Index No: 09694/2009

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

**Amended***
***Post Trial Order***

Hon. RALPH T. GAZZILLO
A.J.S.C.

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| Louis J. Modica, | : | David J. Sutton, Esq. |
| | : | 65 Hilton Avenue |
| Plaintiff(s), | : | Garden City, N.Y. 11530 |
| | : | |
| - against - | : | Damon A. Hagan |
| | : | 178 East Main Street |
| Patricia Montanino and Niel Montanino, *et.al.*, | : | Patchogue, N.Y. 11772 |
| | : | |
| Defendant(s), | : | |

The non-jury trial of this matter was conducted before the undersigned on June 9th, 10th and 11th, 2014. Prior to the testimony, a number of items were pre-marked as either exhibits or directly admitted into evidence. In addition to those items, the parties relied upon the *viva voce* testimony of five (5) witnesses, all called by the plaintiff: all of the Montanino defendants (Patricia, Jason, Neil and Nicholas), Alida LaMothe and Michael J. Sinke. Although the plaintiff himself was also called, for reasons detailed within the record and pursuant to CPLR § 3117 (a)(3)(iii) his deposition was offered. At the conclusion of the proceedings and in lieu of summations, each side was invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR §4213 by July 11, 2014. Those memoranda having been received and reviewed, the Court's decision is as follows:

The plaintiff's complaint sets forth six (6) causes of action sounding in: 1) conversion (moneys); 2) breach of fiduciary duty; 3) unjust enrichment; 4) fraud; 5) aiding and abetting a breech of fiduciary duty; and 6) fraudulent conveyance. The first five (5) causes of action are directed against defendants Patricia and Neil Montanino, the sixth against all of the defendants. The defendants' answer contains various affirmative defenses, as well as two (2) counterclaims: 1) false imprisonment and 2) malicious prosecution.

## THE WITNESSES AND THEIR TESTIMONY

What immediately follows is an unassessed and condensed version of the testimony of the

various witnesses regarding the relevant and germane events of this controversy as well as some background matter as was portrayed, purported and alleged by each. In order to aid in following a witness' account, the various details and/or aspects of an event or issue may have been collected from different portions of that witness' testimony and assembled together. Also, there may be testimony which raises a question which might be answered elsewhere within the record; on some occasions, a reference to the latter may be provided.

Patricia Montanino stated that she is married to co-defendant Neil Montanino. They live with their two children and co-defendants, Nicholas and Jason, at 28 Campbell Lane, East Islip, Suffolk County, a house she owned with her husband but is now owned by her children. On October 25, 2008, she transferred it to them; at that time they were, respectively, 16 and 18 years of age. Before living in the East Islip home, the family resided in North Carolina.

In 2005 or 2006 she attended a meeting at Felicia Pasculli's office. Pasculli wanted to institute councilmatic districts within the Town of Islip. Besides Pasculli and a number of others, the plaintiff was also there. Pasculli announced that the plaintiff would be funding the project. At that time this witness didn't speak with the plaintiff and it would be months before she met him. Prior to this meeting in Pasculli's office, she had previously been in that office and had been told by Pasculli that the plaintiff needed somebody to help organize his bills. She declined. Although not employed then, she didn't have the time and was occupied running a website which informed people where their taxes were spent. Thereafter, Pasculli spoke with her again about the position and said it could be a temporary and part-time commitment. Subsequently, this witness met the plaintiff and he told her of her duties which would essentially be paying bills as they were received. Additionally, she was to do consulting or "town" work. She was to keep his bills and the consulting work separate, for which she was paid $500 a week for office work and $20 per hour for consulting work.

She started in May or June of 2006 and was there until that December. Typically, he had her submitting Freedom of Information (FOIL) requests everyday, some of which had to do with the councilmatic issue. He might have been in his office a third of the time she was and while she was there on weekends he never was. She would write out his checks and, when he wasn't there, sign them using a signature stamp (explained below) in lieu of having him actually sign them. While still a homemaker/mother she worked seven days a week for him, sometimes at home, including, on occasion, writing checks.

