

**Harris v Young**

2004 NY Slip Op 30330(U)

December 10, 2004

Supreme Court, Kings County

Docket Number: 37234/01

Judge: Barasch S. Melvin

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At an IAS Term, Part 26, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10 day of December, 2004

P R E S E N T:

HON. MELVIN S. BARASCH,  
Justice.

----- X  
JOACHIM HARRIS,

Index No. 37234/01

Plaintiff,

- against -

CHANDRA M. YOUNG, et al.,

Defendants.

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The following papers numbered 1 to 7 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 2
Opposing Affidavits (Affirmations) _____	3 - 5
Reply Affidavits (Affirmations) _____	6 - 7
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff Joachim Harris moves for an order granting him summary judgment against defendant Financial Depot (Financial). Financial cross moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint as against it.

### *Facts and Procedural Background*

This action arises out of the sale of real property owned by plaintiff and located at 176 Malta Street in Brooklyn to defendant Michael Greene on August 24, 2001 for \$255,000. Plaintiff alleges that defendants defrauded him by withholding all but \$180,000 of the proceeds of the sale from him.

Although the facts are in dispute, it appears that plaintiff was approached by defendants Earl Rusnak of Waverley Realty (Rusnak/Waverley), who told plaintiff that he had a buyer who would purchase plaintiff's home. Rusnak recommended that plaintiff retain defendant Chandra M. Young to represent him in the transaction; Young, who plaintiff claims is not an attorney, was associated with defendant Courtney A. B. Hamilton, Esq. Financial, as mortgage broker, obtained a mortgage for Greene from Alliance Funding Company (Alliance) in the amount of \$230,000. Plaintiff contends that Rusnak/Waverly initially provided an unsigned contract to Financial, which indicated a selling price of \$180,000; a second signed contract, which indicated a selling price of \$255,000 and which plaintiff claims contained a forgery of his signature, was presented at the closing. Plaintiff further asserts that Waverley/Rusnak retained Charles Liotta to represent them in the transaction; Liotta ordered a title insurance policy from All State Abstract on behalf of Greene.

When plaintiff arrived at Liotta's office for the closing, defendant Donna Schwartz, a representative for the title company, and Howard Sherman, the attorney for Alliance, were

present. Rose Marie Cantanno, who claims that she was at Liotta's office for another closing, acted as Greene's attorney because Sherman refused to close unless Greene was represented and he had not retained counsel. Liotta remained in another room during the closing. Plaintiff further alleges that at the closing, "unidentified persons" presented copies of forged checks, one in the amount of \$40,500, drawn on an account maintained by Greene and made payable to plaintiff, and a second check in the amount of \$1,903.66, drawn on an account maintained in plaintiff's name and made payable to Greene.

Sherman, who was in a hurry to leave, wrote numerous checks for disbursements and a check in the amount of \$211,877.66 for the remaining proceeds, payable to Young. Sherman left and Young promised plaintiff that she would give him a check in a week. Plaintiff was upset that he was not receiving any of the proceeds, and he called the police. Young and plaintiff then went to Sherman's office in Rockland County, where Sherman cut a check in the amount of \$176,524.24, made payable to plaintiff. Another check in the amount of \$35,353.49, was made payable to Hamilton, which plaintiff alleges was fraudulently claimed to represent an escrow account, and a check in the amount of \$38,596.34 made payable to Liotta, allegedly represented expenses and commissions that plaintiff claims he did not agree to pay.

Plaintiff concludes that defendants fraudulently withheld the proceeds of the sale from him and converted the \$35,353.49 and \$38,596.34 referred to above. Defendants contend that in accordance with the agreement between plaintiff and Rusnak/Waverly, plaintiff was

entitled to receive only \$180,000 from the proceeds of the sale, with the remainder to go to defendants.

Thereafter, plaintiff retained an attorney to recover the money that he claims was wrongfully withheld from him and a settlement was negotiated. By cover letter dated September 13, 2001, Hamilton/Young paid the \$35,353.49 to plaintiff. On October 10, 2001, Liotta paid the remaining \$38,596.34 to plaintiff. General releases were thereafter executed. On October 9, 2001, while the settlement was being negotiated, plaintiff filed the summons and complaint commencing the instant action; an amended summons and complaint adding Financial as a party defendant was filed on January 11, 2002.

