du Boise was not a plaintiff in the nine causes of action that were dismissed by the trial court. As a result, she is not a party to this appeal.

[2] There are two Manatee Design Group, Inc. companies. One is incorporated in Nevada and the other is incorporated in Colorado. For convenience, we have grouped the two together and refer to both as "Manatee." Unger wholly owns Manatee.

[3] The complaint also named the following individuals as defendants: (1) Howard Bernstein (Bernstein), an attorney and an accountant who previously represented ABI, Beaton, Unger and Gelbard; (2) Morris Engel (Engel), an attorney and accountant who previously represented ABI, Beaton and Gelbard; and (3) Rosslyn Hummer (Hummer) and Eric Peterson (Peterson), attorneys who previously represented ABI, Beaton and Unger.

[4] Although Unger was one of the defendants who demurred, the judgment of dismissal was entered only in favor of Beaton, ABI, Littman and Manatee. Unger, in his individual capacity, is not a party to this appeal.

[5] Unger, Beaton, ABI, Littman, and Manatee also filed a motion to strike punitive damages and alter ego allegations in the FAC. The motion was granted. Gelbard has not appealed from that ruling.

Engel also separately demurred to the FAC. His demurrer was sustained without leave to amend by the trial court. Gelbard has not appealed from that ruling and Engel is not a party to this appeal.

leave to amend with respect to all causes of action other than the eighth cause of action for conversion.[6] Judgment was entered in favor of Beaton, ABI, Littman and Manatee with respect to the first through seventh and ninth through tenth causes of action. Gelbard appealed.

## *FACTUAL AND PROCEDURAL BACKGROUND*[7]

In June of 1998, Gelbard and Beaton formed ABI as a holding company for their investment portfolio of public and private equities. The two agreed to fund ABI through contributions of their separate assets earning each a 50-percent interest in ABI and in all present and future assets and proceeds. Gelbard was responsible for bringing in business for ABI while Beaton was responsible for the "books, records, banking, brokerage, accounting and tax responsibilities." Beaton also managed the daily office responsibilities of ABI. An operating agreement was put in place and signed by both Gelbard and Beaton effective August 1, 1998.

In January of 1999, ABI received proceeds of $15 million from the sale of certain stock holdings, of which Beaton and Gelbard were each entitled to 50 percent. Gelbard used a portion of his profits to purchase a seven-acre horse ranch property in

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[6] The eighth cause of action was brought by Gelbard and Du Boise against Unger, Hummer and Peterson – none of these defendants is included in the judgment of dismissal at issue in this appeal. The disposition of that cause of action is unclear from the record.

[7] As the appeal is taken from a judgment following an order sustaining a demurrer without leave to amend, we rely upon and recite the facts as alleged in the operative complaint, the FAC. All references to the complaint are to the FAC unless otherwise noted.

Agoura, California (the Ranch) for $1,860,000 in April of 1999. Gelbard allegedly took title to the Ranch in the name of ABI on advice of counsel as part of a personal asset protection plan due to the "high risks of litigation in the securities industry," but claims he held and still holds equitable title to the Ranch. He deducted the costs of purchase, the property taxes and other deductible expenses on his personal tax returns for the tax years 1999 and 2000.

In 2000 and 2001, Beaton and ABI's accountant and attorney at the time, Engel, represented to Gelbard that Gelbard owed money to ABI because he had taken more than his 50-percent share of the $15 million in proceeds. As a result, Gelbard contributed stock from his separate holdings valued at $4.5 million. However, Gelbard later learned that the $4.5 million contribution was never credited to his capital account. Beaton also insisted that Gelbard take out a $1.3 million loan secured by the Ranch, which he did, the proceeds of which were used to exercise ABI stock warrants.