On the average, she performed 20 hours of office work per week and this would increase to 35 hours within first or second month. Simultaneously, she was doing her website and consulting work. She submitted a bill to him for $12,000 for some of her consulting work (plus her children's work). She had previously performed other consulting work and been paid for some by multiple checks, and this $12,000 amount included future hours. As to her office salary, every week she gave him a bill for the hours she worked and she was paid by a weekly check within a day or two. Some of those checks were for $500.00, some for more. After a few months, her salary was increased but she didn't know how much. He signed 90% of her paychecks but told her she could use the signature stamp.

There was another check (number 2061, pl.[1] 48, dated September 21st, 2006) which she made out to her order for $32,000.00. Although she doesn't recall whether the signature was by his hand or stamp, she indicated in the memo portion "real estate loan." She also stated that he wasn't making a real estate loan to her. She placed that check in her and her husband's joint checking account. Of that $32,000.00, $12,000.00 was purportedly for her consulting work and the balance was to be paid for political contributions. She called the Board of Elections and was advised that this was improper. When she told the plaintiff she wouldn't do what he wanted with the funds, she decided to take her $12,000.00 and give the balance to Pascale in cash. She typed a bill (pl. 35) dated November 15, 2006; this was unsigned and indicated it was for "aprox (sic) 23 weeks @ 25.00 hr, 7 days a week sorted = round off 12,000.00. Paid in full." The consulting work was for that November's election. In that race, the plaintiff supported Philip Nolan for Islip Town Supervisor; she didn't care who won.

Another issue was the witness's home mortgage on the Campbell Lane home. She stated that her mortgage was approximately $180,000.00. By electronic transfer from the plaintiff's account, she took $176,000.00 and satisfied the mortgage. This was a loan, but was undertaken without discussing the transaction with her husband. She never gave the plaintiff a note, mortgage, a personal guarantee, nor any other signed document or writing. The only "paperwork" she produced is an unsigned typed memo (pl. 77) on the plaintiff's business letterhead which merely states:

> September 27, 2006,
> Loan Process:
> 186,500.00 Principal amount
> Payments of 500.00 Bi-weekly, final date to be determined.
> Direct deposites (sic) to be made- Real Estate Investments account.

She stated that the interest rate she was paying her bank was 6% but with the plaintiff it would be 5.5%. She believed she made one or two payments. When she eventually spoke with her husband he said he didn't like the plaintiff and didn't want the loan but she didn't want to pay it off until she quit. Thereafter, with money from her money market funds from a civil suit settlement, she paid the plaintiff $100,00.00 plus a confession of judgment for $86,500.00.

Another distinct issue was her personal credit card. She stated that with his money, she paid back whatever charges on her accounts that were for his benefit, such as office supplies, newspaper political ads, and other expenses[2]. (While she was on the stand during this exchange she was presented with some credit card statements; she was unsure as to the source of some payments, but some were on-line transfers from his accounts, some by his checks. As to why she paid by various methods she indicated there "was no rhyme or reason.")

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[1] As used herein, "pl." refers to a plaintiff's exhibit in evidence.

[2] As her personal card, it was also used for her personal expenses.

As to the signature stamp, she had previously purchased two stamps at his direction at Office Depot which replicated his signature. She purchased two because it was a "buy-one-get-one-free" offer; prior to the purchase of two, she had called and asked him. The two, however, are slightly dissimilar. She paid for them with her MBNA credit card or a check and was reimbursed by the plaintiff. When she quit, and while either in her driveway or outside his office, she took a hammer and destroyed them both because she "was very angry with him." She told Pasculli of this, who said it was "okay." This witness had had the same conversation with the plaintiff previously; he was satisfied. As to any argument with Pasculli during the call with her, the witness could not recall any part of the conversation.

