

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

FENIX ENTERPRISES, INC., et al.,

Plaintiffs,

-v-

M&M MORTGAGE CORP., INC., et al.,

Defendants.

Case No. 3:08-cv-124

Judge Thomas M. Rose

**ENTRY AND ORDER GRANTING FINAL JUDGMENT TO RANGLES,
M&M AND M&M MORTGAGE ON ALL OF STEWARD'S AND FENIX'S
CLAIMS AND GRANTING FINAL JUDGMENT TO TIMMONS, EVANS
AND LOKOMOTIV ON STEWARD'S AND FENIX'S CORRUPT
ACTIVITY AND DECEPTIVE TRADE PRACTICES CLAIMS**

This matter arises from the alleged transfer of \$300,000 by Plaintiffs Fenix Enterprises, Inc. ("Fenix") and Darryl Steward ("Steward") to Defendant M&M Capital Group, LLC ("M&M"). The alleged transfer was related to the purchase of real estate at The Resort at Singer Island (the "Property"). Also named as Defendants are M&M Mortgage Corp., Inc. ("M&M Mortgage"), Michael D. Randles ("Randles"), Ronnie Timmons ("Timmons"), Raymond L. Evans ("Evans") and Lokomotiv, Inc. ("Lokomotiv"). Randles is the owner of M&M and M&M Mortgage. Timmons and Evans are the owners of Lokomotiv.

Plaintiffs' Complaint brings five Claims for Relief. All five Claims for Relief are against all of the Defendants. The First Claim for Relief is for breach of contract. The Second Claim for Relief is for fraud. The Third Claim for Relief is for conversion. The Fourth Claim for Relief is for engaging in a pattern of corrupt activity and the Fifth Claim for Relief is for violation of Ohio's Deceptive Trade Practices Act, Ohio Rev. Code § 4165.01.

The Plaintiffs are both citizens of Ohio and the Defendants are all citizens of Georgia. (Compl. ¶ 9.) Therefore, this Court has diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and no Party has argued otherwise.

On June 3, 2009, the Court granted summary judgment to Steward and Fenix on their first three claims for relief against Timmons, Evans and Lokomotiv. (Doc. #54.) Judgment was rendered against Timmons, Evans and Lokomotiv in the amount of \$300,000.

Steward and Fenix did not move for summary judgment on their Fourth and Fifth Claims for Relief against Timmons, Evans and Lokomotiv or on any of their claims against Randles, M&M and M&M Mortgage. Although they have appeared in this matter, neither Timmons, Evans nor Lokomotiv responded to the Motion for Partial Summary Judgment against them.

On September 22, 2009, Steward's and Fenix's remaining claims were tried to the Court. Neither Timmons, Evans or Lokomotiv appeared. Following are the findings of fact and conclusions of law regarding the remaining claims.

FINDINGS OF FACT

On January 10, 2008, Randles first met with Timmons and Evans and discussed a loan. Timmons and Evans were interested in securing funds to purchase the Property. Randles had never met Timmons or Evans prior to this meeting. Timmons and Evans are the owners of Lokomotiv, a Georgia corporation, and had been referred to Randles by Angela Leonard and Victor Kitchim, a realtor and broker.

After the initial discussions, Randles agreed to try to provide financing for Timmons and Evans to purchase the Property. Randles never received a formal loan application from Timmons or Evans, did not run a credit report on them and did not get tax returns from them.

The agreement between Randles and Timmons and Evans was set forth in a letter and in a Loan Brokerage Agreement. The letter was signed by Evans on behalf of Lokomotiv and by Randles for M&M. The Loan Brokerage Agreement was signed that same day by Evans on behalf of Lokomotiv. The letter provides that M&M will need a \$100,000 non-refundable retainer fee and the Loan Brokerage Agreement provides that Lokomotiv agrees to pay M&M an application fee in the amount of \$100,000 that is deemed earned by M&M at the time it is paid. In addition, Randles verbally instructed Timmons and Evans that the money received would be used to pay his business expenses and was non-refundable. Neither the letter nor the Loan Brokerage Agreement were ever provided to Steward.