In 2003, Unger became involved with ABI. In May of that year, Beaton entered into a separate partnership with Unger to form Tymar Entertainment, LLC, which was used to pursue two movie projects. Beaton, allegedly assisted by Littman and others, then turned over some of the duties he previously agreed to handle (the management of the books and records for ABI) to Unger so that Unger could "restate ABI's books and records and re-file ABI's tax returns." Beaton represented to Gelbard that ABI did not have the cash to pay the $1.3 million loan secured by the Ranch. In March of 2004, Beaton induced Gelbard to agree to allow Unger to become a member of ABI by representing that Unger would invest approximately $1 million. However, the

investment was actually a loan by Unger to ABI secured by the Ranch. A lien for $1.1 million was recorded against the Ranch in the name of Manatee, Unger's wholly-owned business. Later that year, the Ranch's title was transferred from ABI to Unger allegedly as a gift for no consideration, at which time the Ranch was valued at $7.5 million, so that Unger could take out a $2.5 million loan against the property for the benefit of ABI at a lower interest rate. At approximately the same time, Unger was then removed as a member of ABI and his company, Manatee, was substituted in his place without Gelbard's knowledge or consent. Unger took out another loan for $3.7 million secured by the Ranch while contending and reporting to the IRS that he did not own the Ranch but that it was owned by ABI.[8]

Beaton and Unger removed Gelbard as a signatory to ABI's accounts in early 2005. Gelbard was then told to have his companion, Du Boise, open a separate bank account so that he could continue to receive distributions from ABI through her account. Beaton and Unger again represented to Gelbard that he had received more money than he was entitled to from ABI and that his capital account was negative $2.6 million as a result. Beaton and Unger then represented to Gelbard that they, as solvent members of ABI, needed him to file for bankruptcy so that they could "write off" his debt. On October 14, 2005, Gelbard filed a chapter seven bankruptcy petition and scheduled the $2.6 million as a debt. The bankruptcy court discharged Gelbard's debts on

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[8] Gelbard's counsel represented at oral argument that many of the subsequent loans secured by the Ranch were used to pay off prior loans in addition to providing an influx of capital to ABI. However, the total outstanding balance secured by the Ranch is not clear from his statements or the record.

November 19, 2007. Unger purchased Gelbard's one-third interest in ABI from his bankruptcy estate in 2009. Gelbard later requested that the bankruptcy court dismiss his petition. His request was granted on January 8, 2010.

In his complaint, Gelbard alleged that, "[b]ased on portions of deposition transcripts that Gelbard believes he may have first obtained in late 2006, and more particularly, based on partial accounting documents and records of ABI that were finally turned over to Gelbard during his bankruptcy in November [of] 2009," Gelbard discovered, "in late 2009," that Beaton had breached ABI's operating agreement by "making undisclosed and illegal transfers of some of the restricted S8 securities beneficially owned by ABI, and then by continuing to sell and transfer ABI assets, that were then worth tens of millions of dollars, to various persons and entities who were friends, relatives and/or associates of Beaton. . . . " Gelbard claims he was able to piece together information from the documents above and various lawsuits and SEC investigations brought against Beaton to reveal that Beaton and his alleged co-conspirators "were able to generate over $150 million in fraudulent profits for themselves, from stock, cash and other assets that were actually or constructively owned by ABI. . . . [Also,] Beaton and his co-conspirators were successfully able to conceal their illegal stock trading, manipulation and transfer of ABI's assets[] from Gelbard and from state and federal taxing authorities[] so that these illegal profits could be intentionally concealed from, and never shared with, Gelbard, and so that very few, if any taxes would have to be paid by Beaton and his co-conspirators."

Gelbard further alleged that some of Beaton's colleagues were indicted for conspiring to conceal their profits and with under-reporting income directly arising out of shares and money "belonging to ABI that was illegally sold, gifted or otherwise transferred to them . . . by Beaton . . . without Gelbard's knowledge or consent. . . . " In addition, Gelbard alleged that Beaton, after the "formation of ABI in August of 1998[] through at least 2003, . . . diverted, embezzled and/or stole from ABI's investment portfolio over $150 million worth of stock, cash and other assets, while engaging in multiple violations of state and federal securities and tax laws, including S8 registration restrictions, insider trading preclusions, illegal buying and selling of securities and significant tax fraud, all without Gelbard's knowledge or consent. . . . " (Emphasis removed.)

