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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BADRUDIN KURWA, Plaintiff and Appellant, v. MARK B. KISLINGER et al., Defendants and Respondents.	B298008 (Los Angeles County Super. Ct. No. KC045216)

APPEAL from an order of the Superior Court of Los Angeles County, Gloria White-Brown, Judge. Reversed and remanded, with directions.

Law Offices of Robert S. Gerstein and Robert S. Gerstein; Law Offices of Steven H. Gardner and Steven H. Gardner, for Plaintiff and Appellant.

Dale B. Goldfarb, for Defendants and Respondents.

Plaintiff and appellant Badrudin Kurwa, on behalf of himself and derivatively on behalf of Trans Valley Eye Associates, Inc., appeals from a judgment following an order precluding evidence of fiduciary duty in favor of defendants and respondents Mark Kislinger, Mark Kislinger, Ph.D., M.D., Inc., and Mark Kislinger, M.D., Inc. The trial court found that after Kurwa and Kislinger incorporated Trans Valley, Kislinger no longer had a fiduciary duty to Kurwa as a co-venturer, and because they were shareholders in Trans Valley, Kurwa could not maintain an action for breach of fiduciary duty against another minority shareholder. On appeal, Kurwa contends triable issues of fact exist as to whether: (1) the corporation was merely a vehicle for the joint venture, so Kislinger continued to have a fiduciary duty to Kurwa as a co-venturer that was not terminated by formation of the corporation; (2) Kurwa had standing to pursue a derivative action on behalf of the corporation based on Kislinger's fiduciary duty as a director; and (3) Kurwa was entitled to an accounting.

We conclude Kurwa stated a cause of action for breach of fiduciary duty based on allegations that Kurwa and Kislinger disregarded corporate formalities and continued a joint venture relationship. In addition, Kurwa has standing to pursue a derivative action for breach of fiduciary duty based on Kislinger's duty as a director, and Kurwa may seek an accounting. We reverse with directions.

FACTUAL AND PROCEDURAL HISTORY[1]

Business Agreement

Kurwa and Kislinger had separate ophthalmology practices prior to 1992. After being introduced by a third party in 1991, Kurwa and Kislinger agreed to form an organization that would enter into "capitation agreements" with health maintenance organizations (HMOs). HMOs would pay a monthly per capita fee, based on the number of participating HMO members, in exchange for ophthalmology and optometry services.

Kurwa and Kislinger formed Trans Valley in March 1992 to undertake and administer the capitation agreements. Kurwa and Kislinger each owned 50 percent of the stock of Trans Valley and were the sole directors of the corporation. Kurwa was the president of Trans Valley. The articles of incorporation did not contain a specific statement that "the corporation is a professional corporation," as required by Corporations Code section 13404 for the

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[1] In this case, the trial court's rulings on motions in limine effectively granted judgment on the pleadings in favor of Kislinger; the court concluded that even if the factual allegations were true, Kurwa could not recover for breach of fiduciary duty from Kislinger. In accordance with the standard of review on appeal from a judgment on the pleadings, we state the facts based on the allegations of the complaint and the undisputed facts. (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 815–816 (*April*).)

purposes of qualifying Trans Valley as a professional corporation that renders professional services.

On July 30, 1992, Kurwa and Kislinger signed a handwritten agreement. The handwritten agreement stated, "Agreement between Bud and Mark [¶] 1) [Huntington Provider Group (HPG)] services for June and July will be paid 'Fee-for-service' on old profile to both MDs as in the past. Except no 'out of pocket' payments from 1 M.D. to other. [¶] 2) From August 1st both doctors will share equally in all payments without regard to number of patients or services provided. [¶] 3) From August 1st both doctors will share equally all WCMC payments (for services dated 8/1/92 or after). [¶] 4) Arrange to see equal number of WCMC + HPG patients by both, & share the work as much as possible. [¶] [5) deleted] [¶] 6) TVEG Act will require 2 sigs. on all transactions. Share copies of all transactions. [¶] 7) Bounce ideas off each other as far as possible before making outside proposals. All new proposals only effective after ok'd and signed by both MDs and Dr. Friesen. [¶] 8) Alternate President/CFO position every year. [¶] 9) Convert WCMC account to TVEG." The agreement was signed by Kurwa and Kislinger as individuals.

