

<b>Five O'clock Club, Inc. v Savino</b>
2012 NY Slip Op 31944(U)
July 16, 2012
Supreme Court, New York County
Docket Number: 107898/11
Judge: Joan A. Madden
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Howe Joan A. Madew  
Justice

PART 11

Index Number : 107898/2011  
FIVE O'CLOCK CLUB, INC.  
vs.  
SAVINO, CHRISTOPHER  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the  
attached Memorandum Decision + Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

## FILED

JUL 20 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 16, 2012

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
THE FIVE O'CLOCK CLUB, INC, and  
KATE WENDLETON, individually,

Index No. 107898/11

Plaintiffs,

-against-

CHRISTOPHER SAVINO,  
JONATHAN ACKERMAN, and  
VIRGINIA BERTOLINO

**FILED**

Defendants.

JUL 20 2012

-----X  
JOAN A. MADDEN, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff The Five O' Clock Club, Inc. ("Five O'Clock") moves, pursuant to CPLR 3212, for partial summary judgment on its causes of action for conversion and unjust enrichment asserted against Virginia Bertolino ("Bertolino"). Bertolino, appearing *pro se*, opposes the motion.

Background

Five O'Clock is an organization providing career coaching services to recently terminated employees of corporate clients in order to help them find new employment. Defendant Christopher Savino ("Savino") was hired on August 11, 2010, as a salesperson by plaintiff Kate Wendleton ("Wendleton"), the organization's CEO and President, based on representations made on his resume and during his interview regarding Savino's connections to the media and film industries. Bertolino, who was Savino's girlfriend, was hired by Five O'Clock, as vice president of corporate relations, to assist Savino. Plaintiffs allege they were the victims of a fraudulent scheme perpetrated by defendants Savino, Jonathan Ackerman ("Ackerman"), and Bertolino during the course of Savino's employment with Five O'Clock, beginning in August 2010 and concluding in April 2011.

In connection with this scheme, Savino told Five O'Clock's executives that he had secured a new account with the American Broadcasting Company ("ABC") television network to provide outplacement services for over 1,600 employees nationwide purportedly being laid off, and that the contract with ABC would bring in \$14 million to Five O'Clock. In fact, Savino had no account with ABC and there was no contract. As part of the fraudulent scheme, it is alleged that defendants induced Five O'Clock to disburse to Bertolino a sum of \$99,734.84, as an advance on the ten percent commission on the fabricated ABC contract.

Plaintiffs now move for summary judgment on Five O'Clock's claims against Bertolino for conversion and unjust enrichment which seeks to recover the \$99,734.84 that Five O'Clock allegedly disbursed to Bertolino. In her affidavit submitted in support of the motion, Wendleton states that Savino convinced her to hire Bertolino based on Savino's representations that after he secured the account with ABC, he needed someone he could "trust absolutely" to handle his calls and correspondence on the ABC project and on other deals he was working on (Wendleton Aff. ¶ 5).

Savino asked for an advance on his ABC commission for personal and living expenses and requested that the Bertolino be made the payee so his estranged wife would not be able to attach the disbursements. (Id., ¶ 24). On January 25, 2011, the day after Bertolino was hired, Wendleton authorized plaintiff to issue a check to Bertolino (check no. 13026) in the amount of \$2,969.92 to cover living and personal expenses of Bertolino and Savino. Wendleton Aff. at ¶¶ 6-7. A second check in the amount of \$2,969.92 was made payable to Bertolino (check no. 13033) and disbursed to Bertolino on February 1, 2011, in order to cover personal living expenses of Bertolino and Savino. Id. at ¶ 11-12. A third check in the amount of \$3,800 was made payable to Bertolino (check no. 13056) and disbursed to Bertolino on February 16, 2011, in order to cover personal living expenses of Bertolino and Savino. Id. at ¶¶ 15-17. Wendleton states that, for each disbursement, it was mutually agreed that Bertolino and Savino would repay

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the amount to Five O'Clock from his commission on the ABC contract, which he would share with Bertolino. Id. at ¶¶ 6, 11, 15. Attached to Wendleton's affidavit are copies of emails from Savino requesting the money and indicating that the check should be made payable to Bertolino.

Five O'Clock's, financial manager, Ahmed ElMasry (ElMasry), submits his affidavit stating that he made a formal request to JP Morgan Chase Bank for the exact photocopies of three checks written from Five O'Clock's account to Bertolino, and attaches the checks provided in response, which are consistent with Wendleton's description of them in her affidavit. ElMasry Aff. ¶ 13, 14; Exhs. 9-11.

