

Gross v Chambre
2017 NY Slip Op 32829(U)
May 15, 2017
Supreme Court, Rockland County
Docket Number: 031761/2015
Judge: Thomas E. Walsh II
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
LESSER GROSS, individually and on behalf of LASK
DEVELOPERS LLC,

Plaintiff,

-against-

DECISION & ORDER

Index No. 031761/2015

Motion # 8

ROBERT J. CHAMBRE, 14 RT 59 LLC, YOEL Y. WEISS,
GIBRALTAR ABSTRACT COMPANY, SHAUL KOPELOWITZ,
VICTOR WEISS and ISAAC SCHEINER and
LASK DEVELOPERS LLC,

Defendant.

-----X
Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1 -3 were considered in connection with Defendant SHAUL KOPELOWITZ and LASK DEVELOPERS LLC Notice of Motion for Summary Judgment for an Order (a) granting summary judgment pursuant to Civil Practice Law and Rules § 3212 dismissing the Complaint and for such other and further relief as the Court deems just and proper:

PAPERS

NUMBER

NOTICE OF MOTION/AFFIRMATION OF JEFFREY FLEISCHMANN, ESQ./EXHIBITS (A-E)/AFFIRMATION OF SHAUL KOPELOWITZ, ESQ./EXHIBITS (A-E)	1
AFFIRMATION OF LESSER GROSS/AFFIRMATION OF RYAN KARBEN, ESQ.	2
REPLY AFFIDAVIT OF JEFFREY FLEISCHMANN, ESQ.	3

Plaintiff brought this action against Defendant KOPELOWITZ alleging that Defendant KOPELOWITZ assigned to himself a purchase money mortgage in the amount of \$450,000 belonging to LASK DEVELOPERS, LLC. This action and the related action, *Kopelowitz v. Weiss et al.*, (Index # 032450/2015) arise from a business transaction for the sale of property located at 141 Rt. 59 Airmont, New York. In October 3, 2013 the Plaintiff entered into a contract to sell the subject property to Defendant WEISS's entity, Defendant 141 RT 59 LLC, for \$1.1 million dollars. Defendant KOPELOWITZ brought the related action based on his allegations that Plaintiff and Defendant WEISS engaged in a "secret deal" to steal

money from Plaintiff with the assistance of former Defendant MICHAEL KLEIN. After the closing on the subject property, Plaintiff received and deposited into his personal account a check for \$225,000 of the sale proceeds from the sale of the subject property. As a result Defendant KOPELOWITZ commenced the related action on June 2, 2014 seeking an accounting, and alleging a breach of fiduciary duty, fraud, conversion and unjust enrichment.

Plaintiff commenced the instant action on April 22, 2015 against the Defendants alleging that Defendant KOPELOWITZ improperly assigned to himself a purchase money mortgage which was dated March 18, 2014 and subsequently recorded with the Rockland County Clerk. Plaintiff's Complaint alleges a breach of fiduciary duty, fraud, conversion and unjust enrichment along with causes of action for a temporary restraining order and declaratory judgment. On April 27, 2015 Plaintiff moved for a preliminary injunction to enjoin Defendants from further enforcing, recording, demanding payment on, or engaging in any transaction related to the Purchase Money Mortgage until the related action, Kopelowitz v. Weiss is resolved. The Court granted the motion for a preliminary injunction by an Order dated September 10, 2015.

