

**Talkin, Muccigrosso & Roberts v Florio, Perrucci,
Steinhardt & Fader, LLC**

2009 NY Slip Op 32114(U)

September 11, 2009

Supreme Court, New York County

Docket Number: 107605/07

Judge: Richard F. Braun

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. RICHARD F. BRAUN**
J.S.C.
Justice

PART 23

Index Number : 107605/2007
TALKIN, MUCCIGROSSO & ROBERTS
VS.
FLORIO, PERRUCCI, STEINHARDT, et al
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/14/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion ~~to~~/for Summary Judgment

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted to the extent of awarding the moving defendant's summary judgments dismissing the causes of action ^{against them} for breach of contract, conversion, breach of fiduciary duty, aiding and abetting, and an accounting, and it is further ~~ORDERED~~ that the Clerk shall enter judgment accordingly, and the remaining claims are severed and shall continue.

This constitutes the decision and order of the Court. See separate Opinion.

FILED
SEP 16 2009

COUNTY CLERK'S OFFICE
NEW YORK
J.S.C.

Dated: New York, New York, September 9, 2009

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

-----X
TALKIN, MUCCIGROSSO & ROBERTS,

Index No. 107605/07

Plaintiffs,

OPINION

-against-

FLORIO, PERRUCCI, STEINHARDT & FADER, LLC,
JAMES FLORIO, MICHAEL J. PERRUCCI,
DOUGLAS J. STEINHARDT, PAUL T. FADER,
CHRISTOPHER M. PERRUCCI, FISCHBEIN, BADILLO,
WAGNER AND HARDING, LLP., RICHARD
FISCHBEIN, HERMAN BADILLO, BRUCE
LEDERMAN, STUART GRUSKIN, HUGH HELLER,
and KENNETH SCHWARTZ, et al.

Defendants.

-----X

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RICHARD F. BRAUN, J.:

Plaintiff asserts causes of action for breach of contract, quantum meruit, unjust enrichment, money had and received, conversion, breach of fiduciary duty, aiding and abetting, and an accounting. All defendants (defendants), except defendant Bruce Lederman, move for summary judgment dismissing the complaint. By stipulation, the action has been severed as to defendant Bruce Lederman, and is stayed as to him because of his bankruptcy filing.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 382 [2005]; *Silverman v Perlbiner*, 307 AD2d 230 [1st Dept 2003]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The party moving for summary judgment has the burden on the motion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

[1986]; *Jaroslawicz v Prestige Caterers*, 292 AD2d 232, 233 [1st Dept 2002]).

The contract is a March 13, 2001 letter agreement between plaintiff and the law firm Fischbein•Badillo•Wagner•Harding, in which the latter agreed to pay the former a referral fee of 1/3 of the latter's fees. Performance of a contract is to be regulated under the laws of the place where the performance is to occur (*Employers' Liab. Assur. Corp. v Aresty*, 11 AD2d 331, 333 [1st Dept 1960], *aff'd upon majority op below* 11 NY2d 696 [1962]). As the contract was performed in the New Jersey courts, New Jersey law applies as to performance of the contract.

The New Jersey Rules of Professional Conduct (RPC) generally bar a lawyer from paying a referral fee to another person (RPC §§ 7.2 [c]; 7.3 [d]). A reasonable referral fee may be paid to a referring attorney where the referral is made to a certified attorney (RPC § 1:39.6 [d]). Where the attorney to whom the referral is made is not certified, a contractually agreed to fee may not be paid (*see Bruno v Gale, Wentworth & Dillon Realty*, 371 NJ Super 69, 72 [2004]).

Defendants explicitly state that the attorneys to whom the referral was made were not certified trial attorneys. Plaintiff has not demonstrated that there is any material question of fact that requires a trial on the breach of contract cause of action. Nor has plaintiff shown that summary judgment should not be granted because discovery is needed, pursuant to CPLR 3212 (f) (*see Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325 [1st Dept 2004]). Thus, summary judgment has been awarded to defendants dismissing the first cause of action, by this court's September 9, 2009 decision and order.

Plaintiff may have the right to recover under a quantum meruit claim for the services that plaintiff performed (*Bruno v Gale, Wentworth & Dillon Realty*, 371 NJ Super at 72). "... '[i]n order to make out a claim in quantum meruit, a claimant must establish (1) the performance of the services

in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services' (citations omitted)." (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD 2d 479, 484 [1st Dept 1991].) Defendants reverse the burden of proof on the branch of their summary judgment motion as to this claim. They do not demonstrate that the amount of money that was paid to plaintiff was reasonable compensation for the services that plaintiff provided. Defendants do not show the number of hours that plaintiff worked, the experience of plaintiff's attorney(s) who did the work, and what would be a fair hourly rate for that time.

An unjust enrichment claim requires a court to determine whether it would be contrary to equity and good conscience to let the defendant keep what the plaintiff seeks to obtain (*see Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]). Defendants also have not shown that summary judgment should be awarded dismissing this cause of action.

The cause of action for money had and received similarly is where there is no contract and a person possesses money that belongs to another that in equity and good conscience the former should not retain (*Parsa v State of New York*, 64 NY2d 143, 148 [1984]; *see State of New York v International Asset Recovery Corp.*, 56 AD3d 849, 852 [3rd Dept 2008]). Defendants have not demonstrated that this cause of action should be dismissed.

"Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights' (citations omitted)." (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002]; *accord Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276, 277 [1st Dept 2006].) Conversion can be found for specifically identifiable money that is "subject to an obligation to be returned or to be otherwise treated in a particular

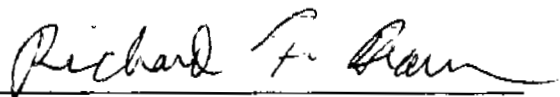
manner (citation omitted).” (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995].) This action does not relate to goods or specifically identifiable money. Thus, a conversion cause of action does not lie here, and therefore the claim has been dismissed.

Breach of fiduciary duty consists of a fiduciary relationship, misconduct by the defendant(s), and damages caused by that misconduct (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2nd Dept 2007]). Plaintiff and defendants did not have a fiduciary relationship under the circumstances here, so the claim has been dismissed.

In the cause of action for aiding and abetting, plaintiff refers both to the alleged fiduciary duty, and aiding and abetting a breach of contract. To have a claim for aiding and abetting a breach of fiduciary duty, there must be such a breach, the defendant(s) must have participated in the breach, and damages resulting therefrom (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006]). As there was no breach of fiduciary duty, to the extent plaintiff may be pleading aiding and abetting such a breach the claim falls. There is no cause of action recognized in New York for aiding and abetting a breach of contract (*Pryor v City of New York*, 63 AD3d 508, 509 [1st Dept 2009]). Thus, this cause of action has been dismissed also.

Plaintiff’s last cause of action is for an accounting. Such a right is derived from a fiduciary or confidential relationship and the breach of the duty arising from that relationship regarding property in which the party who seeks the accounting has an interest (*Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]). As there is no such relationship, plaintiff does not have any right to an accounting, and summary judgment has been awarded to defendants dismissing that claim.

Dated: New York, New York
September 11, 2009


RICHARD F. BRAUN, J.S.C.

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