According to Wendleton, in March 2011, Savino indicated to her that he owed almost \$90,000 in attorneys' fees related to a child custody issue, and that attorney was aggressively contacting ABC requesting a portion of the fee and that the attorneys' tactics could risk upsetting the contract with ABC (Wendleton Aff. ¶¶ 20-21). Wendleton agreed to authorize the disbursement of \$90,000, and Savino instructed her deposit the money by wire transfer into Bertolino's account, since he had closed all his accounts due to the dispute with his estranged wife. (Id., ¶¶ 24, 29). It was further agreed that Savino would take the money as an advance on his commission, which he would share with Bertolino (Id., ¶ 23).

On March 23, 2011, Wendleton authorized the transfer of \$90,000 from to an account ending 2446 at JP Morgan Chase Bank belonging to Bertolino (Id., ¶ 27). According to Wendleton, Savino and Bertolino were at Five O'Clock's offices on the day the transfer was made and were notified of the transfer. (Id., ¶ 26). ElMasry states in his affidavit that he "personally executed the acts necessary for the wire transfer...including providing the full name of the recipient, Virginia N. Bertolino, to JP Morgan Chase Bank, the routing number of her checking account (ending in 2446) and the account information for the plaintiff" (ElMasry Aff. ¶

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6). ElMasry also provides a copy of the document containing wire transfer provided by JP Morgan Chase Bank. (ElMasry Aff. ¶ 7, Exh. 4).

Wendleton states that in April 2011, members of her staff initiated an investigation of Savino and discovered that the resume he provided to plaintiff was almost entirely fabricated. (Wendleton Aff. ¶ 30). They also discovered a press release from the United States Justice Department dated June 10, 2010, announcing the indictment of Savino in a \$12 million investment scheme and charging him wire fraud and securities fraud (Id.). Five O'Clock subsequently determined that there was no contract between Five O'Clock and ABC and on April 15, 2011, an individual from Five O'Clock's office placed a call to the Federal Bureau of Investigation, and Savino was arrested on charges of wire fraud on April 22, 2011 (Id.). On May 11, 2011, ElMasry sent a letter to Bertolino, on behalf of Five O'Clock, demanding the return of the \$90,000 wired into her account (ElMasry Aff. ¶ 12, Exh. 8). Bertolino did not pay Five O'Clock the \$90,000 or the additional \$9,739.84 (Wendleton Aff. ¶ 34). On May 20, 2011, Bertolino announced on her Facebook page that she became engaged to Savino in April 2011. (ElMasry Aff. ¶ 11, Exh. 7).

On June 14, 2011, Savino pleaded guilty to one count of wire fraud for his conduct while employed by plaintiff, and admitted that there was no contract with ABC and that in furtherance of his fraudulent scheme he employed interstate wire communications and received funds from Five O'Clock. (Id., ¶ 33; Fitzgerald Aff., Exh. 5). At the time of Savino's guilty plea, Bertolino agreed to co-sign a \$100,000 personal recognizance bond so that Savino could be released for 30-days prior to serving his sentence (Fitzgerald Aff., Exh. 5, at 26-27). On October 20, 2011, Savino was sentenced to a prison term of 27 months (Fitzgerald Aff., Exh. 8).

On July 11, 2011, plaintiffs commenced this action, asserting a total of 25 causes of action against the three defendants for the involvement in the fraudulent scheme. Included in these causes of action are two counts of conversion (\$90,000 wire transfer and the three checks totaling \$9,739.84, individually) and two counts of unjust enrichment (\$90,000 wire transfer and the three checks totaling \$9,739.84, individually) against Bertolino.

The complaint, which is verified by Wendleton, includes various allegations that Bertolino knew about and participated in the fraudulent scheme. These allegations include that in her position at Five O'Clock, Bertolino was responsible for confirming scheduled appointments with clients and potential clients that Savino was purportedly dealing with, and that she was hired so that his scheme would not be revealed (Verified Petition, ¶ 75). Specifically, it is alleged that routine emails sent from an office administrator at Five O'Clock to confirm meetings with potential Human Resources clients, threatened to expose Savino's scheme since such meetings did not exist and that Bertolino was thus needed by Savino to hide the scheme, and was the only one at Five O'Clock who understood the scheme (Id., ¶¶ 75, 80, 81). It is also alleged that when Bertolino sent out emails confirming meetings purportedly scheduled with potential clients, that Bertolino departed from office practice by sending the emails only to office staff who would attend the meetings and not the potential client (Id., ¶83). In contrast, when there was an actual meeting, Bertolino would send the email to the potential client (Id., ¶¶ 84, 85). It is also alleged that at an event given by Five O'Clock to introduce Savino as its new President, Bertolino told those attending the party that she first met Savino on Rodeo drive when he was flanked by celebrities and these statements were based on a script prepared for her by Savino (Id., ¶ 87).

