

Schaeffer v Gordon

2014 NY Slip Op 31509(U)

June 11, 2014

Supreme Court, New York County

Docket Number: 650800/12

Judge: Laura E. Drager

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 31

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DONNA SCHAEFFER, individually and on behalf
of DESIGNS BY D&D, INC.,

Plaintiff

Index No. 650800/12

-against-

DORIE GORDON, ROBERT GORDON, DORIE
LOVE, LLC, RUSHMORE CAPITAL PARTNERS,
LLC, RUSHMORE CAPITAL MANAGEMENT, LLC,
MORTGAGE MAX, LLC, and DESIGNS BY D&D,
INC.,

Defendants.

Decision & Order
Motion Sequence 004

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Laura Drager, J.S.C.

This is a commercial action brought by the Plaintiff (“Ms. Schaeffer” or “Plaintiff”) individually and on behalf of a corporate entity known as Designs by D&D, Inc. (“D&D”), to recover damages for fraud, conversion and unjust enrichment in connection with the transfer at the request of Defendant Dorie Gordon (“Ms. Gordon”) of approximately \$2.5 million in funds and jewelry by Ms. Schaeffer to Ms. Gordon and Defendant Designs by D&D, Inc., and to Defendant Robert Gordon and corporate entities controlled by him. Defendants Robert Gordon, Rushmore Capital Partners, LLC, Rushmore Capital Management, LLC, and Mortgage Max, LLC (collectively referred to as the “Robert Gordon Defendants”) now move for summary judgment pursuant to CPLR 3212 to dismiss the six causes of action directed against them in the Plaintiffs’ Verified Complaint.¹

¹ The complaint states that the causes of action against the Robert Gordon Defendants are “Individual Claims of Donna Schaeffer” rather than claims made by both plaintiffs identified in the caption (Complaint, p. 8, Exh. A to Notice of Motion). No claims are made by D& D against the Robert Gordon Defendants. D&D is named as both a plaintiff and defendant in this action.

Ms. Schaeffer opposes the motion and cross moves to dismiss the counterclaim brought against her by the Robert Gordon Defendants for contribution and indemnification. Defendant Dorie Gordon submitted no papers in opposition or in support of the motion and cross-motion.

These motions were made after the completion of discovery, including depositions of Ms. Schaeffer, Dorie Gordon and Robert Gordon.

The Parties

The individual defendants Dorie Gordon and Robert Gordon are husband and wife and are engaged in a divorce action pending before this court. Defendant Rushmore Capital Partners, LLC ("RCP") was formed by Robert Gordon in 2007 for the purpose of lending "hard money" high interest loans for real estate mortgages and operates as a hedge fund (Verified Complaint at p.2, Exh. A, to Notice of Motion). Defendant Rushmore Capital Management, LLC ("RCM") is owned solely by Robert Gordon and receives management fees in connection with the funds held by RCP. Defendant Mortgage Max LLC ("Mortgage Max") is a privately held entity formed in 2002 to broker residential mortgage loans. Defendant Dorie Love, LLC ("Dorie Love") is a retail jewelry business operated by Ms. Gordon.

Designs by D & D, Inc. ("D&D") is a jewelry design business owned and operated by Mrs. Schaeffer and Mrs. Gordon.

Uncontroverted Facts

The following evidence is not controverted. Ms. Schaeffer and Ms. Gordon created and operated D&D as equal partners. For a period of time, Ms. Schaeffer was absent from the business for her own personal reasons and left control of the operation and finances of D&D to

