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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KYLE KRAMER,

Plaintiff and Respondent,

v.

PURACYP, INC., et al.,

Defendants and Appellants.

D070407

(Super. Ct. No.
37-2011-00058121-CU-BC-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

Business Law Group, Lowell Robert Fuselier and David J. Hart for Defendants and Appellants.

Sharif Faust Lawyers and Matthew J. Faust for Plaintiff and Respondent.

Defendants Puracyp, Inc. (Company), Mark Dale and Judy Raucy (together Defendants) appeal a judgment granting plaintiff Kyle Kramer declaratory and specific performance relief in his breach of contract action against them. In a prior appeal in this case, we reversed the trial court's original judgment in favor of Defendants and remanded

the matter with directions that the court grant Kramer's request for declaratory relief and conduct further proceedings on his request for specific performance consistent with our opinion. (*Kramer v. Puracyp, Inc.* (Mar. 18, 2015, D065400) [nonpub. opn.] (*Kramer I*.) After remand of the matter, the court conducted further proceedings and concluded Kramer had proven he had no adequate legal remedy and that specific performance was an appropriate remedy for Defendants' breach of contract for the transfer of 20 percent of the shares of stock in Company, a closely held corporation. On appeal, Defendants contend the court erred by granting Kramer specific performance because he did not meet his burden to show either that damages for Defendants' breach of contract were extremely difficult to calculate or that the shares of Company stock did not have a peculiar value to him. Based on our reasoning below, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

In 2005, Company and Kramer entered into an employment agreement (Agreement), pursuant to which he became its vice president of business development. (*Kramer I, supra*, at p. 2.) Over the Agreement's four-year term, Kramer was to receive an annual salary of \$150,000, to be paid starting when Company was financially able, and a 20 percent equity position in Company. (*Id.* at pp. 2-3.) In 2006, they entered into an addendum to the Agreement (Addendum), providing that Kramer would contribute \$8,500 per month back to Company over a one-year period for his 20 percent ownership

¹ For a more complete discussion of the factual and procedural background of this case, refer to our prior opinion in *Kramer I*, which we incorporate herein.

interest in Company. (*Id.* at p. 3.) During his first year of employment, Kramer received only \$30,000 of the \$150,000 salary set forth in the Agreement. (*Ibid.*) Thereafter, he never received the full amount of his salary as set forth in the Agreement and Addendum because, as he was told, Company did not have the money to do so. (*Ibid.*)

In 2011, Company terminated Kramer's employment. (*Id.* at pp. 3-4.) He filed the instant action against Defendants alleging causes of action for breach of contract and seeking declarations that he is a vested 20 percent owner of Company stock and that Company must issue stock certificates to him representing that ownership, and an order compelling Company to issue stock certificates to him representing that ownership. (*Kramer I, supra*, at p. 4.) Following a trial, the court found that Kramer's claim for 20 percent of Company stock was uncertain and that he never paid the \$102,000 amount required for it. (*Id.* at pp. 4-5.) On November 4, 2013, the court entered judgment for Defendants. (*Id.* at p. 5.)

Kramer appealed that original judgment, contending that the court erred by misconstruing the Agreement and Addendum and finding he was not entitled to shares of Company stock. (*Kramer I, supra*, at pp. 1-2.) In *Kramer I*, we concluded Kramer was contractually entitled to shares of Company's stock representing 20 percent ownership or equity in Company and that he had, in effect, contributed \$102,000 back to Company for those shares by accepting only \$30,000 of his full \$150,000 salary during his first year of employment. (*Id.* at pp. 10-15.) Accordingly, we concluded Company breached the Agreement and Addendum when it terminated Kramer's employment and did not give