Steward was told by his friend Ambe Olinga (“Olinga”) that Timmons and Evans had contacted Olinga looking for investors to help finance purchase of the Property. On January 10, 2008, Steward received an email from Olinga. Olinga indicated that Lokomotiv had secured funding from M&M Mortgage to purchase the Property. The email further describes the Property and the expected cost to purchase. The email also indicates that Randles will secure the \$15 million line of credit necessary to purchase the Property and that Randles will “secure” the \$100,000 to be received from Steward to obtain the \$15 million.

On January 11, 2008, Timmons and Evans made contact by telephone with Steward in Greene County, Ohio. Steward is the sole owner of Fenix and its only director and officer.

Timmons and Evans represented to Steward that they were in the midst of purchasing the Property and asked Steward to consider helping them to finance the purchase. Specifically, Timmons and Evans represented that, if Steward or his Company, Fenix Enterprises, would give them a \$100,000 loan, they would repay the amount of \$125,000 at the closing with the proceeds

from financing. Timmons and Evans told Steward that they anticipated closing on the Property soon and that the \$100,000 would be deposited in an escrow account. Timmons and Evans also told Steward that Randles was working for them to help raise financing for purchase of the Property and that they needed the \$100,000 to be able to close the purchase.

Timmons and Evans instructed Steward to send the \$100,000 to Randles by wire transfer. They also told Steward that the \$100,000 would be put in an escrow account until closing.

On that same day, after communicating with Timmons and Evans, Steward forward a Promissory Note to Timmons and Evans for signature. This Promissory Note in the amount of \$100,00 plus \$25,000 in interest was executed by Timmons and Evans. Also on that same day, Evans sent Steward a letter, termed a promissary note, agreeing to give Steward 10% ownership of the Property and 25% return on the investment of \$100,000. Neither promissory note mentions any funds being held in escrow nor does either note mention Randles, M&M or M&M Mortgage.

Steward then wired \$100,000 to Randles. The \$100,000 was forwarded on January 11, 2008 by wire transfer.

On January 14, 2009, Steward traveled to see Randles in Georgia. This visit was impromptu for the purpose of “checking out” Randles, M&M and M&M Mortgage. At this meeting, Randles informed Steward that the \$100,000 had been received and was non-refundable. Randles did not tell Steward about the Loan Brokerage Agreement between he and Timmons and Evans and did not tell Steward that Randles would be receiving a fee for his work on attempting to find financing for the Property. Randles also did not tell Steward that M&M had issued \$1,000 payments to Timmons and to Evans.

At the January 14, 2009, meeting Randles also told Steward that Randles needed an additional \$200,000 to complete his fee requirement and proceed with the financing. During a telephone call the next day between Steward, Randles, Timmons and Evans, Randles again indicated that he needed an additional \$200,000 for his fee. Randles had initially indicated to Timmons and Evans that he needed a total fee of \$300,000 to proceed with the financing.

On January 15, 2008, Timmons and Evans signed a second Loan Brokerage Agreement. This agreement acknowledges the receipt of \$200,000. Per this second agreement, the \$200,000 is earned by Randles at the time it is paid.

Also on January 15, 2008, Steward forwarded an Acquisition Support Contract to Randles and Timmons. The Acquisition Support Contract included signature blocks for the “Buyers,” the “Sellers,” the “Mortgage Broker,” and the “Title Company Information/Representative.” The Acquisition Support Contract called for Fenix to provide acquisition support for a contract price in the amount of \$300,000 and an additional contract fee in the amount of \$140,000. The fee would be considered earned upon closing on the Property. Finally, the Acquisition Support Contract provides that “Fenix will deposit funds into an Escrow Account on behalf of the Buyer in the amount equivalent to the cash value of the Fenix stock held in escrow.”