Gelbard's complaint described an unlawful detainer action against Gelbard and Du Boise by Unger that had resulted in their eviction from the Ranch in October of 2008. Unger and his attorneys at the time, Hummer and Peterson, were alleged to have "converted, stole and disposed of, among other things, boxes and boxes of legal and business documents belonging to Gelbard and Du Boise, that [they] were attempting to use to discover the nature and extent of the fraudulent conduct complained of [in the FAC]" depriving Gelbard of the ability to discover the extent of the conduct earlier than he did in November of 2009. It was also alleged that Unger had filed a lawsuit against Du Boise alleging that she had breached her fiduciary duties to Unger and had converted $1.3 million of Unger's funds. In addition, it was alleged that Unger had later

destroyed nearly the entire interior of the Ranch without obtaining any permits and making the Ranch unfit for occupancy.

The complaint alleged that, in addition to the unlawful detainer action, Unger had filed a few other actions against Gelbard. In either 2008 or 2009, Unger filed an "Adversary Proceeding" against Gelbard seeking to revoke his bankruptcy discharge by falsely asserting that Gelbard had committed fraud. Also in 2009, Unger sued Gelbard on behalf of ABI asserting that ABI was the true owner of Gelbard's shares of stock in two separate companies. On the day that Gelbard's bankruptcy was dismissed, Unger filed yet another action against him in Colorado allegedly for the express purpose of increasing the cost of litigation for Gelbard.

Based on these alleged facts, Gelbard and Du Boise filed their original complaint on January 15, 2010. Unger, Beaton, ABI, Littman and Manatee demurred on February 24, 2010. The trial court sustained the demurrer with leave to amend and Gelbard and Du Boise filed the FAC on June 1, 2010.

The FAC included the following causes of action: (1) fraud by intentional misrepresentation; (2) fraud by intentional concealment of material facts; (3) breach of fiduciary duty; (4) conspiracy to defraud; (5) conversion relating to ABI's assets; (6) fraudulent transfer of real property (Civil Code section 3439 et seq.); (7) fraudulent transfer of real property (common law); (8) conversion relating to possessions at the

Ranch;[9] (9) breach of contract (the operating agreement); and (10) quiet title to the Ranch. Unger, Beaton, ABI, Littman and Manatee again demurred on July 6, 2010.

As part of their demurrer, Unger, Beaton, ABI, Littman and Manatee requested that the trial court take judicial notice of the schedules Gelbard had attached to his 2005 bankruptcy petition, among other things. Gelbard opposed the request on the ground that it was improper to take notice of the truth of factual statements made in the schedules. Taking into consideration the parties' oppositions and replies, the trial court again sustained the demurrer with respect to causes of action one through seven and nine through ten, this time without leave to amend, but overruled the demurrer with respect to the eighth cause of action. (See fn. 6, *ante*.)

Although the trial court did not expressly rule on the respondent's request for judicial notice, it is clear from the transcript of the hearing that such notice was taken because the trial court based its ruling in part on factual statements asserted in Gelbard's bankruptcy schedules. It stated that "Gelbard denied any legal or equitable interest in the Ranch during [his] bankruptcy." Because the court found that his denial of any interest in the Ranch for bankruptcy purposes, which had been made under penalty of perjury, conflicted with his assertion of equitable ownership in the Ranch in the FAC, it sustained the demurrer with respect to all claims based on such ownership.

The court also stated that the fraud-based claims were barred by the three-year statute of limitations period found in Code of Civil Procedure section 338 because

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[9] Because the demurrer was overruled with respect to the eighth cause of action, we need not discuss it further.

Gelbard pled "that he knew of the fraud in 2006" in the FAC. It sustained the demurrer with respect to all causes of action which were based on fraud.

