NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.

Moshe BAHIRI, Plaintiff,
v.
MADISON REALTY CAPITAL ADVISORS, LLC, Brian J. Shatz, Joshua B. Zegen, And Fruchter Family LLC, Defendants.

No. 650743/09.
Dec. 23, 2010.

Lackey Hershman, L.L.P., New York, Kieran M. Corcoran, Esq., Perlman, Yevoli & Albright, PL, Paul D. Turner, Esq. Fort Lauderdale, FL, for Plaintiff.

Greenberg Traurig, P.A., Stephen James Binak, Esq., The Law Offices of Stephen James Binak, Stephen James Binak Esq., Miami, FL, for Defendants.

BERNARD J. FRIED, J.

Defendants move for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the fourth and sixth claims for conversion and civil conspiracy, respectively, in the amended complaint.

Prior to April 30, 2007, plaintiff was one of several members of defendant Madison Realty Capital Advisors, LLC (Madison) (Complaint, Exhibit A to Affirmation of Stephen J. Binak, ¶ 8). On April 30, 2007, plaintiff withdrew as a member. In connection with his withdrawal, plaintiff and Madison entered into a Redemption, Withdrawal and Waiver Agreement (Redemption Agreement) and a consulting agreement, pursuant to which Madison agreed to redeem plaintiff's membership interest for $400,000, plus deliver to plaintiff a $4 million promissory note, and pay him a consulting fee of $250,000 per year for two years (*id.,* ¶¶ 9-10, 13; Redemption Agreement, annexed as exhibit to Amended Complaint). Under the terms of the Redemption Agreement, Madison agreed to make eight payments on the promissory note of $500,000 each, from July 31, 2007 through April 30, 2009 (*id.,* ¶ 13; Redemption Agreement, § 2). It also agreed not to pay its remaining members, including defendants Brian J. Shatz and Joshua B. Zegen, and Lazar Fruchter, more than their $250,000 annual salaries at any time when Madison was in arrears on payments under the promissory note (Amended Complaint, ¶ 13; Redemption Agreement, § 2[c]).

In his amended complaint, plaintiff alleges that, while Madison paid him $500,000 on each of the following dates, July 31, 2007, September 30, 2007, and on December 31, 2007, it ceased making payments after December 31, 2007 (Amended Complaint, ¶ 42). He then asserts that, during the time that Madison was in arrears on the promissory note, it paid Shatz, Zegen, and Fruchter more than $250,000 each in annual salary (*id.,* ¶¶ 42-

48). Plaintiff alleges that these payments were made in violation of the terms of the promissory note and Redemption Agreement, and that, as a result of these payments, Madison became insolvent (*id.,* ¶ 50). Thus, plaintiff claims that these payments were fraudulent conveyances (*id.,* ¶ 51). Plaintiff alleges causes of action for breach of the consulting agreement, breach of the Redemption Agreement, and breach of the promissory note against defendant Madison (the first through third causes of action); conversion (the fourth cause of action) and civil conspiracy (the sixth cause of action) against defendants Shatz, Zegen, and the Fruchter Family LLC; and fraudulent transfer against all the defendants (the fifth cause of action).

Defendants move to dismiss the fourth and sixth claims (conversion and civil conspiracy) for failure to state a claim. They argue that the conversion claim fails, because the money plaintiff seeks is not specifically identified, and he is simply seeking damages for breach of contract. With regard to the conspiracy claim, defendants urge that the claim is redundant of the fraudulent transfer claim.

The motion to dismiss is granted, and both the fourth and sixth causes of action are dismissed. The conversion claim fails for several reasons. First, conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Peters Griffin Woodward, Inc. v. WCSC Inc.,* 88 A.D.2d 883, 883 [1st Dept 1982] [citation omitted]). While money may be the subject of a conversion claim, it must be specifically identified and segregated, and there must be an obligation to return or otherwise treat the specific fund in a particular manner (*Manufacturers Hanover Trust Co. v. Chemical Bank,* 160 A.D.2d 113 [1st Dept 1990], *appeal denied* 77 N.Y.2d 803 [1991]). In addition, the plaintiff must show legal ownership, or an immediate superior right of possession, and control of the identifiable fund (*Castaldi v. 39 Winfield Assoc.,* 30 AD3d 458 [2d Dept 2006]; *Peters Griffin Woodward, Inc. v. WCSC Inc .,* 88 A.D.2d at 884). If the claim alleges an obligation to pay plaintiff money that he or she is owed, a conversion is not alleged, despite the fact that a specific fund is the subject of the claim (*see Stack Elec. v. DiNardi Constr. Corp.,* 161 A.D.2d 416, 417 [1st Dept 1990]; *Interstate Adjusters v. First Fid. Bank, N.J.,* 251 A.D.2d 232, 234 [1st Dept 1998]). Moreover, conversion cannot be maintained where the damages are merely being sought for a breach of contract (*Fesseha v. TD Waterhouse Inv. Servs.,* 305 A.D.2d 268, 269 [1st Dept 2003]; *Peters Griffin Woodward, Inc. v. WCSC Inc.,* 88 A.D.2d at 884).