In 1997, Kurwa and Kislinger drafted a two-page agreement resolving certain details of their relationship. The document provided in part: "6. It is understood that Dr. Kurwa and Dr. Kislinger are partners in TransValley. Should any of the contracts that are currently managed be lost, the remaining contracts will then be re-split between

them. [¶] 7. Also, should either Dr. Kislinger or Dr. Kurwa acquire any managed care contracts, those would also be part of TransValley and would be jointly administered." There were no signature lines and the record does not contain an executed copy of the document.

Trans Valley ultimately entered into three capitation agreements, serving approximately 200,000 patients in the San Gabriel Valley from 1992 through 2003. Physician Associates of the Greater San Gabriel Valley ("Physician Associates") purchased HPG and became the largest HMO to contract with Trans Valley.

Beginning on September 26, 2003, Kurwa's license to practice medicine was suspended for 60 days and he was placed on probation for five years related to Medicare billing practices. Kislinger filed articles of incorporation for a new corporation on October 6, 2003, under the name Mark Kislinger, M.D., Inc. Kislinger's attorney wrote a letter to the president of Physician Associates as follows:

"This office represents Mark Kislinger, M.D. We are writing to you on his behalf on a matter that involves the continuity of patient care.

"At the present time, there exists a provider agreement between Physician Associates and Trans Valle[y] Eye Associates. As you know, one of the two co-owners of Trans Valley, Dr. Badrhudin [*sic*] Kurwa has had his license to practice medicine suspended in the State of California. Pursuant to the agreement between you and that entity, his participation in the provider agreement is automatically

terminated. Moreover, we believe the corporate status of Trans Valley is inappropriate for the practice of medicine.

"To solve these problems, we have formed a new appropriate medical corporation for Dr. Kislinger. This new corporation will hire substantially all of the employees and will contract physicians of the previous entity, so there will be no interruption of services to patients or any noticeable change to anyone. To facilitate this transfer, we would request that PA transfer its provider agreement from Trans Valley to Mark Kislinger, M.D., Inc. Dr. Kurwa, because of his suspension, will not be a part of the new corporation.

"We would appreciate having the transfer take place as soon as possible to maintain continuity and quality of patient care, and to avoid any improper entanglement with Dr. Kurwa, whose license is suspended at the present time.

"I would appreciate discussing this matter with you to effectuate this change as smoothly as possible. Your cooperation is appreciated."

On October 31, 2003, Physician Associates provided notice to Trans Valley that it was terminating the capitation agreement effective November 30, 2003, because Trans Valley could not perform under that agreement: Trans Valley was not organized as a professional medical corporation or registered with the California Medical Board. Physician Associates solicited proposals for a new provider, but had already agreed to award an exclusive capitation agreement to Kislinger's medical corporation.

Complaint Filed

Kurwa filed his original complaint in 2004. He filed the operative second amended complaint against several defendants, including Kislinger, his professional corporations, and Physician Associates on April 7, 2005.[2]

The complaint alleged that Kislinger owed a fiduciary duty to Trans Valley, which he breached by (1) conspiring with others to cause Physicians Associates to terminate its contract with Trans Valley; (2) failing to cooperate with Trans Valley to change the name of the corporation, so that the basis for the termination of the contract could be overcome; (3) taking business for himself that should have belonged to Trans Valley; and (4) converting assets, including bank deposits to his personal use or the use of his business.

The complaint alleged that Kislinger owed a fiduciary duty to Kurwa individually based on their agreement to operate as partners. Kislinger breached his fiduciary duty by conspiring to terminate the contract with Trans Valley

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[2] The operative second amended complaint included defendants who are not before us on this appeal and causes of action which are no longer at issue. For example, Kurwa sued Kislinger's attorneys for tortious interference with contractual relations. The attorneys filed an anti-SLAPP motion, which the trial court denied. This appellate court affirmed the trial court's ruling in a published opinion, *Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP* (2007) 146 Cal.App.4th 841.

and enter into a new contract with an entity associated with Kislinger, and by failing to cooperate in changing the name of Trans Valley to overcome the basis for the termination. Kislinger had failed to share profits and business as required by their agreement, and he had failed to provide an accounting.