Ms. Gordon. During this period of time, at Ms. Gordon's request, Ms. Schaeffer transferred funds on three different dates to accounts held by the Robert Gordon Defendants: \$380,000 to RCP on October 28, 2008; \$150,000 to Mortgage Max on January 9, 2009; and \$290,000 to Robert Gordon/RCM on February 14, 2009 (Verified Complaint p. 6, Exh. A, to Notice of Motion; Verified Answer of Robert Gordon Defendants ¶¶5-6, Exh. B to Notice of Motion; EBT of Donna Schaeffer, pp. 11-13, 17-18, Exh C to Notice of Motion). Ms. Schaeffer testified that she made these transfers to repay Ms. Gordon for money she claimed she had borrowed from her accounts with the Robert Gordon Defendants to cover D&D expenses (EBT of Donna Schaeffer, pp. 11-18, Exh C to Notice of Motion).² The \$380,000 transferred by Ms. Schaeffer to RCP on October 28, 2008 and the \$290,000 paid by Ms. Schaeffer to Robert Gordon/RCM were credited to Ms. Gordon's capital account held by RCP (Robert Gordon Aff. dated 10/29/13 at ¶9). The \$150,000 transferred by Ms. Schaeffer to Mortgage Max on January 9, 2009 was subsequently transferred to Ms. Gordon's Chase Bank account as evidenced by a deposit slip in her handwriting for that amount on January 13, 2008 (*id.* at ¶¶10, 28-34; EBT of Dorie Gordon p. 534). Ms. Schaeffer had no communications with any of the Robert Gordon Defendants concerning any of the three transfers in question (EBT of Donna Schaeffer, pp. 14, 16-19, Exh C

² Conclusory allegations made in Ms. Gordon's Verified Answer and Cross-claims and her confused deposition testimony do not controvert the underlying facts admitted by Ms. Schaeffer. Ms. Gordon testified at her deposition that she asked Ms. Schaeffer to make the \$380,000 transfer to her RCP account (EBT of Dorie Gordon, pp. 177-188, 211-213, 527-531). Ms. Gordon neither admitted nor denied that she asked Ms. Schaeffer to make the transfers of \$290,000 and \$150,000. At deposition, she testified that she did not remember asking Ms. Schaeffer to write the check for \$290,000 to Robert Gordon/RCP but also testified that she remembered "feeling extremely bad that she had to ask at the same time [that Ms. Shaeffer had a personal issue with her father]" (*id.* at 521-527). Ms. Gordon did not deny that she asked Ms. Schaeffer to write the check for \$290,000 or to transfer \$150,000 to Mortgage Max.

to Notice of Motion).

Claims against the Robert Gordon Defendants

The gravamen of Ms. Schaeffer's claims against the Robert Gordon Defendants is that they purportedly knew that neither Ms. Schaeffer nor D&D owed any money to Ms. Gordon and that the Robert Gordon Defendants conspired with Ms. Gordon to defraud Ms. Schaeffer and D&D of the deposited funds. Plaintiff alleges that Ms. Gordon falsely led Ms. Schaeffer to believe that Ms. Gordon had spent funds for D&D's benefit and that the money Ms. Schaeffer gave to the Robert Gordon Defendants was repayment of those funds. Ms. Schaeffer further alleges that the Robert Gordon Defendants knew that no money was owed by Plaintiff to Ms. Gordon when they accepted the funds transferred to them by Ms. Schaeffer (Complaint at ¶¶20-21, Exh. A to Notice of Motion).

In response to the Complaint, Ms. Gordon filed a Verified Answer with Cross-claims against the Robert Gordon Defendants (Exh. 12, Notice of Cross-Motion). Ms. Gordon's Answer admits that she had a business relationship with Ms. Schaeffer and otherwise denies the substantive allegations of the complaint and any wrongdoing by herself. In particular, she does not deny that Ms. Schaeffer owed money for expenses incurred by D & D. In her Cross-claims, Ms. Gordon alleges that Ms. Schaeffer deposited the funds owed to D & D into accounts controlled by the Robert Gordon Defendants. However, she contends that the deposited funds were not transferred to herself, D&D, or Dorie Love but, instead, were improperly used by the Robert Gordon Defendants.³

³ In this motion, the Robert Gordon Defendants do not request dismissal of Ms. Gordon's Cross-claims against them.

Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1st Dep’t 1986).⁴ Once that showing is made the burden shifts to the party opposing summary judgment to produce evidence of material issues of fact which require a trial. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). *See also, Johnson v. Phillips*, 261 A.D.2d 269 (1st Dep’t 1999). Moreover, on a motion for summary judgment, “the facts must be viewed in the light most favorable to the non-moving party.” *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012).

All of Ms. Schaeffer’s claims against the Robert Gordon Defendants are based on allegations that the Robert Gordon Defendants knowingly received funds from her under false pretenses stemming from Ms. Gordon’s representations to Ms. Schaeffer that money was owed

⁴ The Robert Gordon Defendants complain that the initial affirmation of Plaintiff’s counsel in opposition to their motion is incompetent for failure to recite that it is made under the penalties of perjury, as required by CPLR Rule 2106. On a motion for summary judgment, a plaintiff can establish a prima facie case through the affirmation of its attorney based upon documentary evidence. *See, Eldon Group Amer., Inc. V. EquiPLEX Indus. Prods. Corp.*, 236 A.D.2d 329 (1st Dep’t 1997). Here, Plaintiff’s counsel submits deposition transcripts, pleadings and other documents as exhibits to his affirmation that is not made under the penalties of perjury. The defect is correctable. *See, Brightly v. Liu*, 77 A.D.2d 874 (2d Dep’t 2010), (properly notarized affirmation accepted on renewal motion). Plaintiff’s counsel cured the defect in Plaintiff’s Reply Affirmation (at ¶11, p.5), which is made under the penalties of perjury, where counsel states that the “contents of [his] prior affirmation are hereby incorporated by reference [in his reply affirmation].”

by D&D and/or Ms. Schaeffer for business expenses paid by Ms. Gordon. The Robert Gordon Defendants argue that, based on the uncontroverted evidence and viewed in the light most favorable to the Plaintiff, all of the claims against the Robert Gordon Defendants must be dismissed because Plaintiff fails to present evidence that the funds deposited into the accounts by Ms. Schaeffer were not in payment for business expenses incurred by D&D. Further, she provides no evidence that the Robert Gordon Defendants had any reason to believe otherwise. Moreover, there is no evidence of any relationship or communications between Plaintiff and the Robert Gordon Defendants establishing any duty or obligation owed by the Robert Gordon Defendants to Plaintiff. Based on the uncontroverted evidence, Ms. Schaeffer acted solely at the request of and on the instructions of Ms. Gordon. Finally, there is no evidence supporting any collusion between the Robert Gordon Defendants and Ms. Gordon.

Plaintiff's Third, Sixth and Seventh Causes of Action - Unjust Enrichment, Constructive Trust and an Accounting

The elements of an action for unjust enrichment are: enrichment of the defendants; at the plaintiff's expense; such that it would be "against equity and good conscience to permit [the defendants] to retain the funds." *See, Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011).

There is no evidence that the Robert Gordon Defendants were enriched at the expense of Ms. Schaeffer. Although the Robert Gordon Defendants received money from Ms. Schaeffer, the funds were immediately disbursed to Ms. Gordon's own bank account or to her own capital account held by RCP. The Robert Gordon Defendants acted merely as a conduit for the payments made by Ms. Schaeffer to Ms. Gordon. Ms. Schaeffer argues that the Robert Gordon

Defendants received a benefit because RCP continues to hold Ms. Schaeffer's money in Ms. Gordon's RCP account. As a result, RCP and RCM received up to \$100,000 in management fees and incentives from Ms. Gordon's account. However, these fees accrued as a result of the ordinary business of the Robert Gordon Defendants in running investment vehicles. The evidence reveals that Ms. Gordon's RCP account was opened on June 1, 2008, well before Ms. Schaeffer's transfers. Indeed, at the time of the first transfer, Ms. Gordon already had \$213,172.28 in her RCP account. The incentive fees received were based not only on the Schaeffer deposits in issue here, but on other funds already in her account or subsequently deposited from other sources. (Exh. 3, pp. 42, 52-55; Exh. 11, to Notice of Cross-Motion; Exh. 1 to Maitland Reply Aff.).