She began a Citibank Bank account in his name and listed herself as the was contact person. He wanted the 4.2% interest rate and she signed as account holder and, by means of her personal check, made the initial, opening deposit of $5.00. With a check (pl. 38) from his account and in her handwriting she deposited an additional $100,000.00. She was not, however, certain if she stamped the signature. The account's statements went to her Campbell Lane address. On an "On-Line Signature Page" (pl. 36) appears her signature and the plaintiff's[3]. She filled out a twelve page application (pl. 39). On page two, under "Account Type" she checked the option "Joint (with rights of survivorship)." The third page lists her as co-applicant and what follows is all of her personal data. As to the plaintiff's information, where it requested his mother's maiden name (page 3) she inserted her husband's mother's maiden name and put her address as the plaintiff's current address (page 3) and mailing home address (page 4). With respect to this information, she indicated that he had instructed her to lie, including lying about his address. Page "6" of the application states that she is an professional accountant/attorney/engineer. She also had faxed her LIPA and Cablevision, Disney Awards bills to prove her name and address. As proof of his address, she submitted her Suffolk County Water Authority bill with her address but with his name superimposed on it (pl. 40). She stated that this was so all the information would come to her home and his wife wouldn't know about it. Later, when this witness wanted her name removed from the account, the bank told her she had to close the account so she gave him the $100,005.00. She returned the money because she didn't like that he had said she had stolen money. This was told to her by Pascale, who said he was accusing her of stealing $100,000.00. Other than this and other similarly brief testimony, she had no recollection of that conversation with Pasculli nor any other part of that call.

Regarding the transfer of the home to her children, this was by deed dated October 25, 2008. At that time her son Nicholas was 16 and Jason was18; she was unsure if Jason was employed. She transferred the home because of her health. The year before the transfer she had been on medication for high blood pressure. She stated that the children paid nothing for the house. She believed there was a line of credit in an unknown amount but indicated that her sons had virtually no way of paying any expenses and her and her husband had paid the real estate taxes. Prior to the transfer, the home was held by her and her husband by the entirety but if "something happened to either of [them]" the intent of the change was that the house would pass

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[3] It was subsequently indicated that both the signature on the $100,000 check and the "On-Line Signature page" were by the same stamp; see Sinke's testimony and exhibits, *infra.*

to the children. When they turned the house over to the children she had no will.

The history of her arrest began in or about May, 2008. She was notified by an Assistant District Attorney to surrender and appear at his office. She complied and, with her attorney, James McDonaugh, was given immunity in exchange for testimony against the plaintiff regarding illegal political contributions. She was there for a few hours, interviewed by a Detective Lewis, fingerprinted but not handcuffed or placed in a cell. She received immunity from prosecution in exchange for her cooperation in an investigation regarding campaign contributions, the plaintiff, and Nolan. She stated she appeared before a judge and was charged with Grand Larceny. She also stated that other than that day she never again met with law enforcement or the prosecutor, and during court appearances, her lawyer was Alfred Graf. Two years after her arrest, the matter was dismissed for violating her "30 - 30" or "speedy-trial" rights.

Another legal matter was her involvement in a civil lawsuit. Although she had no interest in Islip Town politics, she was named as a petitioner. She met with a Garden City law firm, Reichman, Perez but she merely drove the plaintiff herein to the lawyers and he paid all the legal fees.

On examination by her attorney, she indicated that she had netted approximately $400,000.00 from a personal injury case. As to the transfer of the home to the children, the lawyer she spoke to never told her that due to the manner it was held (by the entirety) it would pass to her husband upon her death. She denied ever commingling the plaintiff's money with hers. She indicated that the plaintiff had on occasion loaned money to others, and that he had a number of businesses and rents receivable, and various accounts. She also added that she worked in the office alone and without co-workers. Reviewing her MBNA credit card statements, she indicated that various charges, such as office supplies, Post Office, newspapers ads and other expenses, were for incurred for his professional and political benefits and not hers; as such they were paid from his funds. The amounts charged totaled approximately $3,494.00 for which she was reimbursed $3,343.15.

She stated that she had gone to criminal court over six times and the case was dismissed. She produced her Certificate of Disposition (defendant's I) which indicated that the charge had been "dismissed" but without any further explanation. Annexed thereto was a copy of her cooperation agreement with the District Attorney.

As regards the transfer of the house, she stated it was for estate planning. She did not, however, ask the attorney who prepared the transfer to prepare wills, living wills, powers of attorney, or health care proxies. She did other estate planning without a lawyer though neither she nor her husband have wills.