Summary judgment was entered in favor of Physician Associates based on the undisputed fact that Trans Valley was not incorporated as a professional medical corporation pursuant to the Moscone–Knox Professional Corporation Act (Corp. Code, § 13400 et seq.). This appellate court affirmed the judgment in favor of Physician Associates, ruling that Trans Valley's failure to comply with statutory provisions for professional medical corporations rendered its agreement to provide medical services to Physician Associates a violation of the ban on the corporate practice of medicine contained in Business and Professions Code section 2400. (*Kurwa v. Physician Associates of the Greater San Gabriel Valley* (Jan. 14, 2009, B202301) [nonpub. opn.].) The capitation agreement was therefore void *ab initio,* and Trans Valley could not maintain an action for breach of contract against Physician Associates.

Kislinger filed several motions in limine. He sought to exclude certain evidence at trial, including evidence of any fiduciary duty, evidence of a joint venture, the handwritten 1992 agreement, the capitation agreement between Trans Valley and Physician Associates, and the 1997 agreement. Kurwa opposed the motions on the ground that Kislinger

owed Kurwa a fiduciary duty as a joint venturer, the agreements between the parties were admissible even if not enforceable, and the derivative action for breach of fiduciary duty had been pled in an abundance of caution.

A hearing was held on March 2, 2010. The trial court granted three of the motions in limine. The court found there was no fiduciary duty between Kislinger and Kurwa. The joint venture and any associated fiduciary duties terminated when the parties formed the corporation Trans Valley. Minority shareholders in a corporation do not owe each other a fiduciary duty, so Kurwa also did not have standing to bring a shareholder derivative action on behalf of Trans Valley.

The court's rulings disposed of Kurwa's derivative and individual causes of action for breach of fiduciary duty, as well as the claim for an accounting based on a breach of fiduciary duty. Kurwa expressly abandoned causes of action for fraud, breach of contract, and breach of the contractual duty of good faith and fair dealing, and noted that the cause of action for removal of a director was moot. The parties orally agreed to dismiss opposing causes of action for defamation without prejudice and to waive the applicable statute of limitations. The court dismissed the entire action with prejudice, except that the defamation cause of action was dismissed without prejudice and the cross-complaint was dismissed without prejudice. On August 23, 2010, the court entered judgment in favor of Kislinger.

Proceedings after the 2010 Judgment

Kurwa appealed from the 2010 judgment. Although a majority of this court concluded Kurwa had appealed from a final judgment, the California Supreme Court held that the 2010 judgment was not a final and appealable judgment because the parties preserved claims for possible future litigation. (*Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1100.)

Kurwa dismissed his defamation cause of action with prejudice and filed a new notice of appeal from the 2010 judgment. This appellate court concluded that the appeal must be dismissed, because the notice of appeal was untimely and the cause of action for defamation in the cross-complaint remained outstanding. Our Supreme Court affirmed, because the trial court had not yet rendered a final and appealable judgment. The Supreme Court clarified that the trial court had the power to vacate the defective judgment and the underlying stipulation, in order to enter a final judgment that would allow Kurwa to proceed on appeal. (*Kurwa v. Kislinger* (2017) 4 Cal.5th 109, 112.)

The trial court vacated the 2010 judgment and set aside the stipulated dismissal of the defamation causes of action. Kurwa dismissed his cause of action for defamation and Kislinger dismissed his cross-complaint. On April 15, 2019, the trial court entered a final judgment in favor of Kislinger. Kurwa filed a timely notice of appeal from the April 15, 2019 judgment.

DISCUSSION

Standard of Review

"Motions in limine are designed to facilitate management of a case by deciding difficult evidentiary issues in advance of trial." (*McMillin Companies, LLC v. American Safety Indemnity Co.* (2015) 233 Cal.App.4th 518, 529 (*McMillin*).) When a motion in limine shows that a plaintiff's allegations, even if true, would not establish a cause of action, the court may exercise its inherent powers to enter judgment in favor of a defendant. (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 701 (*Coshow*); *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 284–285.) When used in this manner, the motion in limine becomes a substitute for a dispositive motion. (*McMillin*, *supra*, 233 Cal.App.4th at p. 529.)

