Gascoyne v Avellino
2013 NY Slip Op 32203(U)
September 16, 2013
Supreme Court, New York County
Docket Number: 111722/2009
Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD PART 49
Justice

DANIEL C. GASCOYNE, *et al.*,

Plaintiffs,

-against-

FRANK J. AVELLINO, *et al.*,

Defendants.

INDEX NO. 111722/2009
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the forgoing papers, it is ordered that this motion for summary judgment is decided in accordance with the accompanying decision and order.

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

Dated: September 16, 2013

O. PETER SHERWOOD, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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DANIEL C. GASCOYNE, et. al.

Plaintiffs,

DECISION AND ORDER
Motion Seq. No.: 004

- against -

Index No. 111722/2009

FRANK J. AVELLINO, et. al.

Defendants.

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O. PETER SHERWOOD, J.:

This action is alleged to have a connection to the Bernard L. Madoff ("Madoff") Ponzi scheme. Plaintiffs allege that defendant Frank Avellino ("Avellino"), Madoff's long-time business associate, operated defendant Kenn Jordan Associates ("KJA") and various other entities as feeder funds to Madoff. As such, plaintiffs claim that Avellino fraudulently, negligently and/or in breach of his fiduciary duties to plaintiffs mismanaged plaintiffs' funds by investing them or allowing them to remain invested with Madoff. Alternatively, plaintiffs assert that Avellino never invested their funds with Madoff or anyone else, but converted them to his own use with the assistance of the co-defendants.

BACKGROUND

On this, defendants' motion for summary judgment, there is a wide discrepancy between the "undisputed facts" as alleged in the two Commercial Division Rule 19-a statements submitted by the parties. Because this is defendants' motion for summary judgment, the following statement of facts are drawn principally from defendants' Rule 19-a Statement, the parties that have the burden to establish that there are no triable issues of fact.

Kenn Jordan ("Jordan"), Avellino's long-time friend and accounting client, formed KJA, a Florida limited partnership, in 1992, together with several friends, including Grace DeLury ("DeLury"), now deceased, and her sister Margaret Gascoyne. KJA was established as a "pass-through partnership"by which the KJA partners pooled their funds and each of the partners

agreed to have such funds invested by Jordan on their behalf in a discretionary account with Bernard L. Madoff Investment Securities ("BLMIS") (Avellino Aff. Exhibits "A" through "C").

KJA was allegedly operated as follows: gains and losses realized from the BLMIS investments, less expenses, were allocated to each partner's capital account on a pro rata basis. Quarterly performance statements of the partnership's BLMIS account were provided to the partners. Partners could obtain distributions from their capital accounts on thirty days' notice (defendants' Rule 19-a Statement ¶4). In a letter dated December 10, 1993, Jordan explained to the limited partners the terms of the 1993 allocation of gains and losses and allocation of their pro rata share to their respective capital accounts (*id.*, Exhibit "D"). Jordan handled such administrative duties for KJA.

In 1998, after Jordan was diagnosed with cancer, he asked Avellino to assume the administrative duties at KJA. By letter dated March 18, 1999, Jordan advised DeLury that as of April 1, 1999, all inquiries, requests for checks or any other questions regarding KJA should be directed to Avellino, whom Jordan described as his "friend, confidant, financial advisor and accountant for over forty years." Jordan died later that year (*id.* ¶¶ 5-6). Avellino agreed to assume the administrative duties of KJA. When Jordan died, KJA was dissolved by operation of law but Avellino continued doing business under the name KJA. DeLury and Margaret Gascoyne continued to place additional funds with KJA and to make withdrawals. They also established new accounts on behalf of family members, namely, Margaret Gascoyne's sons, Daniel Gascoyne and Terrence Gascoyne and the children of Edna Gutierrez.

DeLury died on November 7, 2008. By letter dated November 12, 2008, Daniel Gascoyne and Edna Gutierrez, as Co-Trustees for the Grace DeLury Trusts and Estate, advised Avellino to value and liquidate DeLury's KJA account no later than December 10, 2008, and to wire the funds to a trust account at Wachovia Bank.