As to her civil suit settlement, she received $650,000.00, less a third of which was disbursed as attorneys fees. She split the remainder in 2004, giving at least $100,000.00 to each child and placing those funds in a money market account. Those monies were later used to repay the plaintiff for the home mortgage/loan. Other than the $200,000.00 or so she gave to her children, she had no idea what she did with the balance. Lastly she indicated that the final date

for paying off the home's mortgage/loan to the plaintiff had not been determined, her political work was little more than advertisements, and she didn't know if she had charged the signature stamps.

Alida LaMothe indicated that she has known the plaintiff for 20 years and knows his family and his friends. She had been employed by him on and off in 2003 or 2004, working as his personal assistant until the middle of 2006. Thereafter, she was replaced by the defendant. Among her duties - which she was also requested to do by his wife and daughter - was to help him to pay his bills. He was always very specific as to what he wanted done and would "never" have anyone sign a check for him. His practice was to advise her in a penciled note what he wanted her to do, and nothing could be sent out without him seeing it. She would have to "run a tape" and attach a written schedule or memo for each transaction. As to a signature stamp request, she stated emphatically as if shocked by the suggestion, "Never. Never. He would never, never do that." He was very "meticulous" about his money—he even counted postage stamps. He would never do any on-line banking; he had refused when she had suggested it. He was very old fashioned in his ways and would call the bank virtually every day regarding each account and their balances.

She had key for his office. He was regularly in his office, but when he went to Florida she'd mail him any checks for his signature, plus the envelope, so he could sign the checks and mail them to the payee. As to office supplies and expenses, she'd tell him what was needed, he'd tell her to buy it, she'd buy it, return with the receipt, and he'd pay her by check. He never told her to use her credit card.

She stated that she knows the defendant Patricia Montanino. This witness stated that she was told to give her the office keys. She refused and called the plaintiff's family as she didn't want to give them to a stranger. Early in 2007, he asked this witness to return, saying the defendant Patricia Montanino had paid off her home and stole from him and he wanted this witness to go through all of the paperwork.

On cross-examination she indicated that due to the number and sizes of his accounts and his various transactions, he wouldn't be able to completely scrutinize the balances or variances of each account. She was responsible to do what he asked her to do and he and his wife, she emphasized, were very meticulous. Suffice to note, and without burdening the record by a line-by-line juxtaposition of the two, she provided a markedly different portrait of the job description than the defendant.

Jason Montanino testified that he is the son of Patricia and Neil Montanino and lives with them and his brother Nicholas. He was unclear as to when he first learned he owned the home, i.e., at the date of the deed, October 25, 2008, or thereafter, versus his testimony during his June, 2010 deposition when he indicated he was unaware of any ownership. He indicated that he hadn't discussed with his parents why the house had been transferred to him. He added that he has never paid any of its expenses; his parents pay them and he "throws a couple of bucks to help." He has never made any mortgage payments on the home. At the signing of the deed he

would have been 18, working with his father and making $500.00 a week but switching to Home Depot, and Stop and Shop and earning $150.00 weekly.

Neil Montanino testified that he and his wife had purchased their home for $225,000.00 to $250,000.00. They undertook a mortgage with CitiBank but didn't remember its amount. When they transferred it to their sons, Nicholas was 15 and unemployed, Jason was 18. Neither he nor his wife had discussed the transfer with his children. He indicated that he doesn't understand what "estate planning" means and explained his wife's illnesses. She had selected the lawyer for the transfer but neither of she nor he has a will, health care proxy, or a living will.

He did learn that the CitiBank mortgage had been satisfied; his testimony as to opening mail delivered to his home was, however, indirect. When he asked his wife how the mortgage was paid, she stated she had borrowed the money from the plaintiff. He was upset as he was comfortable with CitiBank holding the mortgage, even though it was at a higher rate. He didn't know the monthly cost of the mortgage charge was but he was making "a little more than $750.00 a week" at the time and $900.00 as of June 2010. While his wife was working for the plaintiff her "hobby" was doing nails. At the time of the loan from the plaintiff, neither son was contributing any money to the home and the only source of income was his and her salaries. Presently, she works for the Board of Elections and is paid $1400.00 bi-weekly; the house was their sole real estate asset.

Michael J. Sinke was offered and accepted as an expert in Forensic Document Analysis. He been so employed as such for 17 years and his services have been provided to both sides in criminal and civil litigation in state and federal courts where he has been qualified as an expert some fifty or so times.