By order and decision dated July 16, 2003, the action was dismissed as against all defendants, except Financial, as barred by the general releases (the July 2003 Decision).

#### *The Parties' Contentions*

Plaintiff, in support of his motion for summary judgment, relies essentially upon the facts as summarized above. He also argues that after the closing, Alliance sold its mortgage to Beal Bank and that Beal Bank allegedly retained an investigator who determined that the mortgage was "potentially fraudulent." More specifically, the investigator noted that there was no appraisal listed on the HUD form, there was no down payment, the rental income verification stated that Greene owned the property before he took title, all loan application data was dated the day of the closing, no invoices for funds paid to Financial were provided, the financial pedigree of Greene was not sufficient to obtain a loan in the amount of \$229,500, no survey or certificate

of occupancy were provided by the title company, Financial never communicated with Greene, the loan given by Alliance did not meet its standards and Greene defaulted on the loan. Plaintiff thus concludes that the facts establish that Financial participated in a scheme to defraud him.

In opposition, Financial submits an affidavit from Joseph Hughis, an officer and director, in which he alleges that Greene contacted Financial by telephone to obtain financing for the purchase. Since Financial's office is located in West Palm Beach, Florida, all communications with Greene were by telephone, fax and/or mail. After obtaining the necessary information from Greene, Financial submitted his application to Alliance for underwriting and approval, and once the completed application was submitted, Financial played no further role in the loan process. Hughis further asserts that other than his conversations with Greene and/or his attorney, neither he nor any other agent for Financial had any contact or communications with any other party to the transaction. Accordingly, plaintiff's claim that Financial was party to a scheme to deprive him of the proceeds of the sale is without merit.

Financial further argues that plaintiff cannot maintain an action against it because there is no privity of contract between the two; plaintiff has failed to plead his cause of action for fraud with the requisite specificity; plaintiff cannot succeed on his RICO claim (Title IX of the Organized Crime Control Act of 1970, 18 USC §§ 1961-1968) because he has not alleged any conduct that could be construed as the

conduct of an enterprise through a pattern or racketeering activity; since plaintiff has already recovered all of the money that he claims was wrongfully withheld from him, he has suffered no damages; and plaintiff cannot recover on his claim of conspiracy, since no such cause of action is recognized in this state.

In his reply papers, plaintiff attacks the factual allegations made by Financial as untrue and asserts that he is entitled to summary judgment against Financial because documents were forged, fraudulent documents were transmitted through the mail and by fax and approximately \$75,000 of the proceeds of the sale to which he was entitled were converted. Plaintiff further asserts that he did not allege that he was in privity with Financial, since his claims are premised upon intentional tort. In addition, plaintiff alleges that he is entitled to recover punitive damages and the attorneys' fees that he incurred in obtaining the proceeds of the sale that were withheld from him.

### ***Discussion***

In addressing the parties' demands for relief, it is first noted that plaintiff's complaint contains ten pages of allegations and claims, but interposes only two causes of action; it fails to particularize the claims made against each of the nine named defendants; and it does not identify his causes of action.<sup>1</sup> As the July 2003 Decision recited, the summons with notice listed the nature of the action as legal

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<sup>1</sup> Although plaintiff apparently served an amended complaint adding Financial as a defendant, the document attached to the moving papers is characterized as a "verified complaint," although Financial is named as a party defendant.

malpractice, fraud, unlicensed practice of law, conversion, and conspiracy to convert personal property.<sup>2</sup> In opposition to Financial's cross motion, plaintiff claims that he seeking recovery on the grounds of fraud, conversion, conspiracy and RICO violations. In view of the inartful manner in which the complaint is drafted, the court will accordingly rely upon plaintiff's characterization of his claims.