Evidentiary rulings on motions in limine are typically reviewed for an abuse of discretion, but when the motion substitutes for a dispositive statutory motion, we apply the standard of review relevant to the dispositive motion. (*McMillin*, *supra*, 233 Cal.App.4th at pp. 529–530 [de novo review of motion in limine similar to grant of summary adjudication or nonsuit]; *Coshow*, *supra*, 132 Cal.App.4th at pp. 701–702 [independent review of motions in limine properly construed as motion for judgment on the pleadings].)

"Judgment on the pleadings is similar to a demurrer and is properly granted when the 'complaint does not state facts sufficient to constitute a cause of action against [the] defendant.' (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii); see *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254; *Rolfe v. California Transportation Com.* (2002) 104 Cal.App.4th 239, 242.) The grounds for the motion must appear on the face of the challenged pleading or from matters that may be judicially noticed. (Code Civ. Proc., § 438, subd. (d).) The trial court accepts as true all material facts properly pleaded but does not consider conclusions of law or fact, opinions, speculation, or allegations contrary to law or facts which are judicially noticed. (*Shea Homes Limited Partnership v. County of Alameda*, *supra*, 110 Cal.App.4th at p. 1254.)" (*Coshow*, *supra*, 132 Cal.App.4th at p. 702.)

"We independently review the trial court's ruling on a motion for judgment on the pleadings to determine whether the complaint states a cause of action. In so doing, we accept as true the plaintiff's factual allegations and construe them liberally. (*Rolfe v. California Transportation Com.*, *supra*, 104 Cal.App.4th at pp. 242–243.) If a judgment on the pleadings is correct upon any theory of law applicable to the case, we will affirm it regardless of the considerations used by the trial court to reach its conclusion. (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.)" (*Coshow*, *supra*, 132 Cal.App.4th at pp. 702–703.)

We review de novo the trial court's legal conclusion, based on the allegations of the complaint, that Kislinger did not owe a fiduciary duty and Kurwa had no standing to sue.

Joint Venture

Kurwa contends the complaint stated a cause of action against Kislinger for breach of fiduciary duty based on their relationship as joint venturers, which was not terminated by their incorporation of Trans Valley. Specifically, the handwritten 1992 agreement and the 1997 draft agreement expressly describing the doctors as partners, which were prepared after Trans Valley was formed, showed that the business continued to operate as a joint venture and employed the corporate form merely to carry out the joint venture agreement. We conclude the allegations are sufficient to state a cause of action for breach of fiduciary duty based on the parties' disregard of the corporate form and continued operation of a joint venture.

A joint venture is an undertaking formed by two or more people, without a partnership or corporate designation, to jointly perform a business enterprise for profit. (*Nelson v. Abraham* (1947) 29 Cal.2d 745, 749 (*Nelson*).) The elements of a joint venture are: (1) joint ownership of the venture; (2) the right to joint control; and (3) shared profits and losses. (*Orosco v. Sun-Diamond Corp.* (1997) 51 Cal.App.4th 1659, 1666.) A joint venture may be made by written agreement or oral agreement, or shown from "'a reasonable deduction from

the acts and declarations of the parties.' [Citation.]" (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482–483 (*Weiner*).) "Whether a joint venture actually exists depends on the intention of the parties." (*April*, *supra*, 147 Cal.App.3d at p. 819.) When the evidence is disputed, the existence of a joint venture is a question of fact for the jury. (*Id.* at p. 820.)