Timmons acknowledged receipt of the Acquisition Support Contract which Evans signed and returned to Steward. Randles emailed Steward that he was unable to open the attachment that allegedly contained the Acquisition Support Contract and hoped that “the wire was sent already.” A few minutes later Randles emailed Steward that he had been able to open the attachment and had called Steward. On the next day, January 16, 2008, Randles emailed Steward

to confirm that, when the purchase of the Property closes, Fenix will be shown on the closing statement for \$440,000 provided that M&M receives the funds. Also, on January 16, 2008, Steward wired \$182,000 to M&M followed by an additional \$18,000 on January 18, 2008.

It was Randles' understanding that Timmons and Evans borrowed the total of \$300,000 from Steward and instructed Steward to wire the money to Randles. Randles was not aware that this money was to be escrowed and believed it was to satisfy his fee agreement with Timmons and Evans. This understanding was confirmed by Randles in an email to Steward dated February 26, 2008. However, Steward thought that the \$300,000 would be placed in an escrow account.

The \$300,000 was not placed in an escrow account. Randles used the money on his own business expenses. For example, on January 18, 2008, Randles advanced Timmons \$23,000 from the \$300,000.

In early February of 2008, Steward became concerned about the status of the \$300,000 that he had sent to Randles. On February 13, 2008, Steward emailed Randles that Steward's contract with Lokomotiv to close on the Property expired "last week" and asked for the return of the \$300,000. Steward again demanded return of the \$300,000 via email on February 26, 2008. On February 26, 2008, Randles responded to Steward that there is no escrow and that the money sent was non-refundable and is governed by certain contracts that he had with Lokomotiv. Randles also reported that they were "still working through the transaction." On February 28, 2008, Timmons wrote Steward that he understood that Fenix has opted to exit from the project to purchase the Property and that Lokomotiv be allowed a reasonable time of 14 to 30 business days to return Steward's funds.

In May of 2008, Randles had the property inspected and evaluated . It was found by the

evaluator to be “an extraordinary investment opportunity.” In June of 2008, Steward contacted the owner of the Property directly to ascertain the status of the sale. The response was that the only paperwork involving Lokomotiv was an executed Confidentiality Agreement.

On November 17, 2008, Timmons notified Randles that negotiations for the purchase of the Property had concluded, a contract had been executed and funding for the acquisition in the amount of \$15 million was now required from M&M Mortgage. However, the closing never occurred, the purchase agreement was terminated by the owners of the Property and Steward’s \$300,00 was never returned to him.

CONCLUSIONS OF LAW

The Plaintiff has brought five Claims for Relief. Each will be addressed seriatim.

Breach-of-Contract Claim

Steward and Fenix allege that Randles, M&M and M&M Mortgage breached a contract.¹ As a result, the Plaintiffs allege that they are entitled to rescission of the contract and a return of the \$300,000.

To prove a breach of contract under Ohio law, the plaintiff must establish the following elements: (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff. *Resource Title Agency, Inc. v. Morreale Real Estate Services, Inc.*, 314 F. Supp. 2d 763, 769 (N.D. Ohio 2004)(citing *Thomas v. Publishers Clearing House, Inc.*, 29 Fed. Appx. 319, 322 (6th Cir. 2002)). To prove the existence of a valid contract, a party must prove that there was an offer, an acceptance, contractual capacity,

¹The Court has already granted summary judgment to Steward and Fenix on their breach-of-contract claim against Timmons, Evans and Lokomotiv.

consideration, a manifestation of mutual assent and legality of object and of consideration.

Morgan v. Del Global Technologies Corp., No. 3:05-CV-123, 2007 WL 3227068 at *13 (S.D. Ohio Oct. 29, 2007)(citing *Kostelnik v. Helper*, 770 N.E.2d 58, 61 (Ohio 2002)). Mutual assent means that both parties to the contract must consent to its terms - there must be a meeting of the minds. *Id.* (citing *Juhasz v Costanzo*, 761 N.E.2d 679, 684 (Ohio Ct. App. 2001)).