### ***Fraud***

In order to make a prima facie showing of fraud, a plaintiff must establish "a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury" (*Jo Ann Homes v Dworetz*, 25 NY2d 112, 119 [1969], citing 24 NY Jur, Fraud & Deceit, § 14). Pursuant to CPLR 3016 (b), if a cause of action is based upon fraud, the circumstances constituting the wrong must be stated in detail (see generally *LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 109 [2001]). When a plaintiff confronted with a defendant's motion to dismiss fails to come forth with any facts or circumstances constituting the claimed fraud as required by law, dismissal of the claim is appropriate (see e.g. *Greschler v Greschler*, 51 NY2d 368, 375 [1980]).

Plaintiff's motion for summary judgment on his claim of fraud must be denied on the ground that the facts as pleaded by him and as argued in support of his

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<sup>2</sup> Since Financial is not engaged in the practice of law, those claims pertaining to the unlicensed practice of law and legal malpractice obviously cannot be supported as against it.

motion are insufficient to state a cause of action, since his claim is pleaded in general terms. More specifically, plaintiff does not provide any details with regard to the alleged misrepresentation made to him; he does not identify the party making the alleged misrepresentation or the circumstances under which the statement was made; and he fails to allege any basis upon which to conclude that the person who made the alleged representation had knowledge that it was false (*see generally Barclay Arms v Barclay Arms Assoc.*, 74 NY2d 644, 646-647 [1989]; *Lipton v Unumprovident*, \_\_\_ AD3d \_\_\_, 2004 NY App Div LEXIS 11065, 7-8 [2004]; *Cohen v Houseconnect Realty*, 289 AD2d 277, 278 [2001]; *Jae Heung Yoo v Se Kwang Kim*, 289 AD2d 451, 452 [2001]).

Further, Financial has made a prima facie showing of entitlement to summary judgment on the claim by submitting the affidavit of Hughis, which establishes that the company maintains its office in Florida, had no contact with any of parties to the subject transaction except for Greene or his attorney and Alliance, and received no money above its broker's fee of \$4,590. In opposition, plaintiff fails to raise an issue of fact with regard to whether he ever met with or spoke to anyone affiliated with Financial, or whether anyone affiliated with Financial made any false representation to him, which compels the conclusion that plaintiff fails to raise to an issue of fact as to whether he acted in reliance upon such false representation to his detriment (*see e.g. Barclay Arms*, 74 NY2d at 646-647).

In so holding, the court also notes that plaintiff's reliance upon the opinion of Beal Bank's investigator that the mortgage given to Greene was potentially fraudulent is misplaced. Significantly, the investigator did not conclude that the underlying mortgage transaction was fraudulent, but only stated that there was a potential for fraud. Further, the investigator's opinion is insufficient proof of the factual predicates upon which it is based, since he has no personal knowledge of any of the facts, and instead based his opinion upon his review of the file. Finally, even if the mortgage was premised upon fraudulent representations made by Greene and/or Rusnak/Waverley to Financial, or by Financial to Alliance, no false representations were made to plaintiff and plaintiff certainly did not rely upon these misrepresentations in agreeing to sell his house, since the mortgage approval process post-dated plaintiff's agreement to sell.

In the alternative, it is well settled that a cause of action for fraud does not arise when the only fraud charged relates to a breach of contract (see e.g. *Breco Envtl. Contrs. v Town of Smithtown*, 307 AD2d 330, 332 [2003]; *Melissakis v Proto Constr. & Dev.*, 294 AD2d 342, 343 [2002]; *Tsilogiannis v 53-11 90th St. Assocs.*, 293 AD2d 468, 469 [2002]; *Rubinberg v Correia Designs*, 262 AD2d 474, 475 [1999]; *Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 118 [1998]). Thus, inasmuch as plaintiff alleges that defendants retained more than the commission to which he agreed and held escrow money for repairs that he did not agree to make, plaintiff's cause of action for fraud must fail on the ground that the

fraud complained of is premised upon defendants' alleged intent to breach their contractual obligation to plaintiff (see generally *Waugh v Nowicki*, 10 AD3d 437 [2004], *lv denied* 3 NY3d 603 [2004]; *Third Ave. v Greble & Finger*, 8 AD3d 75 [2004]; *Goldstein v CIBC World Mkts.*, 6 AD3d 295, 296 [2004]).