him the 20 percent ownership interest in Company for which he had paid. (*Id.* at p. 15.) We rejected Company's argument that Kramer was not entitled to either specific performance or declaratory relief for its breach of contract because he waived those remedies in his pleadings and deposition testimony. (*Id.* at pp. 16-19.) Accordingly, we reversed the trial court's ruling denying Kramer's requested relief for specific performance and declaratory relief, and remanded the matter with directions for the court to grant the declaratory relief he requested and to conduct further proceedings on his request for specific performance. (*Id.* at pp. 22, 29.) In so doing, we stated that the trial court should allow the parties to submit briefing on the question of whether all of the requirements for specific performance were met, including whether Kramer's remedy at law was inadequate. (*Id.* at p. 22.) We cited the following authorities: Civil Code section 3384; *Capaldi v. Levy* (1969) 1 Cal.App.3d 274, 281; *Kaneko v. Okuda* (1961) 195 Cal.App.2d 217, 233-235 (*Kaneko*); *Korabeck v. Weaver Aircraft Corp.* (1944) 65 Cal.App.2d 32, 39 (*Korabeck*); and *Wait v. Kern River Mining etc. Co.* (1909) 157 Cal. 16, 24 (*Wait*). (*Kramer I, supra*, at p. 22.)

On remand, the trial court allowed briefing by, and heard argument from, the parties on the issue of whether the remedy of specific performance should be granted. The parties agreed that all of the elements for specific performance had been met, except for the inadequacy of a legal remedy. The court issued a statement of decision, concluding Kramer had proven he had no adequate legal remedy and that specific performance was the appropriate remedy in this case, and granting his requests for

declaratory relief and specific performance. In particular, the court stated Kramer had presented evidence at trial showing: (1) Company is a closely held corporation and its stock is not traded on the open market; (2) Company had only two directors (i.e., Dale and Raucy) who owned at least 80 percent of the outstanding shares of Company stock; and (3) Dale stated there were no plans to take Company public.

In its statement of decision, the court stated: "Numerous cases have upheld the appropriateness of specific performance involving agreements for the sale of closely held stock." It cited and discussed *Wait, supra*, 157 Cal. 16; *Steinmeyer v. Warner Cons. Corp.* (1974) 42 Cal.App.3d 515; *Kaneko, supra*, 195 Cal.App.2d 217; *Glascocock v. Sukumlyn* (1955) 131 Cal.App.2d 587; and *Korabek, supra*, 65 Cal.App.2d 32. The court concluded there was a common theme that ran through each of those cases, i.e., that specific performance was upheld where there was a closely held corporation with stock that was not publicly traded. Finding the facts in this case were apposite to those in the above-cited cases, the court concluded Kramer had proven he had no adequate legal remedy for Company's breach of contract and that specific performance was the appropriate remedy in this case. The court noted Defendants had not cited any case holding that specific performance was not an appropriate remedy for breach of an agreement to sell stock in a closely held corporation where the stock was not publicly traded. They also had not cited any case supporting their assertion that Kramer was required to present expert testimony proving Company's stock could not be valued. The court also noted none of Defendants' cited cases were factually apposite to the facts in

this case. It rejected Defendants' argument that shares of Company's stock did not have a peculiar value to Kramer, noting the cases they cited used the term "peculiar value" to simply note the stock was unique because it was not publicly traded.

On May 16, 2016, the court entered judgment for Kramer, declaring that he "is a vested, undilutable 20% owner of [Company], and is entitled to any rights incidental to or arising from the ownership and/or possession of the shares," and ordering Defendants to "issue and deliver possession to [Kramer] within 10 days of the entry of this judgment stock certificates representing [Kramer's] vested, undilutable 20% ownership of [Company] . . . along with the corresponding stock ledgers which demonstrate the percentage ownership of each certificate." Defendants timely filed a notice of appeal.

DISCUSSION

I

Specific Performance Generally and Standard of Review

Specific performance is an equitable remedy. (*Treasurer v. Commercial Coal Mining Co.* (1863) 23 Cal. 390, 391-392 (*Treasurer*); *Wait, supra*, 157 Cal. at p. 23; *Korabek, supra*, 65 Cal.App.2d at p. 39.) "To obtain specific performance after a breach of contract, a plaintiff must generally show: '(1) the *inadequacy of his legal remedy*; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity

of the requested performance to that promised in the contract.' " (*Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472, italics added.)