Additionally, there is no evidence that the Robert Gordon Defendants had any relationship with Ms. Schaeffer such that they owed a duty to her. In *Mandarin Trading, Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011), the Court of Appeals noted that "although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated (citation omitted)." *Id.* In the present case, although Ms. Schaeffer was acquainted with Robert Gordon, she presents no evidence of any business relationship between them. Thus, any connection between the Plaintiff and the Robert Gordon Defendants is too attenuated to support a claim against them for unjust enrichment.

Finally, there is no evidence of any collusion between the Robert Gordon Defendants and Ms. Gordon. Plaintiff's reliance on the unsubstantiated conclusory allegations made by Ms. Gordon to the effect that her husband handled financial responsibilities for D&D is not supported

by any evidence. In Ms. Gordon's Verified Answer and Cross-claims against the Robert Gordon Defendants, she alleges that she was unsophisticated in business and permitted her husband, Robert Gordon, to handle her financial responsibilities in connection with D&D (Exh. 12, p. 7, to Notice of Cross-Motion). Ms. Gordon's testimony concerning Robert Gordon's involvement in the business of D&D is vague and unsubstantiated (EBT of Dorie Gordon, Exh. 5, pp. 119-121, 125-128, to Notice of Cross-Motion).

Ms. Gordon further alleges, in sum and substance, that the Robert Gordon Defendants improperly retained funds owed to D&D. However, Ms. Gordon provides no evidence to support this allegation. If anything, Ms. Gordon's testimony defeats her allegation. She acknowledged in her deposition that she bought and sold the inventory for D&D. Neither she nor Ms. Schaeffer, the co-owners of D&D, presented any evidence or records supporting the contention that Robert Gordon played any role in the running of D&D. The only specific claim raised by the Ms. Gordon against her Husband is her claim that he insisted that she return the money she had borrowed from her own RCP account for the benefit of D&D. That claim does not support her allegation that Robert Gordon was involved in the financial aspects of D&D. Both Ms. Schaeffer and Ms. Gordon testified at the depositions that Ms. Gordon alone asked Ms. Schaeffer to transfer funds to the Robert Gordon Defendants to reimburse Ms. Gordon for business expenses she had expended on behalf of D&D. Robert Gordon was not party to those requests (EBT of Dorie Gordon, Exh. 5, pp. 177-188, to Notice of Cross-Motion; EBT of Donna Schaeffer, Exh. C, pp. 11-13, to Notice of Motion). Neither Ms. Schaeffer nor Ms. Gordon presented any testimony or documentary evidence to support the claim that the money was to be

returned to D&D as opposed to Ms. Gordon. In any event, even if the money was to be returned to a D&D account, there was no evidence to support the claim that the Robert Gordon Defendants prevented Ms. Gordon from transferring the money received from Ms. Schaeffer to D&D. There was no evidence presented to support a claim that Ms. Gordon was prohibited from withdrawing money from her RCP account and, in fact, she deposited \$150,000 into her Chase bank account shortly after a transfer of that amount was made into a Robert Gordon Defendant's account by Ms. Schaeffer.

The party opposing summary judgment must tender evidentiary proof in admissible form and may not rely on conclusory allegations. *See, Friends of Animals, Inc. v. Associated Fur Manufacturers*, 46 N.Y.2d 1065, 1068 (1979); *Cabrera v. Rodriguez*, 72 A.D.3d 553, 554 (1st Dep't 2010), (unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact). The allegations in Ms. Gordon's Cross-claims to the effect that the Robert Gordon Defendants retained funds belonging to D&D, are contradicted by her own deposition testimony and documentary evidence supporting the claim that all of Ms. Schaeffer's funds deposited into Robert Gordon Defendant accounts were transferred into Ms. Gordon's own accounts (EBT of Dorie Gordon, Exh. 5, pp. 206-213, to Notice of Cross-Motion).