### **Conversion**

In order to succeed on a cause of action sounding in conversion, a plaintiff "must show legal ownership or 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" (*Fiorenti v Central Emergency Physicians*, 305 AD2d 453, 454-455 [2003], quoting *Independence Discount v Bressner*, 47 AD2d 756, 757 [1975][citations omitted]). In addition, "[a] cause of action for replevin or conversion requires a demand for the property and refusal" (*Feld v Feld*, 279 AD2d 393, 394 [2001], *appeal denied* 96 NY2d 717 [2001], citing *Guggenheim Found. v Lubell*, 77 NY2d 311, 317-318 [1991]; *Douglas v Christie's Intl.*, 226 AD2d 185 [1996]); see also *Proceeding v Kreuger*, 203 AD2d 133 [1994]). Thus, until demand is made and refused, possession of property that is allegedly stolen cannot be considered wrongful (see e.g. *Guggenheim Found.*, 77 NY2d at 318; cf. *HB Intl. v Kahan Jewelry*, 266 AD2d 77, 78 [1999]).

Applying the above general principles to the facts of this case, plaintiff has failed to demonstrate that he is entitled to summary judgment as against Financial on his claim of conversion. Most significant in this regard, in view of the parties' differing versions of the agreement made between plaintiff and Rusnak/Waverly and the amount of money which plaintiff was entitled to receive pursuant thereto, plaintiff has failed to establish that he had legal ownership of or an immediate superior right to the funds. Further, the facts as alleged by plaintiff fail to establish that Financial was ever in possession of the allegedly converted funds, since the checks representing the funds were made payable to Hamilton and Liotta and the funds were returned by those parties. Similarly, plaintiff does not establish that a demand for the return of the funds was made to Financial. Finally, although plaintiff seems to infer that the fact that the other defendants released the money to him established that they wrongfully converted the funds, such is not the case. Even though a defendant in a multidefendant suit settles, proof as to the settler's fault may still be presented at trial and the settler's equitable share determined so that the remaining defendants can seek to limit their own equitable share (see e.g. *Williams v Niske*, 81 NY2d 437, 440 [1993]); see also *Whalen v Kawasaki Motors*, 92 NY2d 288, 292 [1998]; *Meleo v Rochester Gas & Elec.*, 72 AD2d 83 [1979], *lv dismissed* 49 NY2d 797 [1980]).

Financial, however, has made a prima facie showing of entitlement to summary judgment dismissing the conversion claim as against it. As a threshold

issue, Financial's claim that plaintiff cannot recover on a cause of action sounding in conversion because the money that he claimed was converted was returned to him is without merit. "While defendants urge that there are no damages since they ultimately satisfied all payment obligations . . . , nominal damages may be awarded as a result of the conversion and plaintiffs should be given an opportunity to prove at trial any other damages they sustained as a result of the conversion" (*MacGuire v Elometa*, 189 AD2d 708, 708 [1993], citing *Silverstein v Marine Midland Trust Co.*, 1 AD2d 1037 [1956]).

The affidavit of Hughis, however, establishes that Financial's only role in the subject transaction was to prepare an application for a mortgage and to submit it to Financial, and that the only money that Financial received from the transaction was its brokerage fee. Plaintiff comes forward with no evidentiary showing to refute these contentions or to raise an issue of fact with regard to whether Financial was ever in possession of the funds that plaintiff alleges were converted.

### ***Conspiracy***

"New York does not recognize civil conspiracy to commit a tort as an independent cause of action" (*Sokol v Addison*, 293 AD2d 600, 601 [2002]). Thus, a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort (*Romano v Romano*, 2 AD3d 430, 432 [2003]). Accordingly, plaintiff can prevail on his cause of action for conspiracy only if he can establish his claims of conversion and/or fraud (see e.g. *Multiloan Mortgagee. Co. v Asian*

*Gardens*, 303 AD2d 658, 661 [2003][plaintiff's cause of action alleging conspiracy to defraud was properly dismissed, since plaintiff failed to offer proof that misrepresentations were made by the defendants and New York does not recognize civil conspiracy as an independent cause of action]; *Kestenbaum v Suroff*, 268 AD2d 560, 561-562 [2000]).

