[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

TIMOTHY FULTON,
Plaintiff,

-against-

THE HANKIN FIRM, PLLC,
Defendant.

Index Number 10187/2011

Motion Date October 2, 2013

Motion Seq. No. 5

THE HANKIN FIRM, PLLC,
Third-Party Plaintiff,

-against-

MATTONE, MATTONE, MATTONE, LLP and JOSEPH M. MATTONE, JR., ESQ.,
Third-Party Defendants.

Motion Cal. No. 48

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1-9
Opposition.....	10-13
Reply.....	14-21

Upon the foregoing papers it is ordered that this motion by defendant, Hankin & Mazel, PLLC ("Hankin") for an order pursuant to CPLR 3212 dismissing the Complaint of plaintiff, Timothy Fulton in the first-party action is hereby decided as follows:

This action arises out of a business transaction regarding the sale of shares of stock in a corporation known as Emjay Environmental Recycling, Ltd. ("Emjay"). It is undisputed that on or about February 3, 2010, John Kelly ("Kelly") and Michael Cholowsky ("Cholowsky") were the sole shareholders of Emjay, with Kelly being a sixty percent (60%) equity owner of Emjay

and Cholowsky being a forty percent (40%) equity owner of Emjay. A series of transactions and agreements were entered into whereby plaintiff maintains he was supposed to purchase forty-five (45) of Kelly's sixty (60) shares and thereby become a forty-five (45%) owner of Emjay. Plaintiff asserted causes of action for unjust enrichment, conversion, fraud, aiding and abetting fraud, gross negligence, mutual mistake, and breach of contract, which causes of action sounding in gross negligence, mutual mistake, and breach of contract were previously dismissed by order of this Court dated December 13, 2011. Defendant now moves to dismiss the plaintiff's first-party Complaint, which consists of the following four (4) remaining causes of action: unjust enrichment, conversion, fraud, aiding and abetting fraud.

In the instant action, plaintiff alleges that defendant failed and/or refused to return monies in the sum of One Million One Hundred Thousand and 00/100 ($1,100,000.00) dollars to plaintiff, despite his having demanded its return, and as such, defendant has been unjustly enriched in the amount of One Million One Hundred Thousand and 00/100 ($1,100,000.00) dollars.

It is well-established law that: "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (internal quotation marks and citations omitted)(Blue Wolf Group, LLC. v. Gaiam, Inc., 847 NYS2d 895 [Civ Ct, New York County 2007]).

Defendant establishes a prima facie case that the cause of action for unjust enrichment should be dismissed via, inter alia, the affidavit of Mark L. Hankin, Esq., who avers that: he is a member of defendant firm, defendant never retained any funds allegedly belonging to the plaintiff and defendant immediately released any funds to the seller John Kelly (its client) in accordance with the Agreement of Sale and the amendments thereto. Defendant established that plaintiff failed to present evidence that defendant is in possession of any monies belonging to plaintiff.

As discussed below, plaintiff has established a triable issue of fact.

In the instant action, plaintiff alleges that he has ownership interests in certain monies and that defendant has exercised control over such monies to the exclusion of plaintiff's rights and without his authority.

To state a cause of action for conversion, plaintiff must show legal ownership to a specific identifiable thing and that defendant exercised unauthorized dominion over it, to the exclusion of plaintiff's rights (Batsidis v. Batsidis, 9 AD3d 342 [2d Dept 2004], citing Independence Discount Corp. v. Bressner, 47 AD2d 756 [2d Dept 1975]).

Defendant establishes a prima facie case that the cause of action for conversion should be dismissed via, inter alia, the Agreement of Sale dated February 3, 2010 and the affidavit of

Mark L. Hankin, Esq., wherein he avers that: he is a member of defendant firm, defendant was authorized and contractually required, as escrow agent, to release the escrowed funds and the Agreement of Sale does not require plaintiff's consent before releasing the escrowed funds. Defendant established that defendant was authorized to exercise dominion and control over plaintiff's funds and that plaintiff relinquished his legal rights over those funds pursuant to the terms of the Agreement of Sale.

As discussed below, plaintiff has established a triable issue of fact.

Plaintiff asserts a claim for fraud alleging that defendant knowingly represented the material fact that plaintiff was a Purchaser, and in reliance upon said representation, plaintiff authorized wire transfers in the amount of One Million One Hundred Thousand and 00/100 ($1,100,000.00) to defendant, which monies have not been returned to plaintiff.

To state a cause of action for fraud, plaintiff must demonstrate that defendant knowingly misrepresented a material fact, upon which plaintiff justifiably relied, resulting in an injury (New York University v. Continental Ins. Co., 87 NY2d 308 [1995]). CPLR 3016 (b) states that in an action for fraud, "the circumstances constituting the wrong shall be stated in detail". It is well settled that a claim for fraud must satisfy the specificity and particularity requirements of CPLR 3016 (b) and allege the essential elements of a fraud claim, misrepresentation of a material fact, falsity, scienter and deception (see, Barclay Arms, Inc. v. Barclay Arms Assocs., 74 NY2d 644, 647 [1989]; Channel Master Corp. v. Aluminium Ltd. Sales, Inc., 4 NY2d 403 [1958]).