With respect to the ninth cause of action for breach of the operating agreement, the trial court found that it was barred by the four-year statute of limitations period in Code of Civil Procedure section 337 because the last alleged breach occurred in 2005. It then sustained the demurrer as to that claim. After entry of judgment of dismissal,[10] Gelbard filed a timely appeal.

## *ISSUES ON APPEAL*

Gelbard contends that it was improper for the trial court to take judicial notice of the factual statements asserted in his bankruptcy schedules filed in 2005. He also contends that the statute of limitations periods for the fraud and breach of contract actions were tolled because he was not able to discover the issues constituting either fraud or breach until late 2009. Finally, he contends that the trial court abused its discretion in failing to grant him leave to amend his complaint.

## *DISCUSSION*

1. *Standard of Review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.

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[10] Although the defendants Unger, Beaton, ABI, Littman and Manatee had filed the demurrer and were described in the trial court's minute order, the judgment only listed Beaton, ABI, Littman and Manatee as successful defendants. They are thus the only parties to this appeal.

[Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide 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." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court." (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.)

2. *Causes of Action Relating to the Ranch: (6) Fraudulent Transfer (Civil Code Section 3439 et seq.), (7) Fraudulent Transfer (common law), and (10) Quiet Title*

Although Gelbard's real estate claims are not the first asserted in the FAC, we start our discussion here because the analysis of the judicial estoppel question important to these causes of action plays a small role in our later discussions.

Gelbard contends that it was improper for the trial court to take judicial notice of the factual statements asserted in his bankruptcy schedules filed in 2005[11] regarding his interest in the Ranch. He states that trial courts cannot take judicial notice of facts pursuant to Evidence Code section 452, subdivision (d). Gelbard is wrong. Clearly, the court may take judicial notice of pleadings filed in other courts as well as the fact that Gelbard had asserted certain claims therein. It is not the taking of judicial notice that controls here, however, but rather, it is the doctrine of judicial estoppel.

Evidence Code section 452, subdivision (d), allows a trial court to take judicial notice of the "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." It is important to distinguish between a court's properly taking judicial notice of the existence of such records, including all that is stated therein, and the court's improperly taking judicial notice of the *truth* of any facts asserted therein. " ' [A] court *cannot* take judicial notice of *hearsay allegations* as being true, just because they are part of a court record or file. A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the *truth* of facts asserted in documents such as orders, **findings of fact** and conclusions of law, and judgments[,]' " with certain limitations. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564.)

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[11] Respondents also point to Gelbard's statements in his judicially noticed responsive declaration to an order to show cause in his divorce proceeding involving Shana Gelbard. The record does not contain sufficient evidence that the court in Gelbard's divorce proceeding adopted the statements he made in his declaration as true as we have no evidence of the outcome of the order to show cause hearing.

In this case, the trial court properly took judicial notice of the bankruptcy schedules in which Gelbard did not include any mention of legal or equitable title to the Ranch. Those schedules did not include any reference to the Ranch or any claimed interest therein by Gelbard. Had he had any interest in that property when he filed the schedules, he would have been required by law to include the property in those schedules. As he did not, the noticed schedules demonstrated a direct conflict with statements Gelbard made in his complaint. Whether his assertion in those schedules that he did not own the Ranch is true is not relevant.

"The doctrine of judicial estoppel precludes a party from taking inconsistent positions in separate judicial proceedings. [Citation.] It ' " 'is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. . . . "The policies underlying preclusion of inconsistent positions are 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.' " . . . Judicial estoppel is "intended to protect against a litigant playing 'fast and loose with the courts.' " ' " [Citation.] "It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." [Citation.]' " (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 841.)

For the doctrine of judicial estoppel to apply, five requirements must be met: " '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the

first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citation.]" (*The Swahn Group, Inc. v. Segal*, *supra*, 183 Cal.App.4th at p. 842.) "We may decide the issue of judicial estoppel if [the] facts indicate the doctrine should be applied on demurrer." (*Id.*, at p. 843.)