In support of his motion for summary judgment, plaintiff argues that Financial was a party to the claimed conspiracy because it played a role in securing the mortgage, without which the scheme to defraud and/or convert the proceeds of the sale of his property could not have been perpetrated; that there was a relationship between Alliance and Financial, since Sherman appeared at the closing as the attorney for Alliance, he incorporated Financial and he was designated as its agent for service of process; and Sherman admitted that he had attended another closing with Young in the past. In opposition, Financial argues that its only role in the transaction was to put together a mortgage application for Greene, which was then forwarded to Alliance; that it received no funds in addition to its agreed upon broker's fee in connection with the transaction; and that none of its agents had contact with any defendants, except Greene and/or his attorney and Alliance.

The facts as alleged by plaintiff are insufficient to demonstrate that Financial participated in a scheme to defraud him or to convert his funds. As discussed above, the causes of action sounding in fraud and conversion are being dismissed as against Financial. For the same reasons relied upon in granting Financial's

motion for summary judgment, the court finds that plaintiff has also failed to make a prima facie showing that any of the other defendants can be found liable to him for damages premised upon fraud and/or conversion.

More significantly, even assuming, arguendo, that the other defendants fraudulently withheld or converted proceeds of the sale from plaintiff, plaintiff has failed to allege any facts that would permit the court to conclude that Financial participated in the claimed conspiracy. In this regard, although Financial was admittedly the broker for the mortgage, plaintiff fails to set forth any allegations that raise an issue of fact to substantiate a finding that Hughis knew any other party defendant except Greene and agents of Alliance, which precludes a finding that the co-defendants conspired to defraud plaintiff or to convert his funds. Thus, in the absence of proof of any relationship between Financial and the other party defendants, the court cannot conclude that Financial participated in a conspiracy with the co-defendants. Accordingly, plaintiff's cause of action sounding in conspiracy also must fail.

### ***Plaintiff's RICO Claim***

In seeking to recover damages based upon RICO, plaintiff relies upon 18 USC §§ 134,<sup>3</sup> 1343<sup>4</sup> and 1961.<sup>5</sup>

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<sup>3</sup> Inasmuch as USC does not contain a § 134; plaintiff is alleging wire and mail fraud; and as is discussed more fully hereinafter, §§ 1341 and 1343 are often applied together, it is presumed that he intended to cite 18 USC § 1341, entitled frauds and swindles. That section provides that:

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“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.”

<sup>4</sup> 18 USC 1343 provides that:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.”

<sup>5</sup> 18 USC 1961 provides definitions, and states, as is relevant here, that:

“As used in this chapter [18 USC §§ 1961 et seq.]

“(1) ‘racketeering activity’ means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery,

## **The Law**

Although not specifically alleged, plaintiff is apparently relying on 18 USC § 1964 [c] to plead a private civil action pursuant to which he can recover treble damages for injury by reason of a violation of the substantive provisions of RICO<sup>6</sup>

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extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USC § 802]), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud),

“(3) ‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property;

“(4) ‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

“(5) ‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

“(9) ‘documentary material’ includes any book, paper, document, record, recording, or other material.”

<sup>6</sup> In this regard, the court also notes that no private right of action exists under the closely analogous mail fraud and wire fraud statutes, 18 USC §§ 1341 and 1343, given the absence of congressional intent to create such a right (*see Wisdom v First Midwest Bank*, 167 F 3d 402, 408 (1999), citing *Ryan v Ohio Edison Co.*, 611 F 2d 1170, 1178 [1979][finding the scant legislative history of the mail fraud statute to indicate an intent to punish dealers of fraudulent devices for using the United States mails but not an intent to create a private right of action]; *Bell v Health-Mor*, 549 F 2d 342, 346 [1977][finding no implied private remedy under mail fraud statute]; *Napper v Anderson, Henley, Shields, Bradford & Pritchard*, 500 F 2d 634, 636 [1974][same under wire fraud statute], *cert denied*, 423 US 837 [1975]).