In the Complaint the Plaintiff has raised six (6) causes of action as to the Defendant KOPELOWITZ. The first cause of action seeks a Temporary Restraining Order and a Preliminary Injunction prohibiting the Defendants from taking any action to enforce the Mortgage. The second cause of action against Defendant KOPELOWITZ seeks a declaratory judgment that "only [plaintiff] has any authority to execute documents as Operating manager of Lask." Plaintiff is also seeking the court "declare and determine the [plaintiff] is the sole and only authorized Operating Manger of Lask." In the third cause Plaintiff asserts that Defendant KOPELOWITZ committed fraud in transferring the Mortgage to his own name and that Defendants CHAMBRE and GIBRALTAR who sought to enforce the note aided and abetted the fraud. In the fourth cause of action Plaintiff asserts that Defendant KOPELOWITZ transferred an asset of LASK DEVELOPERS, INC to his own name without authority, converting company funds to his own use. As to the fifth cause of action Plaintiff alleges a breach of Fiduciary Duty by Defendant KOPELOWITZ when he transferred an asset of LASK DEVELOPERS, INC to his own name without authority which resulted in a converting of company funds to his own use. Finally, as to the sixth cause of action Plaintiff alleges that Defendant KOPELOWITZ transferred an asset of LASK DEVELOPERS, INC. to his own named without authority, converting company funds to his own use and unjustly enriching himself.

Defendant KOPELOWITZ argues that Plaintiff's causes of action for fraud, breach of fiduciary duty, conversion and unjust enrichment must be dismissed based on a lack of proof of an essential element - damages. Defendant submits that each of the causes of action alleged by Plaintiff require a showing that the Plaintiff was injured as a result of Defendant's representations. According to Defendant KOPELOWITZ, the Plaintiff admitted in his Examination Before Trial (hereinafter EBT) that there were no damages as a result of the assignment of the Purchase Money Mortgage since it has been continuously held by Defendants in escrow subject to the resolution of the parties rights to the proceeds of the sale of the subject property in the related action.

Plaintiff submitted Opposition that is in response to several of the pending motions in the instant action. The Opposition submitted by Plaintiff consists of a general Affidavit of Plaintiff and an Affirmation of Ryan Karben, Esq. which contains no annexed documents/exhibits. Plaintiff asserts that the Defendant has failed to reach his "heavy burden under" the "rigorous standard" of a Summary Judgment. In support of his argument Plaintiff delineates the legal requirement to sustain a claim for fraud, conversion, breach of fiduciary duty and unjust enrichment. Additionally as to the claim for fraud, Plaintiff appears to allege that the fraudulent conduct/act of Defendant KOPELOWITZ was the assignment of the Purchase Money Mortgage from Weiss in and of itself. Further, Plaintiff states that all of the elements of each cause of action were set forth with the particularity required by Civil Practice Law and Rules § 3106 (b) in the Complaint. In Ryan Karben, Esq.'s Affirmation he avers that the "facts adduced in discovery only buttress GROSS' claims." The statement of counsel is not followed or supported by any of the facts that he alleges support Plaintiff's claim.

In Reply Defendant KOPELOWITZ raises an issue with Plaintiff's Affidavit in which he submits that the Plaintiff testified in a deposition prior to completion of the instant Affidavit and the statements provided in the Affidavit regarding damages are directly contradicted by the Plaintiff's EBT testimony.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [Giuffrida v. Citibank Corp., et al., 100 NY2d 72 (2003), citing Alvarez v. Prospect Hosp., 68 NY2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [Lacagnino v. Gonzalez, 306 AD2d 250 (2d Dept 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the

motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124 (2000), citing *Alvarez, supra*, and *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [(*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)].

Defendant KOPELOWITZ has made a prima facie showing of entitlement to judgment as a matter of law as to the third, fifth and sixth causes of action. Upon Defendant KOPELOWITZ meeting his burden on the summary judgment motion, the burden shifted to Plaintiff to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. The Plaintiff has raised triable issues of fact requiring a trial regarding the third cause of action for fraud, the fifth cause of action for breach of fiduciary duty and the sixth cause of action for unjust enrichment. Therefore, Defendant KOPELOWITZ's Motion for Summary Judgment as to the third (3rd), fifth (5th) and sixth (6th) causes of action, fraud, breach of fiduciary duty and unjust enrichment respectively are all denied.