He indicated that it is possible to determine if a signature is made from a stamp (even from a copy of a document) but most especially where there are multiple samples. He added that if a signature were personally executed by the same person one-hundred times in a row, the rule of "Natural Variations" would preclude them from being exactly the same. However, when multiple samples are overlaid one atop another and they lineup or overlay each other in a manner, that indicates they came from the same source, usually a stamp.

As to the matter at bar, he received and reviewed 32 checks plus a signature page document. He placed them into either one of two stacks. One stack contained all those signatures which were identical to each other, the other stack also contained only those signatures identical to each other, but the signatures from one stack were distinct and dissimilar from those of the other stack. This indicated that more than likely all of the contents of one stack came from the same signature stamp and all of the second stack from the same but distinct signature.

Thereafter, he identified the Citibank "Online Signature Page" (pl. 36) dated December 1, 2006. Additionally there were a number of checks, such as plaintiff's exhibit 38 (the $100,000.00 used to open the Citibank joint account) plaintiff's 48 (the $32,000.00 "real estate loan") and others which comported with his opinion as to the signatures' genesis. To summarize his testimony and his report (pl. 90-92), all of the thirty-three (33) signatures were not true

signatures of the plaintiff and the signatures which appear on all thirty-three (33) documents come from one of two different signature stamps. Additionally, when all of the signatures which came from the same source or common parent were placed in a stack and those of the other in another stack, the signatures of one stack, while the same *viz-a-viz* every other member of that stack, were distinct from the signature common to the other stack. Therefore, the signatures were not the plaintiff's true signature, they were made by one of two stamps, and 16 checks were made from one stamp and the remaining 16 checks and the signature page by the other.

On cross examination, he indicated that copies of other checks appear to be from different stamps. While he indicated the signatures had similarities, he would not state they were the same and that other signatures were clearly different.

Nicholas Montanino, the other son, indicated he first learned of his ownership of the property at his deposition and didn't remember how he acquired the property (or much of anything else). He stated that he had once worked for the plaintiff and tried to show him something about the internet but the plaintiff knew nothing about it. As to his home, the witness stated that he pays none of its expenses.

For the reasons set forth within the record and pursuant to CPLR § 3117, the deposition of the plaintiff, Louis J. Modica, Jr., was received into evidence. Those portions which were offered indicated that he "definitely" hadn't asked the defendant Patricia Montanino to obtain signature stamps and "definitely" hadn't given her permission to use them. Additionally, he denied giving her any loans, the authority to remove money from his checking accounts or on-line banking to pay her credit cards, or her mortgages, or her salary of $21,000.00 in 2006. As to payments to a law firm, the first and second checks were authorized, not others. Similarly disavowed was her having any permission or authority to take cash received for a boat slip; rental at the marina and use such funds for personal expenses, the cash receipts from a marina, and payment of $12,000.00 for political consultation and political contributions. The defense offered portions of his deposition which indicated that he might have told her to go to LIPA to pay an electric bill and that they had had conversations about "Quick-Books." Also, he indicated that he didn't like the then-Town Supervisor but it had nothing to do with political parties. He had also stated that he might have asked her to collect rent and to deal with a tenant and that she had helped out at one of the marinas, but it wasn't part of her duties.

Before proceeding with the analysis, it should be noted that in its post-trial memorandum (page 3), counsel for the plaintiff indicated that it had reduced its allegations of its loses from the $536,295.00 originally contained within its complaint to $117,101.17 (plus punitive damages). Initially, the plaintiff had sought of net recovery of damages $249,295.00 (the $536,295.00 less $287,000.00 already received by way of restitution). The plaintiff, however, has withdrawn his requests for recovery of payments made to the law firm of Reisman Perez ($61,533.00), theft of marina boat slip payments ($49,428.00), as well as checks made out to Patricia Montanino ($20,122.00). Remaining are the following claims: payments made on the MBNA Credit Card ($68,828.17), the Citicard Credit Card ($16,273.00) and the "real estate loan" of $32,000.00 for a net total of $117,101.17, plus punitive damages.

