

<b>Ghiz v Schreck and Co.</b>
2013 NY Slip Op 31516(U)
July 10, 2013
Sup Ct, New York County
Docket Number: 158805/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 158805/2012
GHIZ, DDS, RONALD
vs.
SCHRECK AND COMPANY, CPA'S,
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. 158805/12
MOTION DATE
MOTION SEQ. NO. 002

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1, 2, 3

Answering Affidavits — Exhibits No(s). 4, 5

Replying Affidavits No(s). 6

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 7/10/13

HON. EILEEN A. RAKOWER J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE



cause of action).

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(5) the cause of action may not be maintained because of ... statute of limitations . . .; [and]

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (see CPLR §3211[a][7]).

The sixth cause of action alleges civil conspiracy to convert funds against Scarnati. The Complaint alleges “at some time between 2007 to date,” Scarnati, along with defendant Anthony Vallario, “learned of sufficient facts such that [they] knew or should have known that defendant Carolina Vallario was stealing money from Plaintiffs,” received money known to be stolen “between 2007 to date,” “participated in a civil conspiracy to steal money from plaintiffs,” and based on these allegations, “converted plaintiffs’ funds.”

New York does not recognize an independent cause of action for conspiracy to commit a civil tort (*see Romano v. Romano*, 2 A.D. 3d 430, 432 [2<sup>nd</sup> Dept 2003]) (“a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort”).

“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.” *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (N.Y. 2006).

CPLR §214[3] mandates that a cause of action for conversion be commenced within three years of the date that the action accrues. The three year statute of limitations “normally runs from the date the conversion allegedly took place. Where possession is originally lawful, a conversion does not occur until the owner makes a demand for the return of the property and the person in possession of the property refuses to return it.” *In re Estate of King*, 305 A.D. 2d 683, 683 [2nd Dept 2003]. The “Statute of Limitations alleging conversion by a fiduciary only began to run when plaintiffs discovered facts upon which to demand the return of property allegedly converted.” *Elghanayan v. Victory*, 192 A.D. 2d 355, 356 [1<sup>st</sup> Dept 1993].

Here, neither the Complaint nor the opposing affidavit submitted by plaintiff Ronald Ghiz state when Plaintiffs first discovered facts upon which to demand the return of the funds allegedly converted. The Complaint alleges that Vallario stole money during her employment with Plaintiffs from March 2007 through August 2009, and there are no other allegations that any theft occurred or any funds were converted after Vallario’s employment was terminated. In his opposing affidavit, Ghiz avers that that Vallario was convicted on June 9, 2011 of Grand Larceny of the Third Degree for the theft/embezzlement of over \$400,000 from Plaintiffs during the course of her employment. The Certificate of Disposition of Indictment, which is annexed to plaintiff Ronald Ghiz’s opposing affidavit, indicates that Vallario was arrested on November 22, 2010. However, nowhere in Ghiz’s affidavit does he state when Plaintiffs first discovered facts of the conversion. While Plaintiffs argue that it was not until the date of Vallario’s conviction that they understood the “full nature of Vallario’s actions,” that is not the applicable standard that is applied in determining the accrual date on a conversion claim.

Dismissal of Plaintiffs’ sixth cause of action as against Scarnati is therefore warranted based on Plaintiffs’ failure to plead factual allegations that support the timely commencement of their conversion claim.

The seventh cause of action alleges civil conspiracy to commit fraud against Scarnati. It alleges that Scarnati and Anthony Vallario “participated in scheme [sic] to fraudulently enter seemingly legitimate business transactions onto the financial books of plaintiffs to hide and or conceal the true nature of the transactions which were part of said defendants’ scheme to convert plaintiffs’ funds to their own personal gain and benefit.”

To establish a claim of civil conspiracy, the plaintiff must “demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties’ intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury.” *Abacus Fed. Sav. Bank v. Lim*, 75 A.D. 3d 472, 474 [1<sup>st</sup> Dept 2010]).

“The elements of a cause of action for fraud are (1) the false representation or concealment of a material existing fact, (2) scienter, (3) deception, (4) reliance, and (5) injury.” *House of Spices (India), Inc. v SMJ Servs., Inc.*, 2011 N.Y. Misc. LEXIS 1922 (N.Y. Misc. 2011). “[E]ach of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that ‘the circumstances constituting the wrong shall be stated in detail.’” (*Id.*)(citations omitted).

Here, the Complaint does not allege any allegations to sustain a fraud claim as against Scarnati, or a civil conspiracy to commit fraud. The Complaint states only that Scarnati “participated in scheme [sic] to fraudulently enter seemingly legitimate business transactions onto the financial books of plaintiffs to hide and or conceal the true nature of the transactions which were part of said defendants’ scheme to convert plaintiffs’ funds to their own personal gain and benefit.” The Complaint, however, does not plead any detail to alert Scarnati to the nature of the fraud as alleged against her specifically.

In his opposing affidavit, plaintiff Ghiz states that Scarnati negotiated and deposited into her bank account checks dated May 29, 2008, July 17, 2008, July 17, 2008, July 30, 2008, December 2, 2008, that had been written to “Cash” on Plaintiffs’ dental practices account. Ghiz states that these checks were not authorized by him to be paid to Scarnati or any one else. Ghiz states that the signature that appears on the checks was forged with an old stamp that no one had authority to use. However, this allegations alone are insufficient to sustain a claim of fraud as against Scarnati, or a claim of civil conspiracy to commit fraud. As for a claim for fraud, these allegations do not demonstrate “a false representation or concealment of material existing fact” by Scarnati, or the other required elements.

As for their civil conspiracy to commit fraud claim, Plaintiffs have failed to plead any alleged agreement between Scarnati and Vallario to commit the acts that Vallario allegedly committed which form the basis of Plaintiffs' Complaint.

Wherefore, it is hereby,

ORDERED that defendant Elvira Scarnati's motion to dismiss is granted, and the Complaint is dismissed as against Eliva Scarnati, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 7/10/13

  
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EILEEN A. RAKOWER, J.S.C.  
HON. EILEEN A. RAKOWER