(see *Sedima v Imrex Co.*, 473 US 479, 481 [1985]; see also *Holland Enters. v Mascaro & Sons*, 653 F Supp 1242, 1248 [1987], *affd* 829 F 2d 1120 [1987]).<sup>7</sup>

In seeking to establish mail and wire fraud, it has been noted that:

“18 USC §§ 1341 and 1343 prohibits the use of mail or wire communications for the purposes of executing a ‘scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses.’ To allege mail or wire fraud, a plaintiff must plead that the defendants engaged in ‘(i) a scheme to defraud (ii) to get money or property, (iii) furthered by the use of interstate mail or wires.’ *US v Autouori*, 212 F 3d 105, 115 (2d Cir 2000). Allegations of mail or wire fraud are subject to the particularity requirements of Rule 9 (b). See *DRS Trading Co., Inc. v Fisher*, No. 01 Civ 8028, 2002 US Dist LEXIS 12403, at (SDNY July 9, 2002).

“Pleading mail or wire fraud with the requisite particularity under Rule 9 (b) requires the plaintiffs to (i) specify the statements that they contend were false or misleading; (ii) explain why the statements were fraudulent; (iii) state when and where the statements were made; and (iv) identify the speaker or speakers. *Moore v Painewebber, Inc.*, 189 F 3d 165, 173 (2d Cir 1999). Allegations of intent are subject to a less strict standard. *Shields v Citytrust Bancorp.*, 25 F 3d 1124, 1128 (2d Cir 1994). Nevertheless, a plaintiff must allege facts that give rise to a strong inference of fraudulent intent. *Id.*”

(*Crawford & Sons, Ltd. Profit Sharing Plan v Besser*, 216 FRD 228, 234 [2003], *reconsideration denied* 298 F Supp 2d 317 [2004]). “In addition, where more than one

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<sup>7</sup> In addressing Financial’s motion for summary judgment, the court must also be cognizant of the possibility that plaintiff is attempting to transform a “garden variety fraud or breach of contract . . . into a vehicle for treble damages by resort to what [has been] referred to as ‘the litigation equivalent of a thermonuclear device’ -- a civil RICO suit” (*W. 79th St v Congregation Kahl Minchas Chinuch*, 2004 US Dist LEXIS 19501, 16 [2004][citations omitted]).

defendant is charged with fraud, the plaintiff must ‘particularize and prove each defendant’s participation in the fraud and each defendant’s enactment of the two necessary predicate acts’” (*W. 79<sup>th</sup> St.*, 2004 US Dist LEXIS 19501, 22 [citations omitted]; *accord id.*; *USA Certified Merchs. v Koebel*, 262 F Supp 2d 319, 332 [2003], *reconsideration denied* 273 F Supp 2d 501 [2003]). Also, “[a] plaintiff must prove that the defendant knowingly participated in the scheme and that the misrepresentations were material” (*see e.g. USA Certified Merchs.*, 262 F Supp 2d at 332, citing *US v Autuori*, 212 F 3d 105, 115 [2000]; *SQKFC v Bell Atlantic Tricon Leasing*, 84 F 3d 629, 633 [1996]). New York State courts have adopted the federal requirement that RICO claims must be pleaded with specificity (*see e.g. CFJ Assocs. v Hanson Indus.*, 274 AD2d 892, 896 [2000]).

In addition, in order to establish a cause of action for a RICO violation, plaintiff must also bring the complained of actions within the purview of the RICO statute. “‘Racketeering activity’ is defined as comprising specific enumerated crimes, including mail fraud, wire fraud, and bank fraud” (*Crawford & Sons, Ltd. Profit Sharing Plan*, 216 FRD at 234). To succeed on a RICO claim, plaintiff must establish:

“(1) that the defendant (2) through the commission of two or more acts (3) constituting a “pattern” (4) of “racketeering activity”(5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an “enterprise” (7) the activities of which affect interstate or foreign commerce.’ *Moss v Morgan Stanley, Inc.*, 719 F 2d 5, 17 (citing 18 USC §§ 1962 [a], 1962 [b] and 1962 [c]; *The Jordan (Bermuda) Inv. Co., Ltd. v Hunter Green Invs. Ltd.*, 154 F Supp 2d 682, 690 [SDNY 2001]).”

(*W. 79<sup>th</sup> St.*, 2004 US Dist LEXIS at 13).