Defendant establishes a prima facie case that the cause of action for fraud should be dismissed via inter alia, the Agreement of Sale dated February 3, 2010 and the affidavit of Mark L. Hankin, Esq., wherein he avers that**:** at no time did defendant ever represent that plaintiff was a purchaser under the Agreement of Sale or otherwise with respect to the purchase of the seller, Kelly's shares in EMJAY.

As discussed below, plaintiff has established a triable issue of fact.

In the instant action, plaintiff alleges that: "[d]efendant knew . . .that Kelly and Cholowsky were working individually or in concert to cheat Plaintiff out of the One Million One Hundred Thousand and 00/100 ($1,1000,000.00) dollars that Plaintiff wired into Defendant's two bank accounts in connection with the Agreement of Sale which Fulton wired to those accounts for the express purpose of Fulton acquiring the majority of Kelly's ownership in Emjay."

"The general elements of a claim of aiding and abetting a common law fraud are: (1) a fraud; (2) defendant's knowledge of the fraud; and (3) defendant's knowing rendition of substantial assistance to advance the fraud (Wight v. BankAmerica Corp., 219 F3d 79, 91 [2nd

Cir 2000]; VTech Holdings, Ltd. v. Pricewaterhouse Coopers, LLP, 348 F Supp 2d 255, 269 [SDNY 2004]). The plaintiff must allege facts that show that the aider and abettor had had an actual knowledge of the fraud; constructive knowledge is not sufficient (Filler v. Hanvit Bank, 339 F. Supp. 2d 553, 557 [SDNY 2004])" (High Tides, LLC v. DeMichele, 2010 NY Slip Op 51018U [Sup Ct, Nassau County 2010]).

Defendant establishes a prima facie case that the cause of action for aiding and abetting fraud should be dismissed via inter alia, the Agreement of Sale dated February 3, 2010 and the affidavit of Mark L. Hankin, Esq. Defendant established prima facie proof that: plaintiff has failed to produce evidence establishing the existence of any underlying fraud or that defendant had any knowledge of any such fraud, that Kelly did not engage in any fraud with respect to plaintiff, and to the extent that Cholowsky defrauded plaintiff, defendant cannot be implicated in a prospective promise by someone on the other side of the transaction from its client. Defendant further established that even if Kelly and Cholowsky were engaged in a fraudulent scheme, plaintiff cannot demonstrate that defendant rendered substantial assistance to advance the alleged fraud since defendant was acting as counsel to Kelly with respect to the Emjay transaction, and as escrow agent pursuant to the terms of the Agreement of Sale as to both Kelly and Cholowsky. The only evidence of defendant's "assistance" to advance the fraud consists of the alleged statements that plaintiff was an "investor/purchaser" in Emjay during the February 3, 2010 meeting attended by all parties involved with the Emjay transaction, and that defendant accepted plaintiff's wire transfers and then released the funds to Kelly and the shares in Emjay to Cholowsky. Defendant established that even if defendant did make such statements to plaintiff, such statements were merely legal services rendered on behalf of a client, as they were made in the scope of its attorney-client relationship with Kelly. Further, defendant demonstrated that its receipt of plaintiff's funds and subsequent release of same to Kelly were services rendered within its role as the escrow agent for Kelly and Cholowsky pursuant to the terms of the Agreement of Sale. It is insufficient to impute to an attorney knowledge or assistance in a fraud of a client simply by alleging that the attorney provided legal services and was closely involved in the operations of its client (Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 NY3d 553 [2009]).

In opposition to all four of the aforementioned causes of action, plaintiff raises triable issues of fact. In opposition, plaintiff presents inter alia, the affidavit of plaintiff himself, wherein he avers that: defendant represented and acknowledged that plaintiff was an investor/purchaser of Emjay and assured plaintiff that if he wired funds to defendant, plaintiff would be an investor/purchaser of forty-five (45) of Kelly's sixty (60) shares, he wired one million one hundred thousand dollars into defendant's accounts and defendant accepted such funds which were transferred solely for the purpose of plaintiff acquiring the majority of Kelly's ownership interest in Emjay, that defendant released the $1.1 million to Kelly without his instruction, authorization, or permission, and defendant had every reason to know that the funds were delivered on account of plaintiff.

As there are triable issues of fact as to inter alia, whether defendant unlawfully retained or distributed plaintiff's funds, a trial is necessary and summary judgment is unwarranted. Accordingly, the motion is denied.

This constitutes the decision and order of the Court.

Dated: December 2, 2013

. . . . . .

Howard G. Lane, J.S.C.