On December 11, 2008, Madoff was arrested for securities fraud (Duffy Affirm. In Opp. Exhibit "13"). All BLMIS accounts were frozen by the Securities and Exchanges Commission ("SEC") as of December 12, 2008 (*id.* Exhibit "15"). By letter dated December 31, 2008, Avellino advised Daniel Gascoyne that all of KJA's assets were held in a securities account with BLMIS, which the SEC had frozen due to Madoff's arrest. Avellino also advised Mr. Gascoyne

to consult with his accountant as he might be entitled to a tax deduction and that he should consult various insurance policies as they might cover theft or embezzlement losses (*id.*, Exhibit 14).

The Present Action

On August 17, 2009, plaintiffs' commenced this action against fifteen named defendants including Avellino, his wife, Nancy Avellino, other Avellino family members, several family partnerships and a charitable foundation, as well as Avellino's former accounting partner, Michael S. Bienes ("Bienes"). Of the various plaintiffs named, only DeLury and Margaret Gascoyne actually invested in KJA. DeLury set up an account at KJA on behalf of the children of her sister Edna Gutierrez. The summons and complaint were served on Avellino and his wife Nancy only.

The complaint alleges four causes of action: breach of fiduciary duty against all defendants (first cause of action); fraud against Avellino and aiding and abetting fraud as against the other defendants (second cause of action); negligent misrepresentation against Avellino and KJA (third cause of action); and conversion against all defendants (fourth cause of action).

The complaint alleges that after Jordan's death, Avellino continued to operate KJA and to raise funds from investors including plaintiffs. Due to his "intimate association" with Madoff, Avellino had advance notice of the collapse of Madoff's Ponzi scheme. Avellino either converted plaintiffs' funds for his own use or funneled them to Madoff in the face of numerous "red flags" which he intentionally, recklessly or negligently ignored; Avellino at Madoff's instructions failed to register as a securities broker or registered representative; there was no independent custodian who could verify the existence and value of plaintiffs' investments as Madoff's companies were both advisor and custodian for the investments; Madoff did not permit any performance audits or provide any kind of detailed information about its trading strategy; Madoff did not file disclosures of its holdings with the SEC; in both May 1999 and again in November 2005, a whistleblower submitted detailed information to the SEC demonstrating that Madoff was likely running the world's largest Ponzi scheme; and numerous companies that had conducted their own due diligence decided not to invest with Madoff because of these red flags. Alternatively, plaintiffs assert that Avellino set up a complex web of entities through which

investors' monies, including plaintiffs, were moved. Like Madoff, Avellino never sent plaintiffs detailed statements of their investment transactions and, although Avellino claims that all such funds were invested with Madoff, Avellino has never verified this claim. Plaintiffs' contend that as their investment manager and/or custodian of their funds, Avellino and the other defendants owed plaintiffs' fiduciary duties which they breached.[1]

III. DISCUSSION

A. Cross Motion to Strike

Plaintiffs' cross move to strike Avellino's affidavit submitted in support of defendants' motion for summary judgment claiming that Avellino withheld information at his deposition related to the same information contained in his affidavit by invoking the Fifth Amendment privilege. That information is relevant to this action and, therefore, Avellino should not be permitted to submit a self-serving affidavit in support of summary judgment. Plaintiffs further seek to have the affidavit of Avellino's expert, Boris Onefater, a CPA, stricken as it is based on an interview with Avellino with respect to the same information.

In *LaVerne v Incorporated Village of Laurel Hollow,* 18 NY2d 365, 368 (1966), upon which plaintiffs' rely, the Court of Appeals stated:

> The privilege against self incrimination was intended to be

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[1]Madoff pleaded guilty to 11 felony counts and was sentenced on June 29, 2009 to 150 years in prison. On or about December 10, 2010, the Trustee of the liquidation of BLMIS commenced an action in the U.S. Bankruptcy Court of the S.D.N.Y. against Avellino, his wife Nancy Avellino, Avellino's former accounting partner, Michael Bienes, and others alleging that for decades they dominated, controlled, perpetuated and benefitted from Madoff's Ponzi scheme; operated Madoff's first feeder fund known as Avellino & Bienes ; depended on Madoff to fund their lavish lifestyles, lining their pockets with other people's money and enabling the Ponzi scheme to prosper; and as a result of an SEC investigation in 1992, Avellino & Bienes knew or should have known that they were participating in a fraud based upon the fact that BLMIS had created a false Avellino & Bienes customer account with backdated account statements detailing fabricated trades for the purpose of covering a shortfall of $29.8 million between money Avellino & Bienes owned investors and the balances reflected in BLMIS accounts. The Trustee alleged further that Avellino & Bienes spent the vast majority of their careers investing and funneling money to Madoff. Plaintiff seeks to have the court take judicial notice of Madoff's Trustee's complaint against Avellino and consider it in opposition to defendants' summary judgment motion. Defendants oppose such consideration, arguing that it is not an official record and constitutes inadmissible hearsay.