Even accepting the facts alleged in the Amended Complaint as true, and according plaintiff the benefit of all favorable inferences (*see Leon v. Martinez,* 84 N.Y.2d 83 [1994]), the conversion cause of action fails to state a claim. The funds, here, were not specifically identified. Instead, they were simply part of the general accounts of Madison. Plaintiff does not plead a specific account or any segregated funds. Rather, he simply pleads that any money that Madison paid to defendants Shatz, Zegen, and Fruchter above $250,000 in 2008 and 2009 was money they converted. "[P]laintiff never had title, possession, or control of the funds alleged to have been converted" (*Fiorenti v. Central Emergency Physicians,* 305 A.D.2d 453, 455 [2d Dept 2003] [bonuses that were due employees pursuant to employment agreements were not subject to conversion claim,

because plaintiffs failed to show title, possession, or control of funds]). In addition, plaintiff, here, fails to demonstrate an immediate possessory rights over the money, which simply represents damages in contract (*see Castaldi v. 39 Winfield Assoc.,* 30 AD3d at 458-59 [while plaintiff alleged a contractual right to payment, it never had possession, ownership, or control of proceeds]; *Fiorenti v. Central Emergency Physicians,* 305 A.D.2d at 455 [conversion claim cannot be predicated on a breach of contract]; *PKO Tel. v. Time Life Films,* 169 A.D.2d 582, 582-83 [1st Dept 1991]; *Global View Ltd. Venture Capital v. Great Cent. Basin Exploration, L.L.C.,* 288 F Supp 2d 473, 479 [SD N.Y.2003] [acts must be wrongful or unlawful, not just a violation of contractual rights]). The cases plaintiff relies on are factually distinguishable, involving specific funds given to a recipient, and the recipient's refusal to return the funds (*see e.g. Hinkle Iron Co. v. Kohn,* 229 N.Y. 179 [1920] [defendant assigned to plaintiff the eighth payment to be received from the City on a contract, the City made that particular payment, but defendant refused to provide the payment to plaintiff]; *Meese v. Miller,* 79 A.D.2d 237 [4th Dept 1981] [purchase money deposited with defendant for computer, computer not ordered by defendant, then defendant refused to return purchase money]; *Melnick v. Sable,* 11 A.D.2d 1075 [2d Dept 1960] [money deposited to buy gas station, transaction failed, then defendant refused to return deposit]).

*3 The sixth cause of action also is dismissed. That claim purports to allege a civil conspiracy, but a conspiracy to commit a tort is never itself a cause of action (*Alexander & Alexander of N.Y. v. Fritzen,* 68 N.Y.2d 968, 969 [1986]; *Litras v. Litras,* 254 A.D.2d 395 [2d Dept 1998]). While conspiracy allegations may be pled to connect someone to an actionable tort committed by another, where the substantive tort is already pled against the parties, like in the instant case, the conspiracy claim will be dismissed as duplicative (*see American Baptist Churches of Metro. NY v. Galloway,* 271 A.D.2d 92, 101 [1st Dept 2000]; *380544 Canada, Inc. v. Aspen Tech., Inc.,* 544 F Supp 2d 199, 231-32 [SD N.Y.2008]; *Lewis v. Rosenfeld,* 138 F Supp 2d 466 [SD N.Y.2001]; *ESI, Inc. v. Coastal Power Prod. Co.,* 995 F Supp 419, 434 [SD N.Y.1998]). The conspiracy claim, here, alleges nothing more than that Shatz, Zegen, and Fruchter conspired to commit the fraudulent transfer tort previously alleged against them in the fifth cause of action. If the conspiracy cause of action is permitted, plaintiff, having recovered on the substantive tort for fraudulent conveyance, would then be permitted a duplicative recovery on the conspiracy claim with only the additional proof of an agreement to conspire (*see Alexander & Alexander of NY, Inc. v. Fritzen,* 68 N.Y.2d at 969; *Danahy v. Meese,* 84 A.D.2d 670, 672 [4th Dept 1981]). Accordingly, it is

ORDERED that the motion to dismiss is granted, and the fourth and sixth causes of action in the amended complaint are dismissed; and it is further

ORDERED that defendants are directed to serve and answer to the amended complaint within 20 days after service of a copy of this order with notice of entry.