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter that which is less than reliable. Secondarily, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See e.g. Fisch on New York Evidence,* 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, the witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and has the opportunity and ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See e.g. N. Westchester Prof. Park Assn. v. Town of Bedford,* 60 NY2d 492 (1983); *Latora v. Ferreira,* 102 AD 3d 838 (2d Dept 2013); *Zero Real Estate Servs., Inc. v. Parr Gen. Contr. Co., Inc.,* 102 AD3d 770 (2d Dept 2013); *Hom v. Hom,* 101 AD3d 816 (2d Dept 2012); *Marinoff v. Natty Realty Corp.,* 34 AD3d 765 (2d Dept 2006). Indeed, as one unanimous appellate bench reiterated, "'[o]n a bench trial, the decision of the fact-finding court should not be disturbed on appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses.'" *Reichman v. Warehouse One,* 173 AD2d 250 (1st Dept 1991)(citing *Nightingdale Rest. Corp. v. Shak Food Corp.*, 155 AD2d 297 [1st Dept 1989], *lv denied* 76 NY2d 702 [1990]).

Also worthy of examination is any witness' interest in the litigation. *See e.g.,* 1 NY PJI3d 1:91 *et seq.*, at p.172. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. What can, however, be devastating to a witness' presentation is the fact-finder's determination that a witness testified falsely about a material fact. Under such circumstances and pursuant to the maxim *falsus in uno, falsus in omnibus,* the law has long permitted—but not required—the finder of fact to disregard those portions or even *all* of the testimony. *See Deering v. Metcalf,* 74 NY 501 (1878); *see also,* 1 NY PJI3d 1:22. In assessing the culpability of a witness, the finder of fact may consider an accused's conduct. For example, any conduct which is indicative of culpability is admissible, flowing from the logic that an inference of guilt may be drawn from the consciousness of guilt. Jerome Prince, Richardson on Evidence, § 4-611 (Farrell 11th ed 1995). While this is circumstantial and therefore weak evidence, *id.*, it includes destruction of evidence and is admissible in criminal as well as civil cases. *O'Neill v. Pelusio,* 65 AD2d 914 (4th Dept 1978). Relatedly is the concept of "spoliation" which not only includes cases where the evidence was destroyed, lost, or altered wilfully or in bad faith but also where it was done negligently, and even if the act or omission occurred before an action was filed. In such cases, there are various sanctions, all of which are designed to proportionately provide relief to the aggrieved party and these include preclusion of favorable proof by the spoliator, payment of costs by the spoliator for the injured party's development of replacement evidence, an adverse inference, and of course the ultimate sanction, *viz,* dismissal of

the spoliator's action or striking his/her responsive pleadings, the net result of which is judgment by default. *Ortega v. City of New York,* 9 NY3d 69 (2007); *Squitieri v. City of New York,* 248 AD2d 201 (1st Dept 1998). Returning to the fact-finding process, as indicated by that case law and is entrenched into hornbook law, destruction of evidence may also support an unfavorable inference to the spoliator. Jerome Prince, Richardson on Evidence, *supra,* § 3-141.

Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See e.g. People v. Brown,* 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, there is also the purpose and goal of the trial, *viz*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it; if the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail. *See e.g.* 1 NY PJI3d 1:23.

Finally, where an award of money damages is sought in a civil action, one of the basic premises in gauging the viability of such an action is the maxim of *damnum sine injuria est injuria sine damnum:* liability without damages is the same as damages without liability. In the absence of proof of both liability by the defendant as well as damages by the plaintiff, the plaintiff will typically not receive any compensation. Also, and assuming the issues of liability and damage are found in the plaintiff's favor, there is a further caveat, *viz*, the proof must contain evidence to support a valid calculation of any monetary award for the damages. Stated otherwise, an award of money damages should not be measured or determined by a whim or caprice; there must be a rational, well-established basis for any such award. Obviously, this rule is not only logical and just, it also reflects the established and historic admonition to avoid awarding damages on whim and/or naked speculation as opposed to some proven, satisfactory method which has some acceptable measure of precision. *See e.g. Goldberg v. Besdine,* 76 AD 451 (2d Dept 1902); *see also Kenford Co. v. County of Erie*, 67 NY2d 257 (1986); *R. B. v. M.S.* , ___ Misc. 3d ___, 303455/10, NYLJ 1202642854926 (Sup NY 2014). Indeed, in addressing the issue of a claim for damaged personal property the unanimous *Goldberg v. Besdine* panel wrote,

> "There is proof as to the first cost of the articles which the plaintiff claims were injured or destroyed, but they were all in use, and had been in use for some time, and no proof was made of their condition or value at the time of the fire. Under these circumstances, the estimate of the value made

> by the court was necessarily conjectural, and is not based upon that reasonably precise proof which it was within the power of the plaintiff to furnish and which the law requires."