> used solely as a shield, and thus a plaintiff cannot use it as a sword to harass a defendant and to effectively thwart any attempt by defendant at a pretrial discovery proceeding to obtain information relevant to the cause of action alleged and possible defenses.

The Fifth Amendment privilege is a "shield against compulsory self-incrimination", not a sword to wield selectively" *In re Estate of Hutchinson*, 13 AD 3d 704, 706 (3d Dept 2004) (internal quotation deleted). Courts have held that while a plaintiff has a right to invoke the Fifth Amendment privilege against self incrimination, such plaintiff is not "entitled to continue to maintain [an] action if the assertion of the privilege prevent[s] the defendant from properly defending the lawsuit" *Miller v United Parcel Serv.*, 143 AD2d 820 (2d Dept 1988).

Generally, the claim is asserted by a nonparty witness or a defendant in court involuntarily, seeking only to defend (*see Levine v Bornstein*, 13 Misc 2d 161, 164 [Sup Ct NY Co 1958]). Where in a civil case, a party has asserted the privilege, additional considerations should be taken into account when deciding whether to grant summary judgment (or to draw an adverse inference) in favor of the opponent (*see In re Inflight Newspapers, Inc. v Joffe*, 423, BR 6, 16-17 [Banks EDNY 2010]). Here, the concern is whether granting summary judgment or drawing an adverse inference imposes an unconstitutional cost on the exercise of the privilege (*see id*). Where the witness claims the privileges, "an adverse inference may be drawn . . . but prior to drawing an inference against the party asserting the privilege, courts must examine whether undue prejudice exists" *id.*

Plaintiffs urge the court to strike Avellino's affidavit and that of his expert. Alternatively, the court should find that such affidavits raise issues of credibility which are for the fact-finder to determine as they are self-serving and refer to matters exclusively within Avellino's knowledge.

Defendants oppose the cross motion, stating that *LaVerne* is inapposite to the facts here . According to defendants, Avellino did not invoke his Fifth Amendment privilege to prevent plaintiffs from obtaining during his deposition information relevant to their claims in this case. Specifically, defendants maintain that Avellino answered all questions posed during his deposition related to his relationship with plaintiffs, statements made or not made to plaintiffs

relating to plaintiffs' investments and other relevant issues related to plaintiffs' case against him. Defendants claim that Avellino exercised his Fifth Amendment privilege as to questions concerning his alleged dealings with Madoff and BLMIS, issues which defendants claim are not relevant to this action or to this motion for summary judgment. In addition, defendants contend that no credibility issues are raised as plaintiffs have not submitted any personal affidavit on this motion and the statements in Avellino's affidavit relate only to plaintiffs' investments, statements Avellino made or did not make relative to plaintiffs' investments and the investment advice that was or was not provided by Avellino to plaintiffs.

The affidavits will not be struck because they do not address the subjects about which the privilege is being invoked. Those subjects -- Avellino's relationship with Madoff and BLMIS -- are relevant to the issues in this case. However, it is not clear that Avellino's refusal to respond to questions at a deposition is likely to impede plaintiffs' ability to establish their claims. Given the substantial documentary and other evidence in this record, no real purpose is served by striking the affidavits. The affidavits will be viewed in the context of the entire record.

B. Defendants' Motion for Summary Judgment[2]

1. Standard of Review

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see*, CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957])). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see*, *Alvarez v Prospect Hosp.*, *supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]. Absent a sufficient showing, the court should deny the

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[2]Plaintiffs have withdrawn their claims of aiding and abetting breach of fiduciary duty, and aiding and abetting fraud as against defendant Nancy Avellino (plaintiffs' Memo of Law in Opp. p. 13, fn. 3, p. 17, fn4. While not specifically withdrawing the conversion claim against Nancy Avellino, no arguments are raised as to such cause of action. Thus, such claim as against her is deemed abandoned.

motion without regard to the strength of the opposing papers (*see* Winegrad v New York Univ. Med. Ctr.., 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp*, 34 NY2d 338 [1974]; *see*, *Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970].