"The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a breach of the fiduciary duty; and (3) resulting damage." (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.) "The rights and liabilities of joint adventurers, as between themselves, are governed by the same rules which apply to partnerships." (*Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 288; see also *Weiner*, *supra*, 54 Cal.3d at p. 482.) A joint venturer owes the same fiduciary duties to coventurers as a partner owes to the other partners in a partnership. (*Galardi v. State Bar* (1987) 43 Cal.3d 683, 693.) Each joint venturer owes the others a duty of utmost good faith. (*Ibid.*; *Nelson*, *supra*, 29 Cal.2d at pp. 750–751.) "'A partner may not dissolve a partnership to gain the benefits of the business for himself, unless he fully compensates his copartner for his share of the prospective business opportunity.'" (*Leff v. Gunter* (1983) 33 Cal.3d 508, 515, quoting *Page v. Page* (1961) 55 Cal.2d 192, 197.)

"A joint venture continues until the purpose for which it was formed has been accomplished or it is expressly extinguished." (*April*, *supra*, 147 Cal.App.3d at p. 821.) However, joint venturers may terminate their relationship

by mutual consent (*Griffeth v. Fehsel* (1943) 61 Cal.App.2d 600, 604–605), or through conduct inconsistent with its continuance (*Richards v. Plumbe* (1953) 116 Cal.App.2d 132, 138).

"In ascertaining the intention of the parties, where they have entered into a written agreement, such intention should be determined chiefly from the terms of the writing [citation]." (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 694 (*Eng*).) "However, '[a] partnership need not be evidenced by writing [citation]. It is immaterial that the parties do not designate the relationship as a partnership or realize that they are partners, for the intent may be implied from their acts [citations].' [Citation.]" (*Ibid.*)

A partnership does not usually continue to exist after a corporation is formed. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1157 (*Persson*).) Partnership obligations, including the fiduciary duties among partners, typically cannot be imposed on the shareholders of a corporation that has been properly formed and operated under the law. (*Ibid.*) "This becomes more apparent . . . where the finding of a de facto partnership was made solely for the purpose of imposing a fiduciary duty on the de facto partners, and not with respect to any other rights or obligations of partners, or for the purpose of enforcing a preincorporation agreement between the partners." (*Ibid.*)

Once the existence of a partnership is shown, the partnership is presumed to continue until the contrary is shown, and a party seeking to rebut the partnership has the

burden of proof to show it has ended. (*Eng*, *supra*, 21 Cal.App.5th at p. 695.) A party can meet its burden to show that a partnership ended and the partnership relationship terminated by establishing that the partnership was incorporated or reorganized into another type of entity. (*Ibid.*) "This affirmative defense is also known as 'supersession' because the corporation supersedes the partnership." (*Ibid.*)

"The proponent of the partnership may avoid this result by offering evidence that the partners intended to retain their partnership notwithstanding incorporation. 'Partners may, by agreement, continue their relations as copartners in conjunction with their relationship as stockholders of a corporation, and "the law would take cognizance of such dual relationship and deal with 'the parties in the light of their agreement[s between themselves], independently of their incorporation' . . . ."' (*Persson*, *supra*, 125 Cal.App.4th at p. 1158; see *Elsbach v. Mulligan* (1943) 58 Cal.App.2d 354, 369 (*Elsbach*); *Asamen*[*v. Thompson* (1942)] 55 Cal.App.2d [661,] 669.) '[C]ourts will enforce preincorporation agreements among partners or joint venturers who have incorporated in order to carry out the agreement between or among the partners or joint venturers.' (*Persson*, at p. 1159.) Because the proponent of the partnership must produce this evidence to avoid a finding that the partnership was superseded, the proponent has the burden of proof on this issue. (See *Mindenberg v. Carmel Film Productions, Inc.* (1955) 132 Cal.App.2d 598,

602 (*Mindenberg*) [affirming grant of nonsuit where proponent failed to produce sufficient evidence of intent to maintain the partnership]; see also Evid. Code, § 550, subd. (a).) In sum, if incorporation is shown, the burden shifts back to the proponent of the partnership to prove that the parties entered into a preincorporation agreement or otherwise intended for their partnership to survive incorporation because the 'ordinary principle' is that the partnership would not survive. (*Persson*, at p. 1159.)" (*Eng*, *supra*, 21 Cal.App.5th at pp. 695–696.)