Ohio law strongly favors written contracts but does recognize oral contracts. *LaPoint v. Templeton*, No. F-07-014, 2008 WL 1700522 at * 4 (Ohio Ct. App. Apr. 11, 2008). The “terms of an oral contract may be determined from ‘words, deeds, acts, and silence of the parties.’” *Id.*(quoting *Kostelnik v. Helper*, 770 N.E.2d 58, 61 (Ohio 2002). “[S]eldom, if ever, does the evidence in proof of an oral contract present its terms in the exact words of offer and acceptance found in formal written contracts. And no such precision is required. It is sufficient if the intent is disclosed by word, deed, act, or even silence.” *Id.* (citing *Rutledge v. Hoffman*, 75 N.E.2d 608, 609 (Ohio Ct. App. 1947)). Therefore, while mutual assent is usually manifested by offer and acceptance, in oral contracts, mutual assent may be manifested by other acts or failures to act. *Id.*

When a party is defrauded by means of a contract, the party may affirm the contract and sue for damages. *Jack Mann Chevrolet Co. v. Associates Inv. Co.*, 125 F.2d 778, 783 (6th Cir. 1942). In lieu of affirming the contract and suing for damages, the non-breaching party may rescind the contract. *Jack Mann*, 125 F.2d at 783; *Lewis v. White*, 1866 WL 6 at **6 (Ohio 1866). However, in the absence of fraud or mistake, one of the parties to a contract cannot rescind the contract without the consent of the other party. *Cantor v. Cantor*, 174 N.E.2d 304, 313 (Ohio Prob. 1959). When a contract is rescinded, it must be rescinded in total and the parties put in the position that they were before the contract was executed. *Lyon v. Bertram*, 61 U.S.

149, 154 (1857).

In this case, Steward and Fenix argue that Randles, M&M and M&M Mortgage breached the Acquisition Support Contract. However, neither Randles, M&M and M&M Mortgage are a party to the Acquisition Support Contract so they could not be said to have breached the Acquisition Support Contract.

There is credible evidence that Randles, M&M and M&M Mortgage were parties to written contracts, the Loan Brokerage Agreements, with Timmons, Evans and Lokomotiv. However, these written contracts indicate that the \$300,000 provided by Steward is a non-refundable fee.

There is also credible evidence that Timmons and Evans gave a Promissory Note in the amount of \$100,000 to Steward and Fenix. However, Randles is not a party to this Note and no mention is made in the Note of the escrow of any funds.

However, there is no credible evidence that Randles, M&M or M&M Mortgage entered into an oral contract with Steward and Fenix to escrow any funds and there is credible evidence to the contrary. Randles never agreed to place any funds into escrow and the written documentation supports this conclusion. The written documentation and evidence supports that the only parties who ever agreed to escrow any funds were Timmons, Evans and Lokomotiv and Steward and Fenix have already obtained judgment against these Parties for \$300,000.

Steward said he relied upon Randles' alleged statements that he would sign the Acquisition Support Contract before wiring any money to Randles. However, discussions regarding the Acquisition Support Contract arose after Steward wired the first \$100,000. Further, the only discussion in the Acquisition Support Contract regarding escrow is that Fenix would

deposit funds into an escrow account. No mention is made of Randles, M&M or M&M Mortgage depositing funds into an escrow account.

In sum, Steward and Fenix did not have a contract, written or otherwise, with Randles, M&M or M&M Mortgage regarding the refundability or escrow of the \$300,000. Randles, M&M and M&M Mortgage are granted judgment on Steward and Fenix's claim against them for breach of contract.

Fraud Claim

Steward and Fenix allege that Randles, M&M and M&M Mortgage have defrauded them out of their funds by failing to place the funds in escrow, by failing to disclose the loan agreements and fees that would be paid by Timmons, Evans and Lokomotiv to Randles, M&M and M&M Mortgage and by failing to disclose that any of the funds provided by Steward and Fenix would be used personally by or for the expenses of Randles, M&M and M&M Mortgage.² Randles, M&M and M&M Mortgage respond that this fraud claim is without merit.