*Goldberg v. Besdine, supra* at 452-53.

Although the rule that requires "that damages be reasonably certain, [it] does not require absolute certainty." *Ashland Mgt. v. Janien,* 82 NY2d 395 at 404 (1993) (as long as based upon reliable factors but without any undue speculation, damages from loss of future profits are often an approximation). *Cf. Vasquez v. Gesher Realty Corp. & B & B Mgt.,* ___Misc 3d ___, 2014 NY Slip Op 24036 (App Term 1st Dept 2014) (in the absence of articulated basis for estimated lost profits, claimed amount for damages indicated as "more or less" insufficient). Under appropriate circumstances where the proof does not provide a sufficient degree of preciseness but there is some support in the record and it is not legally erroneous, the fact-finder may rely upon "reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgement and common sense in arriving at [an] amount." *Matter of Rothko*, 43 NY2d 305 at 323 (1977). "The rule of certainty as applied to the recovery of damages does not require absolute certainty or exactness, but only that the loss or damage be capable of ascertainment with reasonable certainty." 36 NY Jur Damages, § 15. Recognition of that logic and the rule which flows from it is long and well established. *See, e.g., Gombert v. New York Cent. & Hudson Riv. R.R. Co.*, 195 NY 273 (1909).

More specifically with respect to the matter at bar and the particular legal claims presented, the focus begins with the six (6) causes of action: 1) conversion (moneys); 2) breach of fiduciary duty; 3) unjust enrichment; 4) fraud; 5) aiding and abetting a breech of fiduciary duty; 6) fraudulent conveyance, and the request for punitive damages. The first five (5) of these causes of action are against defendants Patricia and Neil Montanino, the sixth against all of the defendants. Additionally, and as contained within the defendants' answer are two (2) counterclaims: 1) false imprisonment and 2) malicious prosecution.

Regarding the plaintiff's first cause of action alleges conversion, our Court of Appeals stated in *Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43 (2006):

> "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. Two key elements of conversion are 1) plaintiff's possessory right or interest in the property and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights."

8 NY3d at 49-50.

The law also permits a claim for aiding and abetting conversion, but not as an independent

cause of action; therefore the alleged conspiratorial claim will rise or fall with the underlying tort of conversion. *Dickinson v. Igoni,* 76 AD3d 943 (2d Dept 2010).

In an action which seeks to establish a breach of fiduciary duty, the plaintiff must "prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Guarino v. N. Country Mtge. Banking Corp,* 79 AD3d 805 at 807 (2d Dept 2011) (citation omitted); *see also, Deblinger v. Sani-Pines prods. Co. Inc.,* 107 AD3d 659 (2d Dept 2013); *Donovan v. Ficus Inv., Inc.,* 20 Misc3d 1139(A) (Sup Ct NY Cty 2008). In essence, a fiduciary relationship requires high level of trust or confidence in one which results in superiority and influence, but not where the parties are on equal footing. *See e.g. Royal Warwick, S.A. v. Hotel Representative, Inc.*, 25 Misc3d 878 (Sup Ct Queens 2009). The fiduciary and common-law duties owed may include those an employee owes to the employer as "it is axiomatic that an employee is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.'" *CBS Corp. v. Dumsday,* 268 AD2d 350 at 353 (1st Dept 2000)(citation omitted). To prove a claim of aiding and abetting such a breech, the plaintiff must establish the breach, and that the defendant-*qua*-accomplice either knowingly induced or participated in the breach, and damages resulting therefrom. *Bullmore v. Ernst & Young Cayman Is.,* 45 AD3d 461 (1st Dept 2007). "Moreover, a 'person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator.'" *Id.* at 464 (citation omitted). Actual and not merely constructive knowledge is required and excluded is any reliance on conclusory allegations that the person knew or should have known. *Id.*