Plaintiff's claims against the Robert Gordon Defendants for imposition of a constructive trust and for an accounting depend on proof of unjust enrichment and that a fiduciary relationship existed between them; that a promise was made; and that an asset was transferred in reliance on the promise. *See, Mei Yun chen v. Mei Wan Kao*, 97 A.D.3d 730 (2d Dep't 2012). "A constructive trust may be imposed when property has been acquired in such circumstances that

the holder of the legal title may not, in good conscience, retain the beneficial interest (citations omitted)." *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976).

A claim for an accounting "is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Palazzo v. Palazzo*, 121 A.D.2d 261 (1st Dep't 1986). "In determining whether a fiduciary relationship exists, 'a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge' (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1998])." *Sergeants Benevolent Assn. Annuity Fund v. Renck*, 19 A.D.3d 107 (1st Dep't 2005).

Plaintiff presents no evidence that a fiduciary relationship existed between her and the Robert Gordon Defendants sufficient to warrant the imposition of a constructive trust or require an accounting by them.

Accordingly, the motion for summary judgment dismissing the third cause of action for unjust enrichment, the sixth cause of action for an accounting and the seventh cause of action to impose a constructive trust against the Robert Gordon Defendants is granted and those claims are dismissed.

Plaintiffs's Fourth Cause of Action - Aiding and Abetting

The Robert Gordon Defendants seek dismissal of the Plaintiff's fourth cause of action for aiding and abetting fraud and breach of fiduciary duty. The complaint alleges that the Robert Gordon Defendants had actual and/or constructive knowledge that Ms. Gordon defrauded Ms. Schaeffer and aided Ms. Gordon in breaching the fiduciary duty she owed to Ms. Schaeffer in

connection with the wire-transfers of funds to Robert Gordon, RCP and Mortgage Max. The complaint further alleges that the Robert Gordon Defendants substantially assisted Ms. Gordon's scheme to defraud Ms. Schaeffer by accepting payments and failing to investigate the purpose of the payments from Ms. Schaeffer (Exh. A, pp. 10-11, to Notice of Motion).

To prevail on a claim of aiding and abetting fraud, Plaintiff must establish the following elements: (1) the existence of an underlying fraud; (2) knowledge of the fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud. *Stanfield Offshore Leveraged Assets, Ltd., v. Metropolitan Life Insurance Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009) (internal citations and quotations omitted). Substantial assistance occurs when a defendant affirmatively assists in or conceals the fraud or, where there is a duty to act, fails to expose the fraud, and "the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Id.* (internal citations omitted).

The Gordon Defendants assert there is no evidence that they owed any duty to Ms. Schaeffer, had any knowledge of the business of D&D, or received any benefit from the funds transferred to them by Ms. Schaeffer. They further argue that the complaint does not meet the specificity requirements of CPLR 3016(b) in pleading liability for aiding and abetting fraud. Plaintiff submits no evidence that Ms. Schaeffer or D&D had a relationship with the Robert Gordon Defendants. Ms. Schaeffer admitted at deposition that she had no communication with Robert Gordon and does not know whether he had any involvement in D&D (EBT of Donna Schaeffer, Exh. C, p. 19 to Notice of Motion).

The court has searched the evidence submitted on this motion and finds nothing to

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support the conclusory allegations in the complaint that the Robert Gordon Defendants acted in furtherance of or had knowledge of any fraud against Ms. Schaeffer or D&D. There is no evidence that the Robert Gordon Defendants had any knowledge as to whether or not Ms. Schaeffer owed money to Ms. Gordon for D&D expenses. Ms. Schaeffer points to purported contradictions in the deposition testimony given by Ms. Gordon and Robert Gordon with regard to the reasons for the wire transfers made by Ms. Schaeffer to the Robert Gordon Defendants (Maitland Aff. in Opp., ¶¶31-33). However, that deposition testimony is not contradictory and does not raise a triable issue. Ms. Gordon testified that Robert Gordon pressured her to obtain the funds from Ms. Schaeffer to pay back funds withdrawn from an RCP account in her name (Exh. 4, pp. 515-520, to Cross-Motion). Robert Gordon testified that he was told by Ms. Gordon that the funds transferred by Ms. Schaeffer were to repay Ms. Gordon for business expenses she incurred on behalf of D&D and which Ms. Schaeffer as co-owner of the business owed. (Exh. 3, p. 169, to Cross-Motion). Even if it is assumed, for purposes of this motion, that Mr. Gordon pressured Ms. Gordon to ask Ms. Schaeffer for funds to replenish the RCP account, that fact does not suggest that Mr. Gordon had knowledge of a fraud against Ms. Schaeffer.