Bertolino interposed a timely verified answer, with cross-claims and affirmative defenses, in which she categorically either (1) denied the allegations made against her, including those specified above, or (2) denied having knowledge or information sufficient to form a belief as to the truth or falsity of the allegations. Bertolino asserted as affirmative defenses: (1) any damages sustained were the result of plaintiffs' negligence or culpable conduct, (2) the damages sustained by plaintiffs were not caused by her, (3) plaintiffs have failed to mitigate their damages, and (4) failure to state a cause of action.

Five O'Clock now moves for partial summary judgment against Bertolino, arguing that Bertolino wrongfully received and possessed and exercised dominion and control over the \$99,739.84, converted it for uses unrelated to the purpose of satisfying Savino's outstanding legal fees in his child custody case. Additionally, Five O'Clock argues that Bertolino cannot in equity and good conscience be permitted to retain \$99,739.84, as the transfer of funds was predicated on the existence of a contract that did not exist, and Savino and Bertolino were thus not entitled to an advance against said commission. In support of their motion, plaintiffs submits, inter alia: Wendleton's affidavit, ElMasry's affidavit, various email correspondence between Savino, Wendleton, Ackerman, and others, and bank records from Bertolino's account at JP Morgan Chase where Five O'Clock wired the \$90,000 and Bertolino deposited the three checks from Five O'Clock totaling \$9,739.84. The bank records for this account show that in addition to making various purchases and paying bills, she withdrew approximately \$62,000 in cash in March and April 2011, shortly after the \$90,000 was wired to her account from Five O'Clock.

Bertolino opposes the motion, asserting that there are issues of fact that cannot be resolved on this motion. In her affidavit, Bertolino reiterates her categorical denial of all allegations in the verified complaint as contained in her verified answer and includes a



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handwritten letter to the Court, in which she denies receiving \$90,000 from Five O'Clock and states that she was also a victim of Savino and Ackerman's fraudulent scheme, and that she has broken her engagement with Savino. Bertolino states that plaintiffs were at least partly responsible for the damages incurred because they failed to investigate Savino before they hired him. Bertolino also states that the \$90,000 advance was given to Savino and not to her, and that Savino convinced her to put the money in her name as he was going through a divorce. Notably, however, she provides no explanation as to the purchases or large cash withdraws from her bank account containing the \$90,000, as shown on her bank statements. She explains that her dire financial situation precludes her from retaining an attorney, hence her status as a *pro se* defendant.

In reply, Five O'Clock argues that Bertolino's opposition affidavit is unresponsive to its motion and does not address any of its legal arguments. Five O'Clock also states that its failure to check into Savino's background does not relieve Bertolino from liability for any funds received as the result of a fraudulent scheme. In addition, Five O'Clock asserts that Bertolino's denial of ever having received a \$90,000 advance from Five O'Clock is contradicted by evidence that the money was deposited into her bank account.

#### Discussion

On a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Unjv. Med. Ctr., 64 NY 2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist and require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Pursuant to CPLR 3212(b), a summary judgment motion should be denied if any party shall show facts sufficient to require trial of any issues of fact. In order to reach this threshold and defeat a plaintiff's motion for summary judgment, the defendant need only present evidentiary materials sufficient to create a material question of fact. Zuckerman v. City of New York, 49 NY2d 557 (1980).

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.... Two key elements of conversion are (1) plaintiff's possessory right or interest in the property ... and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." Colavito v. New York Organ Donor Network, Inc., 8 NY3d 43, 49-59 (2006)(internal citations omitted); see also Aetna Cas. & Sur. Co. v. Glass, 75 AD2d 786, 786 (1st Dept. 1980). "Money, specifically identifiable and segregated, can be the subject of a conversion action,"( Manufacturers Hanover Trust Co. v. Chemical Bank, 160 AD2d 113, 124 [1st Dept. 1990], lv denied, 77 N.Y.2d 803 [1991], and be subject to an obligation to be returned or to be otherwise treated in a specific manner." Salatino v. Salatino, 64 AD3d 923, 925 (3d Dept 2009)(citations omitted). "When funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion. Hoffman v. Unterberg, 9 AD3d 386, 388 (2d Dept 2004), *citing*, Meese v Miller, 79 AD2d 237, 243 (4<sup>th</sup> Dept. 1981). In addition, when "the possession of the property is initially lawful, conversion occurs when there is a refusal to return the property after a demand." Id.