The elements of an Ohio common-law fraud claim are; (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Rorig v. Thiemann*, No. 1:05CV801, 2007 WL 2462653 at * 4 (S.D. Ohio Aug. 27, 2007)(citing *Glassner v. R.J. Reynolds Tobacco*

²The Court has already granted summary judgment to Steward and Fenix on their fraud claim against Timmons, Evans and Lokomotiv.

Co., 223 F.3d 343, 352 (6th Cir. 2000)).

There is no credible evidence that satisfies all of the elements of an Ohio common-law fraud claim against Randles, M&M and M&M Mortgage. There is no reliable evidence that Randles had a duty, contractually or otherwise, or agreed to place the funds wired to him by Steward into an escrow account.

Randles, M&M and M&M Mortgage had no contract, written or otherwise, with Steward or Fenix but entered into a contract with Timmons, Evans and Lokomotiv. All actions taken by Randles, M&M and M&M Mortgage are consistent with the terms of their contract with Timmons, Evans and Lokomotiv.

Further, there is no evidence or legal requirement that Randles, M&M or M&M Mortgage had any duty to disclose the loan agreements, or the contents thereof, between them and Timmons, Evans and Lokomotiv. In addition, there is no evidence or legal requirement that Randles, M&M or M&M Mortgage had any duty to disclose that the funds provided by Steward and Fenix would be used personally by or for the expenses of Randles, M&M and M&M Mortgage.

Finally, based upon the evidence presented, neither Randles, M&M nor M&M Mortgage can be held liable based on the actions of Timmons, Evans and Lokomotiv. There is no evidence that Randles, M&M or M&M Mortgage were responsible for the communications between Steward and Fenix and Timmons, Evans and Lokomotiv or the communications between Steward and Olinga. Thus, at least the first element of an Ohio common-law fraud claim is not satisfied.

In sum, Randles, M&M and M&M Mortgage did not defraud Steward and Fenix out of

their funds by failing to place the funds in escrow, by failing to disclose the loan agreements and fees that would be paid by Timmons, Evans and Lokomotiv to Randles, M&M and M&M Mortgage or by failing to disclose that any of the funds provided by Steward and Fenix would be used personally by or for the expenses of Randles, M&M and M&M Mortgage. Randles, M&M and M&M Mortgage are granted judgment on Steward's and Fenix's fraud claim.

Conversion Claim

Steward and Fenix allege that Randles, M&M and M&M Mortgage are liable for conversion for the same reasons that they are liable for fraud.³ Randles, M&M and M&M Mortgage respond that there is no evidence of the conversion of funds by them.

Conversion is the “wrongful exercise of dominion over property in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights.” *City of Findlay v. Hotels.com, L.P.*, 441 F. Supp.2d 855, (N.D. Ohio 2006)(citing *Young v. City of Sandusky*, No. 3:03CV7490, 2005 WL 1491219 at *5 (N.D. Ohio June 23, 2005)). To establish a conversion claim, a plaintiff must prove three elements: (1) plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages. *Id.* Finally, a demand and refusal are usually required to prove the conversion of property otherwise lawfully held. *Id.* (citing *Ohio Telephone Equipment & Sales, Inc. v. Hadler Realty Co.*, 493 N.E.2d 289, 292 (Ohio Ct. App. 1985)).

In this case, there is no evidence of a wrongful act by Randles, M&M or M&M Mortgage

³The Court has already granted summary judgment to Steward and Fenix on their conversion claim against Timmons, Evans and Lokomotiv.

regarding the \$300,000 sent to them by Steward for the reasons more fully set forth above.

Therefore, at least one of the elements of a conversion claim is not satisfied.

Further, as determined above, Randles, M&M and M&M Mortgage are not liable to Steward and Fenix for fraud. Therefore, following Steward's and Fenix's reasoning likening the basis for fraud in this case to the basis for conversion, and based upon the failure to satisfy all of the elements of a conversion claim, Randles, M&M and M&M Mortgage are not liable to Steward and Fenix for conversion. Randles, M&M and M&M Mortgage are granted judgment on Steward's and Fenix's conversion claim.