"If a corporation or a formal partnership is a mere agency for the purpose of convenience in carrying out a joint venture agreement, and independent and innocent third parties, such as creditors or stockholders, are not injured thereby . . . , justice would seem to demand that in determining the rights of the parties they be placed in the position each occupied under the original agreement." (*Elsbach*, *supra*, 58 Cal.App.2d at pp. 368–369.) "In *Elsbach*, there were 'conflicts in the evidence as to whether the operations of the parties constituted genuine corporate functions or whether the corporate form was employed merely as a convenient method of carrying out the agreement of the parties.' (*Id.* at p. 369.) The trial court could therefore reasonably find that the partnership survived its incorporation. (*Ibid.*)" (*Eng*, *supra*, 21 Cal.App.5th at p. 696.)

"Courts have shown considerable skepticism towards alleged preincorporation agreements. In *Persson*, for

example, two individuals founded a consumer products business. (*Persson, supra*, 125 Cal.App.4th at p. 1147.) After three years owning and operating the business as partners, they incorporated the business and became shareholders, directors, and corporate officers. (*Ibid.*) One of the founders eventually sued the other, alleging breach of fiduciary duty and other claims. (*Id.* at pp. 1149–1150.) Following an advisory jury verdict in the plaintiff's favor, the trial court found that the founders maintained a de facto partnership, notwithstanding the incorporation of the business, and the defendant breached his fiduciary duties as a partner. (*Id.* at p. 1151.) The reviewing court reversed this finding, concluding as a matter of law that the partnership did not survive incorporation. (*Id.* at p. 1156.) It held that the corporation 'was not formed to carry out a preincorporation agreement which was later breached. Additionally, this is not a case where substantial justice requires that the parties be treated in accordance with a preincorporation agreement. [¶] Accordingly, we apply the ordinary principle that, after a partnership is incorporated, the rights or obligations which partners can enforce against each other no longer exist. In the absence of a preincorporation agreement or evidence the corporate form was disregarded, shareholders in a duly formed corporation operating in accordance with legal requirements do not become de facto partners, and thereby acquire fiduciary duties to each other, simply because they earn the same salary and refer to each other for convenience as partners.

They have the rights and obligations of shareholders, not partners, and the trial court erred in concluding otherwise.' (*Id.* at p. 1159.)" (*Eng*, *supra*, 21 Cal.App.5th at pp. 696–697.)

"In *Mindenberg*, the appellate court affirmed an order granting nonsuit on the plaintiff's claim for an accounting and other relief. (*Mindenberg*, *supra*, 132 Cal.App.2d at p. 602.) The plaintiff argued that he formed a joint venture with two defendants, relying on one defendant's testimony that the group discussed going into business together. (*Id.* at p. 601.) The appellate court disagreed. It held, 'The evidence shows without conflict that the original plan was formation of a corporation and the conduct of business by it, each of the three . . . to own one-third of the stock; that the corporation . . . was promptly formed; that it conducted the business throughout, observing the customary corporate forms, electing officers and directors, conducting directors' meetings, acting through its elected officers, etc.; 10 shares of stock were issued to or for the benefit of each of the three participants . . . . The testimony and other proof fails to reveal any respect in which the corporation was used as a blind or sham, or as an agency of the stockholders in any manner or sense other than that of the normal corporation.' (*Ibid.*) The relevant written agreements 'contain[ed] no slight intimation of any joint venture in relation to the corporation or its assets or business.' (*Id.* at p. 602.) The trial court therefore did not err by granting nonsuit. (*Ibid.*)" (*Eng*, *supra*, 21 Cal.App.5th at p. 697.)

"Similarly, in *Cavasso*[*v. Downey* (1920) 45 Cal.App. 780], the appellate court found insufficient evidence 'to support the finding of the [trial] court that the partnership between [the defendant] and [the plaintiff] continued after the formation of the corporation.' (*Cavasso*, *supra*, 45 Cal.App. at p. 786.) The appellate court held that the plaintiff's conclusory testimony was 'not sufficient' to show that a partnership continued. (*Ibid.*) There was no evidence, for example, that the plaintiff and the defendant 'had, by agreement, continued their relations as copartners, in conjunction with their relation as stockholders of the corporation . . . . If such an agreement ever existed it was not alleged or proved.' (*Ibid.*)" (*Eng*, *supra*, 21 Cal.App.5th at pp. 697–698.)