Clearly, Gelbard has taken two directly opposing positions with respect to the Ranch, both of which were under oath.[12] He did not assert either a legal or an equitable interest in the Ranch in his bankruptcy schedules. Now, however, he has alleged that he holds equitable title to the Ranch and has held such title since the Ranch was purchased in 1999. These positions are wholly inconsistent. A bankruptcy proceeding is a judicial proceeding. Thus, the first, second and fourth requirements for judicial estoppel have been met.

Gelbard argues that the third requirement was not met because he requested and received a dismissal of his bankruptcy petition on January 8, 2010. As a result, he was not successful in asserting the first position. The record indicates, however, that Gelbard's request for dismissal followed his prior discharge on November 19, 2007. For purposes of the third requirement for judicial estoppel to apply, the term " ' "acceptance" in the bankruptcy context is construed broadly to "protect[] the integrity of the bankruptcy process." . . . Among other possibilities, the grant of a discharge (even if later revoked) . . . may constitute sufficient "acceptance" of the accuracy of schedules . . . . ' " (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 141.)

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[12] The FAC was verified.

Despite the fact that Gelbard's bankruptcy was ultimately dismissed at his own request, the prior discharge is a sufficient basis for concluding that the bankruptcy court accepted his schedules as true. As a result, the third requirement has been satisfied.

With respect to the fifth requirement, Gelbard states in the FAC that he never held legal title to the Ranch and that it was held by ABI as part of a personal asset protection plan but that he was the equitable owner of the Ranch. He claims that he failed to include the Ranch in his original bankruptcy schedules filed in 2005 because he believed the representations of Beaton, Unger and others that his capital account in ABI was negative $2.6 million and therefore he assumed he no longer held equitable title to the Ranch. As a result, he concludes that the fifth requirement has not been satisfied. This argument is without merit.

Gelbard failed to allege any facts showing that, at the time Gelbard filed for bankruptcy in 2005, he had reason to believe he no longer held equitable title to the Ranch. First, nothing had changed with respect to his possession of the Ranch. Gelbard continued to live at the Ranch until late 2008 when he and Du Boise were evicted as a result of Unger's unlawful detainer action. According to the FAC, Unger did not seek rent from Gelbard at any time after title to the Ranch was transferred to him, nor did ABI ever seek rent from Gelbard.[13] He also alleged in the FAC that he did not discover that the Ranch was transferred to Unger until sometime in May of 2008 when the

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[13] Gelbard asserted that ABI claimed on its 2001 through 2008 tax returns that Gelbard owed back rent for his occupancy of the Ranch in the amount of $15,000 per month. However, he does not assert that such rent was ever requested of him or that he ever paid rent.

unlawful detainer action was filed. Second, although he alleged that he was fraudulently induced into believing his capital account with ABI was negative $2.6 million, he included no allegations in the FAC as to why such negative balance automatically extinguished his equitable title to the Ranch.

Gelbard also asserted that as soon as he learned of the various alleged fraudulent activities, he amended his bankruptcy schedules showing his initial claim was made in good faith based on the representations of Beaton, Unger and others. Gelbard's amendments[14] were filed on December 18, 2009, two years after his debt was discharged and one year after he was evicted from the Ranch. He failed to explain how such amendments speak to his belief at the time he originally filed his petition, however.

Based on the foregoing, it appears that despite believing he held equitable title to the Ranch at the time of his initial bankruptcy filing, he chose to avoid including it as an asset in his schedules thereby making it unavailable to his creditors. As a result, he cannot argue that his taking the position in his bankruptcy proceeding that he does not own any interest in the Ranch was the result of ignorance, fraud, or mistake. " ' "The courts will not permit a debtor *to obtain relief from the bankruptcy court by representing that no claims exist* and then subsequently to assert those claims for his own benefit in a separate proceeding. . . . " ' [Citation.]" (*Gottlieb v. Kest*, *supra*, 141 Cal.App.4th at p. 140.)