More specifically, it has been held that a plaintiff must allege a pattern of at least two acts of racketeering activity undertaken within ten years of each other; the pattern element of a RICO claim requires a showing of continuity plus relationship (*G-I Holdings v Baron & Budd*, 238 F Supp 2d 521, 543 [2002]).

“While this definition of ‘pattern of racketeering activity’ suggests that only two predicate acts are necessary, ‘the requirements of relatedness and continuity prevent the application of RICO to isolated and sporadic criminal acts.’ . . . ‘The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one “racketeering activity” and the threat of continuing activity to be effective.’”

(*Casio Computer Co. v Sayo*, 1999 US Dist LEXIS 14675, 35-36 [1999][citations omitted]).

Further:

“In *HJ Inc.*, the Supreme Court parsed out the two components of the continuity requirement: “Continuity” is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.’ 492 US at 241-42. *See also GICC Capital Corp.*, 67 F 3d at 466 (‘a plaintiff in a RICO action must allege either an “open-ended” pattern of racketeering activity [i.e., past criminal conduct coupled with a threat of future criminal conduct] or a “closed-ended” pattern of racketeering activity [i.e., past criminal conduct “extending over a substantial period of time”].’) *Batra v Pace Univ.*, 1998 US Dist LEXIS 15269, 1998 WL 684621, at 5 (1998).”

(*Renner v Chase Manhattan Bank*, 1999 US Dist LEXIS 978, 22-23, Fed Sec L Rep (CCH) P90438, RICO Bus Disp Guide P9679 [1999], *affd* 85 Fed Approximately 782 [2000]; *see*

also *Jordan (Berm.) Inv. Co.*, 154 F Supp 2d at 695; *Crawford & Sons, Ltd. Profit Sharing Plan*, 216 FRD at 234).

Plaintiff also must plead each defendant's participation in the “operation or management” of an “enterprise” as those terms are defined for the purposes of the statute (*G-I Holdings*, 238 F Supp 2d at 546, citing *Dietrich v Bauer*, 76 F Supp 2d 312, 347 [1999]). “Where, as here, the alleged enterprise ‘primarily conducts a legitimate business, there must be some evidence from which it may be inferred that the predicate acts were the regular way of operating business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity’” (*id.* at 544, quoting *Cofacredit v Windsor Plumbing Supply Co.*, 187 F 3d 229, 243 [1999]).

### ***Discussion***

Applying these standards to the instant case, the court concludes that the plaintiff’s claims are insufficient to establish a RICO violation.

Most significantly, plaintiff fails to plead his cause of action with the requisite specificity in that he does not specify the particular statements that he claims were false, he does not give any particulars with regard to why the statements were fraudulent, he does not allege when and where the statements were made and he does not identify the person(s) responsible for those statements. Plaintiff also fails to plead or establish the existence of an enterprise as distinct from the defendants, since he fails to offer any evidence from which the court can conclude that defendant’s alleged fraudulent actions were their regular way of

operating business, or that the nature of the acts themselves implies a threat of continued criminal activity.

Finally, plaintiff has also failed to establish a pattern of activities. Herein, the actions complained of spanned a brief period of approximately one month and pertained only to the alleged scheme to defraud plaintiff. “[W]here, as here, the alleged scheme had as its goal the fraudulent one-time inducement of one victim to part with his money, the allegations are insufficient to state a claim of open-ended continuity” (*Renner*, 1999 US Dist LEXIS 978, 24, citing *Schlaifer Nance & Co. v Estate of Warhol*, 119 F 3d 91, 97-98 [1997])[the allegedly fraudulent acts, although they spanned over three years, were not continuous for RICO purposes because they were acts related to a single contract and single scheme to defraud]; *China Trust Bank v Standard Chartered Bank*, 981 F Supp 282, 287 [1997][the Court cannot infer a threat of repeated fraud from an alleged single scheme]).