2. Breach of Fiduciary Duty

The elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary relationship between the plaintiff and defendant, (2) misconduct by the defendant, and (3) damages that were directly caused by defendant's misconduct (*see Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). To establish a fiduciary relationship, a plaintiff must show that the defendant was '"under a duty to act for or to give advice for the benefit'" of the plaintiff '"upon matters within the scope of the relation'" (*EBC I, Inc. v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts § 874, Comment a). The relationship is fact specific and "is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*id.*; *see HF Mgmt. Servs., LLC v Pistone,* 34 AD3d 82, 85 [1st Dept 2006]).

In the complaint, plaintiffs assert that Avellino and the other defendants owed a fiduciary duty to plaintiffs "both directly as investment managers of Plaintiffs' money or indirectly as custodians and recipients of Plaintiffs' investment funds". Avellino contends that the record establishes that he was not the investment manager of KJA. He relies on his own sworn affidavit

in which he states that "at no time did I make investment decisions on behalf of KJA and at no time did I hold myself out as an investment advisor or manager or make representations to plaintiffs otherwise." He also states that his wife Nancy had no involvement in the operation of KJA nor did she have any dealings with the plaintiffs. Nancy Avellino also submits an affidavit claiming that she had no dealings with plaintiffs, and no substantive conversations with any of the plaintiffs regarding Madoff, BLMIS, or investing in general. Defendants contend that plaintiffs DeLury and Gascoyne provided funds to Jordan long before Avellino became the fund administrator and each knew that all of her funds were being invested in a BLMIS discretionary fund, an account over which Madoff, not Avellino, would have full discretion.

Plaintiffs respond that under the facts in the record, Avellino was an investment advisor to plaintiff investors with sole control over plaintiffs' assets and investments in KJA and with sole discretion to invest the funds he received from plaintiffs as he chose. For such services, Avellino received compensation in the form of a 20% management fee. He also received compensation from Madoff through KJA. On such facts, plaintiffs aver that Avellino was an investment advisor to plaintiffs which gave rise to a fiduciary relationship with them. Alternatively, plaintiffs' claim that Avellino also owed plaintiffs a fiduciary duty whether he is deemed to be a general partner of KJA, a successor to KJA, a fund administrator or an investment advisor as he had superior knowledge with respect to the investment of their monies with BLMIS and misled plaintiffs with regard to such investment.

In *Abrahamson v Fleschner,* 568 F.2d 862 (2d Cir. 1971), *overruled in part on other grounds by Transamerica Mtg. Advisors, Inc. v Lewis*, 444 U.S. 11 (1979), the Second Circuit held that portfolio managers for hedge funds who manage investor money in return for a percentage of the profits by directing the funds to purchase and sell securities fall within the definition of investment advisor for purposes of the federal Investment Advisers Act. The court found that the general partners in the hedge fund who were sending false statements about the firm's holdings to limited partner investors were investment advisors because they were to receive compensation for managing the investments in the hedge fund. Similarly, in *U.S. v Onsa,* 2013 WL 789182 (E.D.N.Y. 2013), the court held that a hedge fund portfolio manager who provided investment advice to investors by managing their portfolios, determining which

securities the fund should purchase with the investors' money, preparing and distributing account statements with inflated values which misled investors as to the advisability of keeping their money in the fund, and received compensation for the services he provided to the fund, was providing investment advice.

Whether a fiduciary relationship exists between parties is necessarily fact specific (*see Oddo Asset Mgt. v Barklays Bank PLC*, 19 NY 3d 584 [2012]). "Unlike a broker who handles a non-discretionary account, the broker handling a discretionary account becomes the fiduciary of his customer in a broad sense" *Dimsey v Bank of NY*, 14 Misc 3d 1205[A], 831, NYS 2d 359 (Sup Ct NY Co 2006) *Leib v Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 461 F Supp 951, 953 (E D Mich 1978).