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[14] Gelbard filed an amended "Schedule B – Personal Property," in which he included under "[o]ther contingent and unliquidated claims," his alleged interest in "the Horse Ranch valued at $7.5 million that was gifted by Beaton to Unger." We have no evidence that he filed an amended real property schedule.

Thus, we conclude that the trial court did not err in sustaining the demurrer with respect to Gelbard's claims relating to the Ranch. Additionally, there is no reasonable possibility that this defect can be cured by amendment. Therefore, the trial court's decision denying Gelbard leave to amend was not an abuse of discretion. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

3. *Causes of Action Based on Fraud: (1) Fraud by Intentional Misrepresentation, (2) Fraud by Intentional Concealment of Material Facts, (3) Breach of Fiduciary Duty, (4) Conspiracy to Defraud, and (5) Conversion*

Gelbard contends that the statute of limitations period for the fraud-based actions was tolled because he did not actually discover the facts constituting the fraud until late 2009. Although he stated that he obtained portions of a deposition transcript in 2006, he asserts that the transcript was not sufficient to arouse his suspicions triggering a duty to investigate as there was a fiduciary relationship between respondents and him. As a result, he need not allege an excuse as to why he did not investigate further in 2006. We agree.

Code of Civil Procedure section 338, subdivision (d), states that an action for relief on the ground of fraud must be brought within three years of discovery of the facts constituting the fraud. "Under the [so-called] discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that [his or] her injury was caused by wrongdoing . . . . [T]he limitations period begins once the plaintiff ' " 'has notice or information of circumstances to put a reasonable person *on inquiry* . . . . ' " ' [Citations.] A plaintiff need not be aware of the specific 'facts' necessary to establish

the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [he or] she must decide whether to file suit or sit on [his or] her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [he or] she cannot wait for the facts to find [him or] her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111, fn. omitted.)

This rule, however, is applied differently in the context of fiduciary and confidential relationships. "In *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, our Supreme Court stated: 'The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his [or her] rights and interests. "Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud. . . . " [Citation.]' [Citation.] [¶] Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion [citation] and do not give rise to a duty of inquiry [citation]. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist. [Citation.] [¶] Thus, a plaintiff need not establish that [he or] she exercised due diligence to discover the facts within the limitations period unless [he or] she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. [Citations.] Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until [he or] she *actually* discovers the facts constituting the cause of action, even though the means for obtaining the information

are available. [Citation.]" (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 201-202.)

Respondents argue that the partial deposition Gelbard received in 2006 put him on notice and he was under a duty to investigate any potential fraud, triggering the running of the statute of limitations. Therefore, his failure to do so was negligent and he should be deemed to have discovered any fraud as of 2006, making his complaint untimely. We disagree. Gelbard has sufficiently alleged that a fiduciary relationship existed between Beaton, Unger, Manatee and himself as all were members or former members of ABI. (Corp. Code, §§ 17153, 17001, subd. (w), 16404, subds. (b) and (c) [fiduciary duties of loyalty and care owed by each member of an LLC].) He also stated that Littman owed him fiduciary duties as the former attorney for ABI. As a result, the latter rule, applicable in situations involving fiduciary relationships, applies here. He need only to have pled when he actually discovered the fraud and need not have alleged any excuse for not investigating in 2006.

Respondents point to Gelbard's deposition testimony[15] submitted with his request for dismissal in the bankruptcy case in which he stated, "starting in 2006 I began to discover the magnitude of the frauds," as evidence that he actually discovered the fraud in 2006 and, as a result, his fraud claims are barred by the statute of limitations. However, it is not clear from this statement or Gelbard's allegations in the FAC that, as a matter of law, Gelbard *actually* discovered, in 2006, the facts constituting the fraud

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[15] The trial court took judicial notice of this document along with the bankruptcy schedules.