Similarly, plaintiff cannot demonstrate close-ended continuity, since it has been held that “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct” (*Renner*, 1999 US Dist LEXIS 978, 25, citing *HJ Inc.*, 492 US at 242; see generally *Niles v Palmer*, 1999 US Dist LEXIS 17759, 22-23 [1999])[since the Supreme Court decided *HJ Inc.*, the Second Circuit has never held a period of less than two years to constitute a substantial period of time, as contemplated by the RICO statute]; see also *Casio Computer Co. v Sayo*, 2000 US Dist LEXIS 15411, 2000 WL 1877516 [2000][a

single purpose/single victim scheme lasting sixteen months until being discovered did not confer closed-ended continuity]; *Qualis Care v Hall*, 1999 US Dist LEXIS 13398, 1999 WL 683563, 6,7 [1999]).

Accordingly, plaintiff's cause of action as premised upon alleged violations of RICO is dismissed. From this it follows that plaintiff's demand for treble damages and attorneys' fees, as predicated upon RICO violations, must also be dismissed.

### **Punitive Damages**

#### ***The Law***

"Punitive damages are allowable in tort cases . . . so long as the very high threshold of moral culpability is satisfied" (*Giblin v Murphy*, 73 NY2d 769, 772 [1988]). More specifically,

"Punitive damages are awarded in tort actions '[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime' (Prosser and Keeton, Torts § 2, at 9 [5th ed 1984]). That author also teaches that:

"Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton' (Prosser and Keeton, Torts § 2, at 9-10 [5th ed 1984])."

(*Prozeralik v Capital Cities Communs.*, 82 NY2d 466, 479 [1993]; accord *Morsette v "The Final Call"*, 309 AD2d 249, 254 [2003][in order for punitive damages to be awarded,

plaintiff must demonstrate that defendant's conduct was intentional and deliberate, had fraudulent or evil motive, and had the character of outrage frequently associated with crime]).

Further, it is well settled that since a demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud, punitive damages cannot be recovered where a plaintiff is unable to assert an underlying cause of action upon which a demand for punitive damages can be grounded (*see e.g. Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603, 616-617 [1994], citing *Hubbell v Trans World Life Ins. Co.*, 50 NY2d 899, 901 [1980]; *Lee Mfg. v Chemical Bank*, 186 AD2d 548, 550 [1992]).

### ***Discussion***

Applying the above principles of law, plaintiff's demand for punitive damages must be dismissed, since all of his underlying claims as against Financial have been dismissed. In the alternative, the court finds that the conduct complained of does not rise to the necessary level to entitle plaintiff to recover such damages (*Wilson v City of New York*, 7 AD3d 266, 267 [2004]; *cf. Freeman v Port Auth.*, 243 AD2d 409, 410 [1997]).

### ***Attorneys' Fees***

"The rule in New York remains that 'attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule'" (*Glenn v Hoteltron Sys.*, 74 NY2d 386, 393 [1989], quoting *Matter of A. G. Ship Maintenance v Lezak*, 69 NY2d

1, 5 [1986]; accord *Crispino v Greenpoint Mortgagee.*, 2 AD3d 478, 479-480 [2003], citing *Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [1998]). Further, as general rule, “‘only a prevailing party is entitled to recover an attorney’s fee’ and ‘to be considered a prevailing party, a party must be successful with respect to the central relief sought’” (*Hempstead v Taliercio*, 8 AD3d 476 [2004], quoting *Fatsis v 360 Clinton Ave. Tenants.*, 272 AD2d 571 [2000]; see also *Nestor v McDowell*, 81 NY2d 410, 415 [1993], reconsideration denied 82 NY2d 750 [1993]; *Hooper Assocs.*, 74 NY2d 487; *25 E. 83 v 83<sup>rd</sup> St. Assocs.*, 213 AD2d 269 [1995]; see e.g. *Gordon v Village of Monticello*, 87 NY2d 124 [1995]; *Duell v Condon*, 84 NY2d 773, 778 [1995]; *Gallin v Stafford*, 9 NY2d 894 [1961]).

Accordingly, plaintiff herein is not entitled to an award of attorneys’ fees from Financial, since he has pointed to no contract provision, statute or court rule that authorizes such an award and because he has not been successful in maintaining any cause of action as against Financial.

### **Conclusion**

Plaintiff’s motion for summary judgment as against Financial is denied and Financial’s cross motion for summary judgment dismissing the action as against it is granted.

The foregoing constitutes the order, decision and judgment of this court.

ENTER,



J. S. C.

**MELVIN S. BARASCH**