

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

TWIN CITY FIRE INSURANCE CO.,	:	CIVIL ACTION NO.
Plaintiff,	:	3:02cv2110 (DJS)
	:	
vs.	:	
	:	
SCOTT ERIC SANDERS, ET AL.	:	
Defendants.	:	

**DEFENDANT’S MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO DISMISS**

INTRODUCTION

The plaintiff in the above-captioned action alleges that it agreed to insure five transportation-related businesses based upon misrepresentations that these businesses operated in upstate New York rather than in and around New York City. Plaintiff does not allege that defendant Thomas Bevilacque (“Bevilacque”) was involved in any of these businesses, that he made any misrepresentations, that he benefitted in any manner from the alleged misrepresentations, or even that he had any knowledge of the alleged misrepresentations at any time. Nevertheless, plaintiff baldly asserts that Bevilacque conspired with the other defendants to commit Civil Statutory Theft, Connecticut Unfair Trade Practices, Fraud, Negligent Misrepresentation and Conversion simply because he allowed defendant Scott Sanders (“Sanders”) to use a telephone, and receive mail, at his business address. The court should dismiss the complaint as to Bevilacque because plaintiff has not, and cannot, allege facts to support that Bevilacque engaged in a conspiracy to commit the underlying torts.

STATEMENT OF FACTS

The relevant allegations of the complaint, taken as true for the present motion, are as follows:

Defendant Bevilacque is the president of “Amenia Motors, Inc.,” a car dealership located at 2859 E. Broadway, in Amenia, New York. Complaint, ¶¶ 10, 17, 30.¹ “Bevilacque, at the request of defendant Sanders, allowed Lou-Son (as well as Twin D and Brokks) to receive mail and use a telephone at Amenia Motors.” *Id.*, ¶¶ 30, 46, 63. The telephone number at Amenia Motors that Lou-Son, Twin-D and Brokks used, forwarded incoming calls to defendant Always Available, in Brooklyn, New York. *Id.*, ¶¶ 31, 47, 64. Defendants Lou-Son, Twin-D, and Brokks, Inc. represented in insurance applications to plaintiff that they were operating out of 2859 E. Broadway in Amenia, New York, which was false. Complaint, ¶¶ 17, 26(1), 43(1), 61.

On the basis of these allegations, plaintiff alleges that Bevilacque “entered into a combination, agreement or conspiracy” (1) “to obtain automobile insurance premiums . . . that were lower than they would have been” (Complaint, Count I, ¶¶ 129, 130); (2) to commit Civil Statutory Theft (Count II); (3) to violate CUTPA (Count III), (4) to commit fraud (Count IV); (5) to engage in negligent misrepresentation (Count V); and (5) to convert plaintiff’s property (Count VI).

¹ Bevilacque is not the president of any entity known as “Amenia Motors, Inc.” and the plaintiff has not served the car dealership of which Bevilacque is president.

ARGUMENT

A. STANDARD FOR GRANTING MOTION TO DISMISS

In deciding a Rule 12(b)(6) motion, the court accepts the allegations contained in the complaint as true and draws all reasonable inferences in favor of the nonmoving party. Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). The district court, however, need not accept as true the plaintiffs legal conclusions and characterizations. Madonna v. United States, 878 F.2d 62, 65 (2d Cir. 1989).

B. THE COURT SHOULD DISMISS THE CLAIMS AGAINST DEFENDANT

“Under Connecticut law, technically speaking, there is no such thing as a civil action for conspiracy.” Litchfield Asset Management Corp. v. Howell, 70 Conn.App.133, 140-141, 799 A.2d 298 (2002). Rather, the civil conspiracy claim is for damages caused by acts committed pursuant to a formed conspiracy and merely extends liability to all conspirators for the damage that result from any overt act committed by one of them pursuant to the combination. Id.; Edwards v. Novato Consumer Health, 2002 Conn.Super.LEXIS 2319 at * 7-8 (July 15, 2002). However, to hold a defendant such as Bevilacque, who did not commit the underlying torts, liable, the plaintiff must plead and prove that the defendant knowingly agreed to pursue the underlying torts (in this case, Civil Statutory Theft; unfair trade practices; fraud; negligent misrepresentation; and conversion). Marshak v. Marshak, 226 Conn. 652, 665, 628 A.2d 964 (1993) (a civil conspiracy requires a combination between two or more persons to do a criminal or unlawful act or an act by criminal or unlawful means); Schink v. Baker, 2002 Conn.Super.LEXIS 612 at * 31-32 (February 25, 2002) (“The combination required is an agreement to pursue certain actions and/or attain certain ends.”).