An unlawful exercise of dominion and control over plaintiff's property constitutes a conversion. [*General Elec. Co v. American Export Isbrandtsen Lines, Inc.*, 37 AD2d 959 (2d Dept 1971)]. Physical possession of the property is not a requirement to prove a conversion; any wrongful exercise of dominion by one other than the owner is a conversion. [*General Elec. Co.*, 37 AD2d at 959; *Suzuki v. Small*, 214 AD541, 557 (1st Dept 1925)]. "To establish a cause of action in conversion, the plaintiff must show legal ownership of an immediate superior right of possession to a specific identifiable thing, and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights." [*Independence Discount Corp., v. Bressner, et al*, 47 AD2d 756 (2d Dept 1976); *Fiorenti v. Central Emergency Physicians, PLLC*, 305 AD2d 453, 454-455 (2d Dept 2003)]. If the plaintiff never had title, possession or control of the funds that are alleged to have been converted, the action for conversion cannot be sustained. [*Fiorenti*, 305 AD2d at 455]. Additionally, a claim of conversion cannot be based on a "mere breach of contract."

The subject matter of a conversion cause of action "must constitute identifiable tangible personal property" - real property and interests in business opportunities will not suffice. [*ARB Upstate Communications, LLC v. R.J. Reuter, LLC*, 93 AD3d 929, 931-932 (3d Dept 2012); *Romer & Featherstonhaugh v. Featherstonhaugh*, 267 AD2d 697, 697 (3d Dept 1999); *Rao v. Verde*, 222 AD2d 569, 570 (2d Dept 1995); *Volodarsky v. Moonlight*

Ambulette Service, Inc., 122 AD3d 619, 620 (2d Dept 2014)].

As to the fourth (4th) cause of action (conversion), Defendant KOPELOWITZ has made a prima facie showing of entitlement to judgment as a matter of law. Defendant KOPELOWITZ has demonstrated that the property which Plaintiff is alleging was subject to conversion is real property or his interest in the business and therefore is not properly a subject of a conversion cause of action. Upon Defendant KOPELOWITZ's meeting his burden on the summary judgment motion, the burden shifted to Plaintiff to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Defendant has failed to demonstrate a triable issue of fact. As such the fourth (4th) cause of action sounding in conversion is dismissed as to Defendant KOPELOWITZ.

Turning now to the second cause of action, Defendant KOPELOWITZ submits that the declaratory judgment sought by Plaintiff is contradicted by the terms of the Operating Agreement, which provides that each member is an operating manager. Defendant KOPELOWITZ has failed to make a prima facie showing of entitlement to judgment as a matter of law as to the second cause of action for declaratory judgment. Therefore, Defendant's Motion for Summary Judgment as to the second (2nd) cause of action is denied.

Accordingly, it is

ORDERED that Defendant KOPELOWITZ's motion for Summary Judgment (Motion #8) is granted in part and denied in part as delineated in the above Decision of the Court; and it is further

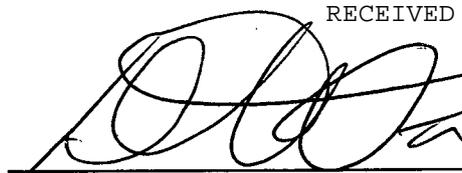
ORDERED that Defendant KOPELOWITZ's motion for Summary Judgment as to the following causes of action are denied: 2nd, 3rd, 5th and 6th; and it is further

ORDERED that Defendant KOPELOWITZ's motion for Summary Judgment as to the 4th cause of action is granted; and it is further

ORDERED that 4th Cause of Action for Conversion in the instant Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court on Motion #8.

Dated: New City, New York
May 15 2017



HON. THOMAS E. WALSH II
Justice of the Supreme Court

TO:

RYAN S. KARBEN, ESQ.
Attorney for Plaintiff LESSER GROSS
(via e-file)

JEFFREY FLEISCHMAN, ESQ.
LAW OFFICE OF JEFFREY FLEISCHMAN, P.C.
Attorney for Defendant KOPELOWITZ
(via e-file)

LISA L. SHREWSBURY, ESQ.
TRAUB LIEBERMAN STRAUS & SHREWSBERRY, LLP
Attorney for Defendants GIBRALTAR ABSTRACT COMPANY and VICTOR WEISS
(via e-file)

STUART A. BLANDER, ESQ.
Attorney for Defendant CHAMBRE
(via e-file)