alleged in the FAC. He does not dispute that he obtained deposition documents in 2006 that were relevant to his claims. Rather, he alleged that it wasn't until 2009 when he received documents pursuant to his bankruptcy proceedings that he actually discovered all of the facts constituting the fraud. "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. [Citation.]" (*McMahon v. Republic Van & Storage Co*. (1963) 59 Cal.2d 871, 874.) Neither the bankruptcy deposition nor the FAC stated that the partial deposition Gelbard obtained in 2006 contained sufficient information such that, based on it alone, it could be said that Gelbard had actually discovered the fraud at that time. Thus the question of whether the statute of limitations commenced running in 2006, despite Gelbard's claims that he did not discover the fraud until 2009, presents an issue that cannot be resolved on demurrer. (*Ibid*.) As a result, we find that the trial court erred in sustaining the demurrer with respect to Gelbard's claims based on fraud.

4. *Cause of Action Based on Breach of Contract: (9) Breach of the Operating Agreement*

Gelbard contends that the statute of limitations period for his breach of contract action (i.e., breach of the operating agreement) was tolled because he did not actually discover the breach until late 2009. He asserts that he was under no duty to investigate

the possibility of such breach as there was a fiduciary relationship between respondents and him. We agree with Gelbard.[16]

Code of Civil Procedure section 337 provides that contract-based claims must be brought within four years. "California courts have often stated the maxim that [for] '[i]n ordinary tort and contract actions, the statute of limitations . . . begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action . . . does not toll the statute. . . . ' [Citation.] [¶] 'The harshness of this rule has been ameliorated in some cases [however,] where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured.' [Citation.] Accordingly, 'a cause of action under the discovery rule accrues when the plaintiff discovers or should have discovered all facts essential to his cause of action . . . ; this has been interpreted under the discovery rule to

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[16] Our review of the terms of the operating agreement, which was attached to the FAC, has revealed a couple of provisions of interest. Section 11.9 states that Colorado law, rather than California law, governs the operating agreement. Thus, whether Gelbard's breach of contract claim was timely or not would most likely be governed by the applicable Colorado statute and not Code of Civil Procedure section 337. Neither Gelbard nor respondents raised the issue before the trial court. The issue also has not been raised before us on appeal and we need not address it. As a result, we decide this case under California law.

Interestingly, section 11.14 of the operating agreement specifies that "[a]ny dispute or controversy arising under, out of, in connection with, or in relationship to this Agreement or any amendments hereto or any breach hereof or in connection with the dissolution of the Company shall be determined and settled by arbitration before a single independent arbitrator, which arbitrator shall be selected and hearings shall be conducted pursuant to the rules of the Commercial Arbitration Panel of the American Arbitration Association (the "AAA"). . . . Any award rendered therein shall be final and binding upon each and all of the Members and judgment may be entered thereon in any court of competent jurisdiction." However, neither Gelbard nor respondents have raised the issue and we deem it to have been waived. (See, e.g., Code of Civ. Proc. § 1281.5, subds. (b) and (c).)

be when plaintiff either (1) actually discovered his injury and its negligent cause or (2) could have discovered injury and cause through the exercise of reasonable diligence.' [Citations.] It is well-settled that the discovery rule applies to causes of action involving the breach of a fiduciary relationship. [Citations.]" (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 826-827.)

As with his fraud claims, Gelbard alleged that respondents were fiduciaries as other members of ABI. He has also alleged that he *actually* discovered their breach of the operating agreement in 2009. Again, the facts as to the timing of his discovery appear to be the subject of dispute. Thus, it is not an issue to be resolved on demurrer. (*National Auto. & Casualty Ins. Co. v. Payne* (1968) 261 Cal.App.2d 403, 409.) Gelbard's breach of contract allegation in the FAC is thus sufficient to survive demurrer. As a result, the trial court erred in sustaining it with respect to the breach of contract claim.

## *DISPOSITION*

The judgment is reversed with respect to the first, second, third, fourth, fifth and ninth causes of action and is otherwise affirmed. The parties shall each pay their own costs on appeal.

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

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.