Moreover, wrongful intent is not required and thus "[a] cause of action for conversion need not allege or prove a tortious taking or even that defendants acted in bad faith." Pokoik v. Gittens, 171 AD2d 470, 471 (1st Dept. 1991). Moreover, it is not essential to a conversion that a defendant apply the property to defendant's own use. Schwartz v. Schwartz, 82 Misc2d 51 (App. Term, 1<sup>st</sup> Dept. 1975).

Here, Five O'Clock has made a prima facie showing to entitlement to summary judgment on the conversion claim by producing evidentiary proof that Bertolino received the funds in question and continues to exercise unauthorized dominion over these funds. Specifically, the bank records attached to the verified complaint, show that Bertolino endorsed and deposited into a JP Morgan Chase bank account in her name each of the three checks totaling \$9,739.84 made out to her and disbursed to her by Five O'Clock. The bank records further show that \$90,000 was transferred into Bertolino's account on March 23, 2011, and that a series of large withdrawals and transfers from the account were made over the next two months, largely depleting her account in the process. Although Bertolino has categorically denied each of these allegations, she fails to produce any evidentiary proof controverting the evidence submitted by plaintiffs.

The record also demonstrates that Five O'Clock has an immediate superior right to the funds in question and that Bertolino has no legal right to these funds, which were specifically identifiable and subject to the obligation to return them upon the payment of the commission from ABC. In particular, the record shows that Five O'Clock agreed with Savino and Bertolino that the money disbursed to Bertolino was to come out of Savino's and Bertolino's share of the commission they would receive from the ABC contract which never existed, a scheme to which Savino pleaded guilty for wire fraud. Since there was no contract, and thus no commission, plaintiffs have demonstrated that they have maintained legal ownership over the funds disbursed to Bertolino. Although Bertolino categorically denies each of these allegations, she does not state, or submit any proof, that she has any legal right to the funds in question.

Moreover, Bertolino's bald statement that she was unaware of Savino's and Ackerman's fraudulent scheme, is insufficient to raise a triable issue of fact as to her liability for conversion as a cause of action for conversion does not require a tortious taking or a showing that a defendant acted in bad faith (Pokoik v. Gittens, 171 AD2d at 471) See also, Schwartz v. Schwartz, 82 Misc2d 51 (App. Term, 1<sup>st</sup> Dept. 1975) ("An agent is guilty of conversion although he acts in good

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faith for a principal who receives the benefit.”). Notably, Bertolino has provided no evidentiary proof to controvert Five O’Clock’s showing that the funds were deposited into her individual bank account to which she had exclusive access, or that she herself accessed this account to make a series of large withdrawals and transfers in the two months following the disbursement of the monies from Five O’Clock. In fact, while she generally denies knowledge of the fraudulent scheme, she does not deny that she knew that money was not being used to pay Savino’s attorneys’ fees or that belonged to Five O’Clock. Nor does Bertolino make any attempt to explain the withdrawal and use of the bulk of the funds from her bank account. Accordingly, Five O’Clock is entitled to summary judgment on its claims for conversion against Bertolino.

As the court has granted summary judgment on the conversion claim, it need not reach whether Five O’Clock is entitled to summary judgment on its alternative claims for relief against Bertolino based on a theory unjust enrichment.

Conclusion

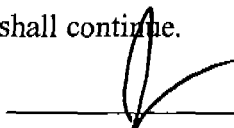
In view of the above, it is

ORDERED that Five O’Clock’s motion for summary judgment is granted to the extent of granting summary judgment in favor of Five O’Clock and against defendant Virginia Bertolino on the fourteenth and fifteenth causes of action for conversion; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Five O’Clock Club, Inc. and against defendant Virginia Bertolino in the amount of \$99,739.84, with interest as calculated by the Clerk; and it is further

ORDERED that the remainder of the action shall continue.

DATED: July 6 2012

  
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J.S.C.

**FILED**

JUL 20 2012

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