Pattern-of-Corrupt-Activity Claim

Steward and Fenix allege that all of the Defendants have entered into a pattern of corrupt activity by conspiring to engage in soliciting another person for the purposes of defrauding by conversion, referring to the \$300,000 sent to Randles by Steward and Fenix. They base this argument on the same reasons as argued for fraud and conversion. Randles, M&M and M&M Mortgage respond that they have not engaged in a conspiracy and have not engaged in a pattern of corrupt activity.

Ohio Rev. Code § 2923.32(A)(1)⁴ makes it illegal to conduct or participate in, directly or indirectly, the affairs of an enterprise through a pattern of corrupt activity. However, Steward and Fenix cite no law defining what is a "pattern of corrupt activity" in this case. Further, Steward and Fenix cite no law defining what is a conspiracy in this case. They refer only to the facts they have alleged regarding their fraud and conversion claims.

⁴Steward and Fenix cite Ohio Rev. Code § 2329.32(A)(1). This is an incorrect cite. Presumably they meant Ohio Rev. Code § 2923.32(A)(1).

A “pattern of corrupt activity” is defined as: “two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event. *Fasheun v. Morgan*, No. 98-3535, 2000 WL 491515 at *6 (6th Cir. Apr. 21, 2000)(citing Ohio Rev. Code §2923.31(E)). “Corrupt Activity” is defined as a violation of a myriad of Ohio revised code sections, none of which are identified by Steward or Fenix. See Ohio Rev. Code § 2923.31(I). Therefore, Steward and Fenix have not identified or cited to the legal definition of “pattern of corrupt activity” under which they are bringing this claim.

Without a cited legal basis for this claim, it must fail as against all of the Defendants. Also, as for Defendants Randles, M&M and M&M Mortgage, there is no reliable evidence that they conducted or participated in, directly or indirectly, a pattern of corrupt activity. Randles, M&M and M&M Mortgage entered into an arms-length agreement with Timmons, Evans and Lokomotiv and exercised control over the funds sent by Steward in accordance with the terms of that arms-length agreement, and they had no agreement with Steward or Fenix. Further, there is no reliable evidence that they participated in a conspiracy with Timmons, Evans and Lokomotiv to defraud Steward and Fenix.

Therefore, following Steward’s and Fenix’s reasoning likening the basis for fraud and conversion in this case to the basis for conspiring to engaging in a pattern of corrupt activity, based upon the failure to provide the legal basis for this claim and based upon being unable to show that Randles, M&M and M&M Mortgage engaged in anything but an arms-length transaction with Timmons, Evans and Lokomotiv, Randles, M&M and M&M Mortgage are not

liable to Steward and Fenix for conspiring to engage in a pattern of corrupt activity. Further, following Steward's and Fenix's reasoning likening the basis for fraud and conversion in this case to the basis for engaging in a pattern of corrupt activity, and based upon the failure to provide the legal basis for this claim, Timmons, Evans and Lokomotiv are not liable to Steward and Fenix for engaging in a pattern of corrupt activity. All of the Defendants are granted judgment on Steward's and Fenix's claim that they engaged in a pattern of corrupt activity or conspired to engage in a pattern of corrupt activity in violation of Ohio Rev. Code §2923.32.

Deceptive-Trade-Practices Claim

Steward's and Fenix's final argument is that all of the Defendants violated the Ohio Deceptive Trade Practices act, specifically Ohio Rev. Code § 4165.02(A)(3), (A)(4) and (A)(7). They base this argument on the same reasons as argued for fraud, conversion and conspiracy. Randles, M&M and M&M Mortgage respond that this section of the Ohio Revised Code appears wholly inapplicable and that there is no evidence that they engaged in any deceptive trade practices in violation of Ohio Rev. Code § 4165.01.

The relevant portions of the Ohio Rev. Code provide that:

(A) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following:

(3) Causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(4) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(7) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have.

Ohio Rev. Code § 4165.02(A)(3), (A)(4) and (A)(7).