Contrary to Defendants' assertion, the applicable standard in reviewing a decision granting specific performance is the abuse of discretion standard. "A grant or denial of specific performance is reviewed under an abuse of discretion standard." (*Real Estate Analytics, LLC v. Vallas, supra*, 160 Cal.App.4th at p. 472.) Because the remedy of specific performance "is discretionary [citations], we must consider whether the [grant or] denial was an abuse of discretion" (*Petersen v. Hartell* (1985) 40 Cal.3d 102, 110.) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

II

Grant of Specific Performance in This Case

Defendants contend the trial court erred by granting Kramer's request for specific performance, arguing he did not meet his burden to show either that damages for Defendants' breach of contract were extremely difficult to calculate or that the shares of Company stock did not have a peculiar value to him.

A

Specific performance of contracts involving stock in closely held corporations. In general, specific performance will not be granted to enforce a contract involving personal property. (*Korabek, supra*, 65 Cal.App.2d at pp. 38, 40.) "[T]he general rule is that equity will not decree the specific performance of contracts relating to personal property where there is no specific quality in the individual articles which gives them a special value to the contracting party and where the recovery of damages will enable him to purchase others in the market of like kind and quality" (*Wehen v. Lundgaard* (1940) 41 Cal.App.2d 610, 613.) For example, specific performance will be denied where a plaintiff seeks "public stocks, such as are commonly bought and sold in the market" (*Treasurer, supra*, 23 Cal. at p. 392.)

However, there is an exception to the general rule against granting specific performance where a contract involves the sale of "unique items of personal property such as shares of stock in *closely held corporations* which are *not traded in the market* and which have *no established market value . . .*." (*Capaldi v. Levy, supra*, 1 Cal.App.3d at p. 281, italics added.) "[W]here the shares are limited in number and cannot always be had in the market[,]" courts have held the general rule against granting specific performance does not apply. (*Treasurer, supra*, 23 Cal. at p. 392.) Furthermore, "an agreement to transfer stock of *peculiar value* may be specifically enforceable." (*Steinmeyer v. Warner Cons. Corp., supra*, 42 Cal.App.3d at p. 519, italics added.) Specific performance has been granted where the shares of stock "had a peculiar value to

plaintiff[;] . . . could not have been purchased on the open market; could be acquired only from the individual defendants; were acquired by plaintiff as a part of his business program; and therefore defendants' failure to deliver could not have been compensated by a money judgment." (*Kaneko, supra*, 195 Cal.App.2d at pp. 233-234, citing *Glascock v. Sukumlyn, supra*, 131 Cal.App.2d at p. 593.) *Steinmeyer* stated the trial court reasonably concluded the stock of a corporation had "a peculiar value" because it was wholly owned by the defendant and "*not readily obtainable on the open market.*" (*Steinmeyer*, at p. 520, italics added; see also *Butler v. Attwood* (6th Cir. 1966) 369 F.2d 811, 815 [specific performance was properly granted to enforce buy-sell agreement regarding corporation's stock because the stock was unique, being closely held and not available on the market]; *Brand v. Lowther* (W.Va. 1981) 285 S.E.2d 474, 479 ["[E]quity will compel specific performance of a contract for the transfer of shares of stock when they have a peculiar value to the party demanding the transfer[;] . . . [s]pecific performance of a contract for the sale of shares of stock will also be decreed in a proper case where the stock is not readily purchaseable in the market or where the pecuniary value is uncertain or not easily ascertainable, as in the case of a closely held corporation."].) Also, if the shares of stock of a corporation do not have an "established market value," specific performance may be granted. (*Wait, supra*, 157 Cal. at p. 24 [stock of mining corporation did not have an established market value because it owned mining claims of unknown value]; cf. *Gilfallan v. Gilfallan* (1914) 168 Cal. 23, 26 [complaint sufficiently alleged claim for specific performance because it alleged that stock of oil corporation had

no actual market value, was owned and controlled by a few persons, was not for sale, and its value was uncertain]; *Treasurer, supra*, 23 Cal. at pp. 392-393 [specific performance was available for stock of mining corporation that had a peculiar value based on its market value that was difficult to substantiate and its risks were great].)