In this case, while it appears that Avellino gave investment advice, there remain material issues of fact as to the nature of the relationship between the plaintiffs and Avellino, including the degree, if any, of Avellino's discretion in investing plaintiffs' funds and the degree to which Avellino, based upon a relationship of trust with plaintiffs, influenced their investment decisions. Because defendants have failed to meet their burden in the first instance of demonstrating entitlement to judgment as a matter of law, the motion for summary judgment as to the claims for breach of fiduciary duty must be denied.

3. Fraud

In the complaint, plaintiffs assert that Avellino induced them to continue to invest with him and KJA by knowingly making false affirmative representations and intentional omissions of material facts regarding plaintiffs' investments and issuing account statements that misrepresented the true facts about their investments and that plaintiffs' relied on such misrepresentations to their detriment by sending additional funds to Avellino, resulting in the loss of plaintiffs' KJA investment. A claim for fraud requires a plaintiff to show that the defendants misrepresented a material fact, that such representation was untrue, that there was an intent to induce reliance, that the plaintiff justifiably relied, and that injury resulted (*see Ross v Louise Wise Servs., Inc.*, 8 NY 3d 478, 488 [2007]).

Defendants claim that plaintiffs have not identified any representation made to plaintiffs, much less fraudulent representations, that induced plaintiffs to make investments in

KJA. Indeed, defendants' assert that the funds comprising their claim were invested with KJA long before Avellino was involved with KJA.

Plaintiffs counter that Avellino actually was involved in the formation of KJA, but used Jordan as a front man because he was being investigated by the SEC. Plaintiffs assert that the evidence shows that KJA was formed for the sole purpose of being a feeder fund for BLMIS. Indeed, once Avellino took over KJA, he falsely represented the profits and income of plaintiffs' investments that he knew did not exist and promptly paid plaintiffs whenever plaintiffs requested disbursement of profits or return of capital contributions. Avellino also allegedly told plaintiffs that they were better off investing in KJA than other investment vehicles. In addition, Avellino allegedly took monies from other entities to cover disbursements to KJA investors rather than obtaining the funds from the actual accounts. Plaintiffs also note that contrary to defendants' contention, the bulk of the funds invested by plaintiffs were made after Avellino's involvement with KJA. Further, plaintiffs claim that Avellino made misrepresentations by issuing false quarterly statements and year end statements reflecting profits that Avellino knew were false.

The issues of material misrepresentation and reasonable reliance necessary for establishing a fraud claim generally are not appropriate for summary disposition by a motion for summary judgment (*see Braddock v Braddock*, 60 AD 3d 84, 93 [1st Dept 2009]; *Brunetti v Musallam*, 11 AD3d 280 [1st Dept 2004]). Here, Avellino's conduct amounted to more than just record keeping. The alleged acceptance of plaintiffs' funds after he assumed administration of KJA, continuing to funnel such monies to BLMIS despite his knowledge of Madoff's investment practices, and issuance of financial reports based on information he should have suspected was false, are sufficient to raise questions of fact as to Avellino's deliberate misrepresentation of the state of the KJA investments with the intent to induce plaintiffs to continue to invest. Accordingly, summary judgment must be denied as to the cause of action for fraud.

4. Negligent Misrepresentation

The elements of a claim for negligent misrepresentation are: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information (*JAO Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007].

Defendants contend that this claim fails for the same reason that plaintiffs' cause of action for fraud must fail. Plaintiffs counter that even if the court were to find that no fiduciary relationship existed between plaintiffs and Avellino, the evidence shows that Avellino was in a special relationship with plaintiffs and had a duty to impart correct information concerning the investments. Plaintiffs further aver that they relied on the false quarterly statements and tax documents Avellino prepared in deeming their investments safe and making decisions to invest additional monies based upon the false reports of past performance.

The record is sufficient to establish, *prima facie,* that plaintiffs relationship with Avellino was more than simply an arms length business relationship. Rather, on Jordan's representation that Avellino was a trusted friend and business associate for more than 40 years, Avellino took over the administration of KJA, continued to accept plaintiffs' funds for investment, set up new accounts and issued financial reports. As discussed above, there are material issues of fact as to the nature of the relationship between plaintiff and Avellino. The record also suggests issues of fact exist as to whether Avellino possessed superior knowledge regarding plaintiffs' investments giving rise to a special relationship with plaintiffs. Avellino also controlled KJA's bank account and there is evidence that he was able to transfer funds and make withdrawals without making disclosures to KJA investors.