Steward and Fenix specifically argue that the Defendants violated the Ohio Deceptive Trade Practices Act when they “created confusion over the use of the funds from the Plaintiffs, created a misunderstanding as to its application of placement in escrow, through deceptive representations (that the Plaintiffs relied upon) by representing that the services and approval for the use of the funds would only be for an investor to look at the financial strength of the Defendants Timmons, Evans and Lokomotiv for purposes of securing funding for their purchase of The Resort at Singer Island.”

First, this case does not involve any transaction regarding goods so this claim could only relate to services. Steward and Fenix argue about misrepresentations and confusion, but they do not identify what services are being provided to them by any of the Defendants.

There is no reliable evidence that Randles, M&M or M&M Mortgage were providing any services to Steward or Fenix. There was no contract, written or otherwise between them and no promise by Randles to provide any service to Steward and Fenix.

There is also no reliable evidence that Timmons, Evans or Lokomotiv were providing any service to Steward or Fenix. At best, the reliable evidence indicates that Timmons, Evans and Lokomotiv were borrowing money from Steward and Fenix to use to try to obtain financing to purchase the Property.

The provisions of Ohio Rev. Code § 4165.02(A)(3), (A)(4) and (A)(7) do not apply unless a product or service is being provided and Steward and Fenix has not shown that any of the Defendants were providing a product or service to them. Thus, following Steward’s and Fenix’s reasoning likening the basis for fraud, conversion and conspiracy in this case to the basis

for engaging in deceptive trade practices, and based upon the failure to identify a product or service being provided, none of the Defendants are liable to Steward and Fenix for engaging in deceptive trade practices in violation of Ohio Rev. Code § 4165.02 (A)(3), (A)(4) or (A)(7). Judgment must be entered for all of the Defendants on Steward's and Fenix's claim that the Defendants engaged in deceptive trade practices in violation of Ohio Rev. Code § 4165.02 (A)(3), (A)(4) or (A)(7).

Individual Liability of the Defendants

In addition to arguing their specific claims, Steward and Fenix argue that this Court should pierce the corporate veil against the Defendants' corporate shareholders to hold them individually responsible. Steward and Fenix did not make this assertion in their Complaint but they did so in their post-trial Brief.

The corporate form may be disregarded and an individual shareholder held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own; (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Collum v. Perlman*, No. L-98-1291, 1999 WL 252725 at *3 (Ohio Ct. App. Apr. 30, 1999)(citing *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Companies, Inc.*, 617 N.E.2d 1075 (Ohio 1993)).

In this case, M&M and M&M Mortgage have not been found liable for any of Steward's and Fenix's claims. Therefore, there is no reason to pierce their corporate veil.

Lokomotiv, has, however, been found liable for breach-of-contract, fraud and conversion. Further, there is evidence that Timmons and Evans had complete control over Lokomotiv, that Timmons and Evans exercised that control in such a manner as to commit illegal acts, including fraud, and that Timmons's and Evans's illegal acts resulted in injury to Steward and Fenix. Therefore, Timmons and Evans are individually liable for Steward's and Fenix's claims for breach-of-contract, fraud and conversion.

CONCLUSION

Judgment has already been granted to Steward and Fenix on their claims of breach-of-contract, fraud and conversion against Timmons, Evans and Lokomotiv. Following a Trial to the Court, judgment is granted to Randles, M&M and M&M Mortgage on all of Steward's and Fenix's claims against them. Also, even though neither Timmons nor Evans appeared at the Trial, Steward and Fenix have not provided the legal basis for conspiracy-to-engage-in-corrupt-activity or deceptive-trade-practices claims against them. Therefore, judgment is granted to Timmons, Evans and Lokomotiv on Steward's and Fenix's conspiracy-to-engage-in-corrupt-activity or deceptive-trade-practices claims against them.

Randles has no individual liability for any of the claims brought against him by Steward and Fenix. However, Timmons and Evans are individually liable for Steward's and Fenix's breach-of-contract, fraud and conversion claims.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and ORDERED in Dayton, Ohio this Seventh day of December, 2009.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

A copy of this Entry and Order is to be mailed to Defendants Ronnie Timmons, Raymond L. Evans and Lokomotiv, Inc. at their last known address.