To establish such an agreement, the plaintiff must necessarily plead and prove that the Bevilacque knew of the alleged co-conspirator's unlawful scheme, and that he acted with the specific intent to pursue the unlawful scheme. Litchfield Asset Management Corp., 70 Conn.App.at 140-142; State v. Stellato, 10 Conn.App. 447, 454, 523 A.2d 1345 (1984); Interstate Aviation, Inc. v. City of Meriden, 1997 Conn.Super.LEXIS 2563 at * 13-14 (June 12, 1997).²

In Litchfield, the plaintiff alleged that the defendants conspired to fraudulently transfer assets to frustrate the plaintiff's attempt to collect on a judgment. Id., at 141-142. The court held that, because transfer of assets was not unlawful in and of itself, the plaintiff was required, and failed, to prove by clear, precise and unequivocal evidence, that the defendants' intent in agreeing to affect the transfer, was fraudulent. Id. The complaint in this case does not contain even the most conclusory allegation that Bevilacque knew of the other defendants' alleged intent to defraud, and steal from, the plaintiff, or that he agreed to allow defendant Sanders to use a telephone and receive mail at Bevilacque's business address with the specific intent to pursue the other defendants' alleged unlawful scheme.

² Indeed, because of the requirement of knowledge and intent, only an intentional tort will support a claim of civil conspiracy. United States v. Mitloff, 165 F.Supp.2d 558, 564 (S.D.N.Y. 2001); State v. Montgomery, 22 Conn.App. 340, 344-345, 578 A.2d 130 (1990) (It is not logically possible to conspire to commit manslaughter - "it is impossible to intend to commit an act unintentionally."). For this reason also, the court should enter judgment in Bevilacque's favor on plaintiff's claim of negligent misrepresentation.

Moreover, Bevilacque could not be held liable for conspiracy, even if he had knowingly agreed to assist the other defendants because there was nothing unlawful in Sander's use of Bevilacque's telephone, and receipt of mail at Bevilacque's business address at the time that Bevilacque agreed to allow Sanders to do so. Marshak, supra; Highland Tank & Manuf. Co. v. First Union National Bank, 2000 Conn.Super.LEXIS 2895 at * 25-26 (November 3, 2000); Litchfield Asset Management Corp., 70 Conn.App. at 140-142. In Marshak, supra, the plaintiff sought to hold the defendant liable for conspiring to unlawfully abduct the plaintiff's children where the defendant drove the plaintiff's husband and children to the airport at a time when the plaintiff's husband had joint custody of the children. The Supreme Court refused to impose liability for conspiracy on a third party, such as the defendant, who agreed to assist or assisted another in doing something that, at the time, was not unlawful. Id., at 666, 668-669. Similarly in this case, there was nothing unlawful in allowing Sanders to use a telephone and receive mail at Bevilacque's business address at the time that Bevilacque consented to Sanders' request. Under Marshak, Bevilacque cannot be held liable for conspiracy for this conduct as a matter of law.

Accordingly, the claims against Bevilacque must fail. See Sundwell v. Leuba, 2001 U.S.Dist.LEXIS 737 at * 24 (D.Conn. January 23, 2001) (conclusory allegations of conspiracy are insufficient to survive a motion to dismiss, even under the lenient standards applied to *pro se* plaintiffs); Warden v. Pataki, 35 F.Supp.2d 354, 365-366 (conclusory allegations of civil conspiracy are insufficient to survive a Rule 12(b)(6) motion).

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the court dismiss all counts against him.