5. Conversion

In support of the cause of action for conversion, the complaint alleges that plaintiffs' interest in monies invested with Avellino was superior to any interest defendants may have and that defendants took plaintiffs' money, exercised control over it and expended those funds for their own purposes in disregard of plaintiffs' interest. This cause of action is based on plaintiffs' alternate claim that Avellino never invested plaintiffs' funds in BLMIS, but rather expended the funds for his own purposes.

Conversion is the intentional and unauthorized exercise of control over personal property owned by another that interferes with the owner's right of possession" (*Richman v Harleysville Worcester Inc. Co.*, 85 AD3d 651, 652 [1st Dept 2011] citing *Colavito v New York Organ Donor Network, Inc,* 8 NY3d 43 [2006]).

Defendants contend, based on Avellino's affidavit, that the conversion claim is not supported by the evidence. Avellino acknowledges that the accounting records and bank statements produced in discovery reflect the movement of cash among several family entities and KJA. However, Avellino maintains that this is not evidence of commingling, but rather constitute "simple cash management". Avellino states that it was not possible to obtain distributions from BLMIS in small amounts or on short notice. Therefore, when a KJA partner requested a distribution for a small amount on short notice he moved cash from his personal account to KJA in order to make the requested distribution. Avellino contends that such movement of cash was reflected as debits and credits in the records of the affected accounts and was reconciled at year end. Plaintiffs counter that Avellino treated KJA's bank account as his own and closed the account after KJA's BLMIS account was frozen without distributing the funds contained therein to KJA investors.

The evidence in the record concerning Avellino's transfer of funds among entities including KJA, raise triable issues of fact as to whether he exercised dominion over and interfered with plaintiffs' right to their investment funds. Avellino's self-serving affidavit that funds were moved from KJA to other entities as a cash accounting method of operation is not sufficient on a motion for summary judgment to establish that Avellino did not wrongfully exercise dominion over plaintiffs' funds to the exclusion of plaintiffs' rights to such funds (*see Demry v Wind*, 82 AD3d 670 [1st Dept 2011]).

C. **Judicial Notice of Madoff's Trustee's Complaint Against Avellino**

Plaintiffs submit as Exhibit "17" of the Duffy Affirmation in Opposition, a copy of the complaint against Avellino filed in the U. S. Bankruptcy Court S.D.N.Y. While acknowledging that the trustee complaint is hearsay, plaintiffs seek to have it considered in opposition to defendants' summary judgment motion claiming that such hearsay evidence may be considered in opposition to defendants' summary judgment motion (*see Stock v Otis Elevator Co.* (52 AD3d 815 [1st Dept 2008]). Plaintiffs add that the trustee complaint may also be considered pursuant to the public records exception to the hearsay rule pursuant to CPLR §4520's because under the powers accorded the trustee under the Security Invester Protection Act, the trustee is responsible for investigating a debtor's conduct and providing governmental reports of same. Plaintiffs

contend the government reports in this context may be admitted under the public records exception to the hearsay rule and is codified at CPLR 4520.

Defendants' submit, correctly, that CPLR 4520 is inapplicable to the trustee's complaint. The complaint of the trustee, like any other complaint, contains unproven and unsubstantiated allegations. It does not meet the test for the public records exception, namely, that a public officer is required or authorized by special provision of law to make a certificate of the facts ascertained.

Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted" (*Arnold v New York City Hous. Auth.*, 296 AD2d 355, 356 [1st Dept 2002]; *see Silva v FC Beekman Assoc., LLC,* 92 AD3d 754, 758 [2d Dept 2012]; *Stock v Otis Elevator Co.*, 52 AD3d 816 [2d Dept 2008]). The trustee's complaint may be considered as it does not constitute the only admissible evidence submitted by plaintiffs in opposition to defendants' motion. However, in reaching its decision on this motion, the court did not rely on the trustee's complaint.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing the complaint as against Nancy Avellino, and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion to strike the affidavits of Avellino and Onefater is denied.

ENTER,

DATED: September 16, 2013

O. PETER SHERWOOD, J.S.C.