In this case, Kurwa has stated a cause of action for breach of fiduciary duty. Although the complaint did not allege that the parties made an agreement prior to incorporation to continue as a joint venture after incorporation, an inference can be drawn from the allegations of the complaint that the parties disregarded the corporate form and operated the business as a joint venture. The corporation was not properly formed for the purpose of the parties' agreement and could not legally operate as a professional corporation. The 1992 agreement divided responsibilities between the doctors as individuals, while the corporation's role was merely as a vehicle to carry out the doctors' joint venture. The 1992 agreement is signed by the doctors in their individual capacities, not as directors or

officers of Trans Valley. The draft of the 1997 agreement expressly refers to Kurwa and Kislinger as "partners." There is no allegation that any actions were taken by Kislinger as a director or officer of the corporation. The trier of fact could conclude from these facts that even after incorporation of Trans Valley, the parties disregarded corporate formalities and operated their business as a joint venture, using the corporate form as a mere agency for the purpose of convenience in carrying out their joint venture agreement. At this stage of the proceedings, the motions in limine based on finding Kislinger had no fiduciary duty to Kurwa as a joint venturer after incorporation must be denied.

Derivative Claim for Breach of Fiduciary Duty

Kurwa contends that he has standing to maintain a claim on behalf of Trans Valley for breach of fiduciary duty, and that Trans Valley did not need to hold an actionable interest in the HMO contracts to have claim for breach of fiduciary duty. We agree.

"It is without dispute that in California, corporate directors owe a fiduciary duty to the corporation and its shareholders and now as set out by statute, must serve 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders.' (Corp. Code, § 309, subd. (a).)" (*Berg & Berg Enterprises,*

LLC v. Boyle (2009) 178 Cal.App.4th 1020, 1037, fn. omitted.)

"'A shareholder's derivative suit seeks to recover for the benefit of the corporation and its whole body of shareholders when injury is caused to the corporation that may not otherwise be redressed because of failure of the corporation to act. Thus, "the action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, *or it seeks to recover assets for the corporation or to prevent the dissipation of its assets*." [Citations.] ". . . 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*[*v. H.F. Ahmanson & Co.* (1969)] 1 Cal.3d 93, 106–107, italics added.)" (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964 (*PacLink*).)

"'"It is a general rule that a corporation which suffers damages through wrongdoing by its officers and directors must itself bring the action to recover the losses thereby occasioned, or if the corporation fails to bring an action, suit may be filed by a stockholder acting derivatively on behalf of the corporation. An individual [stockholder] may not maintain an action in his own right . . . for destruction of or diminution in the value of the stock . . . ."' (*Rankin v.*

Frebank Co. (1975) 47 Cal.App.3d 75, 95.)" (*Paclink*, *supra*, 90 Cal.App.4th at p. 965.)

In this case, the essence of Kurwa's derivative claim is that Kislinger breached his duty to Trans Valley by creating a competing corporation and diverting business for his personal gain rather than aiding Trans Valley. Kislinger asserts that because it was illegal for Trans Valley to contract with the HMOs, Trans Valley suffered no damage. A trier of fact could find, however, that Kislinger's duty as a director of Trans Valley was to investigate the measures available to bring the corporation into compliance and preserve the HMO business for the corporation, such as by forming a new professional corporation and transferring Trans Valley's assets and liabilities to the new corporation. Kislinger's failure to take any action to protect Trans Valley was a breach of his fiduciary duty to the corporation as a director. The order granting the motions in limine based on finding Kurwa could not maintain a derivative action for breach of fiduciary duty must be reversed. The parties do not dispute that Kurwa may seek an accounting in conjunction with a claim for breach of fiduciary duty.

DISPOSITION

The judgment and the order granting the motions in limine are reversed. The trial court is directed to enter a new and different order denying the motions in limine that seek to exclude evidence of fiduciary duties. Appellant Badrudin Kurwa is awarded his costs on appeal.

MOOR, J.

We concur:

BAKER, Acting P. J.

KIM, J.