In the absence of proof that the Robert Gordon Defendants had actual knowledge that Ms. Schaeffer owed no money to Ms. Gordon, Plaintiff fails to raise a triable issue that the Robert Gordon Defendants aided and abetted a fraud against them. *See, First Nationwide Bank v. 965 Amsterdam, Inc.* 212 A.D. 469, 472 (1st Dep't 1995), (actual knowledge required to establish claim of aiding and abetting fraud). Accordingly, the motion for summary judgment dismissing the fourth cause of action against the Robert Gordon Defendants for aiding and abetting fraud is

granted and that claim is dismissed.⁵

Plaintiff also asserts a claim against the Robert Gordon Defendants for aiding and abetting breach of fiduciary duty. As with the fraud claim, the facts submitted on this motion do not support the breach of fiduciary duty claim. The elements of a claim for aiding and abetting breach of fiduciary duty are: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach (citations omitted)." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003).

Plaintiff cannot prevail on this claim without evidence that the Robert Gordon Defendants had actual knowledge of a breach of duty. *See, Laro v. Chase Manhattan Bank*, 269 A.D.2d 188 (1st Dep't), leave to appeal denied 95 N.Y.2d 755 (2000). As discussed above, Ms. Schaeffer offers no evidence that the Robert Gordon Defendants had knowledge that Ms. Schaeffer did not owe money to Ms. Gordon or that Ms. Gordon breached any duty to Ms. Schaeffer. In the absence of such evidence, the claim for aiding and abetting a breach of duty fails as a matter of law. Accordingly, the Plaintiff's fourth cause of action against the Robert Gordon Defendants for aiding and abetting breach of fiduciary duty is dismissed.

Plaintiff's Fifth Cause of Action: Conversion

The Robert Gordon Defendants also request summary judgment dismissing Plaintiff's

⁵Ms. Gordon testified at her deposition that her signature on a certain subscription document for her RCP account appears to be a forgery (EBT of Dorie Gordon, Exh. 5, pp. 234-236, to Notice of Cross-Motion). Accepting this claim as true, it is not evidence of fraud against Ms. Schaeffer. Moreover, it appears that this document pertains to the receipt of a sum of money subsequent to and unrelated to Ms. Schaeffer's transfers. (Exh. 13 of the Cross-Motion).

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fifth cause of action against them for conversion. According to the complaint, the Robert Gordon Defendants improperly controlled and used the funds transferred by Ms. Schaeffer that she claims were intended for D&D's benefit (Exh. A, p.11, to Notice of Motion).

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 (State of New York v Seventh Regiment Fund, 98 NY2d 249 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (Pierpoint v Hoyt, 260 NY 26 [1932]; Seventh Regiment Fund, 98 NY2d at 259) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (Employers' Fire Ins. Co. v Cotten, 245 NY 102 [1927]; see also Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed]). *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (2006)

Here, the Plaintiff offers no evidence that the Robert Gordon Defendants exercised dominion over or interfered with property that rightfully belonged to D&D. The funds were transferred from Ms. Schaeffer's account into accounts held by the Robert Gordon Defendants. There is no evidence that the Robert Gordon Defendants exercised control over D&D funds. Although Ms. Schaeffer transferred money into accounts controlled by the Robert Gordon Defendants, there is no evidence that the Robert Gordon Defendants had any knowledge or reason to believe this money belonged to D&D. Thus, there is no evidence to support the claim that the Robert Gordon Defendants converted property belonging to D&D. Moreover, there is no evidence to support a claim that the Robert Gordon Defendants improperly converted Ms. Schaeffer's funds. Ms. Schaeffer testified that the funds were transferred on Ms. Gordon's instructions and for Ms. Gordon's benefit (Exh. C, pp. 11-14, 16-19, to Notice of Motion). Ms. Schaeffer testified that the funds were sent to Ms. Gordon's accounts held by the Robert Gordon

