

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 09-01098

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, PINE, AND GORSKI, JJ.

JASON L. SCHMIDT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GREGORY V. LORENZO AND LORENZO
INTERNATIONAL, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

JASON L. SCHMIDT, PLAINTIFF-APPELLANT PRO SE.

DAMON MOREY LLP, BUFFALO (GREGORY ZINI OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered September 18, 2008. The order denied plaintiff's motion for summary judgment on the cause of action for conversion and granted the cross motion of defendants for summary judgment dismissing that cause of action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff attorney commenced this action seeking damages arising from, inter alia, his alleged investment in a corporation. In appeal No. 1, plaintiff appeals from an order that denied his motion seeking summary judgment on his cause of action for conversion and granted defendants' cross motion for summary judgment dismissing that cause of action. We conclude that Supreme Court properly granted defendants' cross motion inasmuch as it is well established that a cause of action "to recover damages for conversion cannot be predicated on a mere breach of contract" (*Wolf v National Council of Young Israel*, 264 AD2d 416, 417; see *D'Ambrosio v Engel*, 292 AD2d 564, lv denied 99 NY2d 503; *Welch Foods v Wilson*, 277 AD2d 882, 885). Here, the parties agree that there was an oral agreement pursuant to which plaintiff would pay to defendant Gregory V. Lorenzo the sum of \$50,000, the only amount disputed on appeal, in exchange for shares of corporate stock. That agreement governs the parties' transaction and thus precludes recovery based on a cause of action for conversion (see *Welch Foods*, 277 AD2d at 885).

In appeal No. 3, plaintiff appeals from an order insofar as it denied his motion for summary judgment on the cause of action for unjust enrichment. Recovery on that cause of action, insofar as it is based on the same facts as those alleged in the cause of action for

conversion, is similarly precluded by the existence of the oral agreement (see *Morales v Grand Cru Assoc.*, 305 AD2d 647, *lv denied* 100 NY2d 510; *Welch Foods*, 277 AD2d at 885; see generally *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389). We note that, although the complaint alleges that defendants were additionally unjustly enriched by virtue of services rendered by plaintiff for which no compensation was received, plaintiff has abandoned any contention with respect to those services on appeal (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court