B

Trial court's grant of specific performance. Applying the above legal principles to the circumstances in this case, we conclude the trial court did not abuse its discretion by granting Kramer's request for specific performance relief and ordering Defendants to issue and deliver to him stock certificates representing his 20 percent ownership interest in Company. In particular, the court properly concluded that applicable case law holds specific performance is generally upheld where there is a closely held corporation with stock that is not publicly traded. Defendants have not cited, and we are unaware of, any case, whether in California or another jurisdiction, holding that specific performance is not an appropriate remedy for breach of an agreement to sell stock in a closely held corporation where that stock is not publicly traded. The absence of any such case is instructive and shows that specific performance is routinely granted in cases of stock of closely held corporations. The cases cited in part II(A) above show that for more than 150 years California appellate courts have consistently upheld the granting of specific performance in cases involving the stock of closely held corporations. (See, e.g., *Treasurer, supra*, 23 Cal. at pp. 392-393.)

Although we refrain from concluding that specific performance should always be granted in cases involving the stock of closely held corporations, the case law cited above shows that specific performance is generally an appropriate remedy in a case involving the stock of a closely held corporation that is not publicly traded and for which there is no established market value. In such cases, courts, including the instant court in the circumstances of this case, can properly conclude that the stock of a closely held corporation is unique or has a peculiar value for which specific performance is appropriate. Based on the unique nature or peculiar value of the stock of Company in this case, the court properly found Kramer had shown his legal remedy (i.e., compensatory damages) for Defendants' breach of contract was inadequate and therefore it did not abuse its discretion by granting his request for specific performance relief.

Defendants argue Kramer did not show the shares of Company stock had any peculiar value to him, citing his deposition testimony in which, as we concluded in *Kramer I*, he stated his preference for compensatory damages. (*Kramer I, supra*, at pp. 17-18.) However, to the extent case law requires a plaintiff to show that shares of stock have peculiar value to him or her personally, we conclude the trial court in the circumstances of this case could properly find the shares of Company stock did, in fact, have a peculiar value to Kramer. The record shows he entered into the Agreement and Addendum, which provided him with not only an annual salary, but also significant equity in Company (i.e., 20 percent of its stock), which was a closely held corporation. Based thereon, the court could reasonably infer that at the time of the Agreement and

Addendum and thereafter Kramer sought, in part, the unique benefits and privileges of owning stock in Company. The unique benefits and privileges of owning Company stock could not be purchased on the open market or otherwise acquired. Therefore, specific performance was appropriately granted by the court.

Defendants alternatively argue Kramer did not show that the value of Company's stock was extremely difficult to calculate. However, because Company was a closely held corporation and its stock was not publicly traded, its stock did not have an established market value, was unique, and had a peculiar value. Therefore, under the case law cited above, Kramer was not required to also separately show, whether by expert testimony or otherwise, that the value of Company's stock was extremely difficult to value.

In any event, Defendants do not cite any case supporting their argument, and we are not otherwise persuaded, that to obtain specific performance relief, Kramer was required to present expert testimony showing that the value of the stock of Company, a closely held corporation, was extremely difficult to value. Rather, Kramer showed his legal remedy was inadequate by presenting evidence that Company was a closely held corporation with stock that was not publicly traded and was without any established market value. To the extent Defendants cite cases that did not involve the sale of stock of a closely held corporation but involved expert testimony on the value of stock in other contexts (e.g., *Ronald v. 4-C's Electronic Packaging, Inc.* (1985) 168 Cal.App.3d 290), those cases are factually and procedurally inapposite to this case and did not hold specific

performance could not be granted in their circumstances. We are not persuaded by Defendants' argument that a plaintiff who seeks specific performance must present expert testimony showing the value of the stock of a closely held corporation cannot be valued or is extremely difficult to value.²

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.



03/17/2017

KEVIN J. LANE, CLERK

By 
Deputy Clerk

² Furthermore, although Defendants argue that the cases cited by the trial court (and this court) are factually inapposite to this case because they involved or discussed additional factors, such as the uncertain value of the corporation's underlying property (e.g., mining or oil claims), we are not persuaded those factors are a sufficient basis on which to distinguish this case from those cases and hold that specific performance was not appropriate in the circumstances of this case.