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Defendants, to replace funds removed by Ms. Gordon from her accounts to pay expenses of D&D. Ms. Schaeffer does not dispute the evidence proffered by the Robert Gordon Defendants that, upon receipt by them of the funds from Ms. Schaeffer, those funds were credited or transferred to accounts held by Ms. Gordon. Accordingly, the motion for summary judgment dismissing Plaintiff's fifth cause of action against the Robert Gordon Defendants for conversion is granted.

Plaintiff's Eighth Cause of Action - Exemplary Damages

Finally, the Robert Gordon Defendants request summary judgment of the Plaintiff's eighth cause of action for exemplary (punitive) damages against them. It is well-settled that "New York does not recognize an independent cause of action to recover punitive damages." *Stein v. Doukas*, 98 A.D.3d 1024 (2d Dep't 2012). Where, as here, the underlying claims are dismissed, the claim for punitive damages must also be dismissed. Thus, the Robert Gordon Defendants' request for summary judgment dismissing the eighth cause of action for exemplary damages is granted and that claim is dismissed.

Robert Gordons' Counterclaim against the Plaintiff

Plaintiff cross moves for dismissal of Robert Gordons' Counterclaim against her for contribution and indemnification (the "Counterclaim"). The Counterclaim consists solely of the following pleading: "By reason of the plaintiff's negligent, willful, intentional, malicious and/or reckless acts, defendant Robert Gordon has been damaged in a sum to be determined at trial." (Exh. B, ¶15, to Notice of Motion). That single sentence forms the entire substance of the Counterclaim. There are no factual allegations in support of this conclusory pleading. At his

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deposition, Robert Gordon refused to answer any questions about the Counterclaim, without the presence of his attorney, although Mr. Gordon expressly waived his right to have counsel present at the deposition (Exh. 10 to Notice of Cross-Motion). No evidence is offered in support of the Counterclaim. Ms. Schaeffer served and filed a verified Reply to the Counterclaim in which she denies the allegations and raises, as affirmative defenses, the failure to state a cause of action and the lack of specificity as bases for dismissal of the Counterclaim (Exh. 3, Maitland Reply Aff., dated 2/5/14).

Plaintiff has established a prima facie entitlement to summary judgment dismissing the Counterclaim while Robert Gordon submits no probative evidence in support of the Counterclaim. *See, Zuckerman v. City of New York*, 49 N.Y.2d at 562-563). Thus, the Plaintiff's cross motion for summary judgment dismissing Robert Gordon's Counterclaim against them is granted and that claim is dismissed.

Accordingly, it is hereby

ORDERED, that the motion for summary judgment dismissing the Plaintiff's third, fourth, fifth, sixth, seventh and eighth causes of action against Robert Gordon, Rushmore Capital Partners, LLC, Rushmore Capital Management, LLC, and Mortgage Max, LLC is granted and the Plaintiff's third, fourth, fifth, sixth, seventh and eighth causes of action against Robert Gordon, Rushmore Capital Partners, LLC, Rushmore Capital Management, LLC, and Mortgage Max, LLC are dismissed; and it is further

ORDERED, that the Plaintiff's cross motion for summary judgment dismissing Robert Gordon's Counterclaim against them is granted and defendant Robert Gordon's Counterclaim

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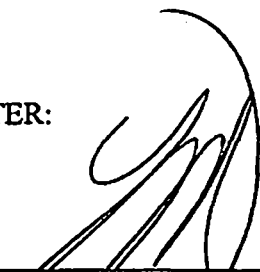
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against the Plaintiffs is dismissed.

This constitutes the decision and order of the court.

Dated: June 11, 2014

ENTER:



Laura Drager, J.S.C.