A cause of action based upon a claim of unjust enrichment is an equitable remedy and has, as its "'ultimate purpose'", the prevention of unjust enrichment. *Dee v. Rakower, supra.* This cause of action is established by proof that a) at that party's expense b) the other party was enriched, and c) permitting the latter party to retain that which is sought to be recovered would be against equity and good conscience. *Id.* In any examination of each of these three elements, the last is the most essential inquiry. *Id.*

Fraud essentially requires a misleading act or omission or misrepresentation about a material fact which was false when omitted or made, was justifiably relied upon by the other, made or omitted in anticipation of the other party's reliance thereon. *See, e.g., Mandarin Trading Ltd., v. Wildenstein,* 16 NY3d 173 ((2011); *Swersky v. Dreyer & Taub,* 219 AD2d 321 (1st Dept 1996).

As regards the transfer of the house, it has long been recognized that a voluntary conveyance which was motivated by the grantor's mischievous efforts to deny creditors their rights will be subject to judicial scrutiny and, where found fraudulent, deemed void. *See, Loeschick v. Addison*, 26 NY Super. Ct. 331 (Super. Ct. N.Y.C. 1865 and the cases cited therein). Indeed, that concept has been codified and is contained in the Debtor and Creditor law, which states, "Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." *Debtor & Creditor Law* § 275. Especially suspect are those transfers made to family members without any tangible consideration. *See e.g., Manor v. Vidal*, 188 Misc3d 1115(A). Essential to the success of

such a claim is proof that the grantor was insolvent and/or had insufficient assets to satisfy a present or future claim or, that he knew he would incur a debt or debts which would exceed his ability to pay. *Parsons & Whittemore, Inc. v. Abady, Luttati, Kaiser, Saurbon & Mair, P.C.*, 309 AD2d 665 (1st dept 2003); *Case v. Fargnoli*, 182 Misc2d 996 (Sup Ct Tompkins Cty 1999).

With respect to the demand for punitive damages, they may be granted in those cases where the "wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as other who might otherwise be so prompted, from indulging in similar conduct in the future." *Walker v. Sheldon*, 10 NY2d 401 at 404 (1961)(citations omitted). They are not, however, subject to unbridled discretion. They must be aimed toward fulfilling their purpose which is not to remedy private wrongs but to vindicate the rights of the public. *Rocanova v. Equitable Life Assur. Soc. of the U.S.*, 83 NY2d 603 (1994). They "are recoverable if the conduct was "'aimed at the public generally.'" *Id.* at 613 (citing *Walker v. Sheldon, supra*, at 404-05.)

Lastly remains, of course, the defendants' two (2) counterclaims alleging false imprisonment and malicious prosecution. To establish a claim of false imprisonment, a claimant must establish that the other intended to confine the claimant, that the claimant was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged. *Martinez v. City of Schenectady,* 97 NY2d 78 (2001). To defeat such a claim, an accused's demonstration of probable cause will serve as both a legal justification for the arrest as well as an affirmative defense. *Id.* Indeed, probable cause has been repeatedly noted as a "complete defense to an action alleging false arrest or false imprisonment." *See, e.g., Rakidjian v. County of Suffolk*, 28 AD3d 734 (2d Dept 2006)(citations omitted). Probable cause has been held to consist "of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe the defendant guilty." *Colon v. City of New York*, 60 NY2d 78 (1983) (citations omitted). Stated otherwise, probable cause exists where there are "'such grounds as would induce an ordinarily and prudent person, under the circumstances, to believe the [claimant] had committed the [crime].'" *Wallace v. City of Albany*, 283 AD2d 872 at 873 (3d Dept 2001)(citation omitted). It "does not require an awareness of a particular crime, but only that some crime *may have been committed.*" *Id.* (emphasis added). It goes without citation that there need not be proof beyond a reasonable doubt that the crime *was actually committed,* i.e., the higher standard and that which is required to *prove guilt* or *to prove it beyond any reasonable doubt.* Indeed, there can be the requisite probable cause even where a party was mistaken but "acted reasonably under the circumstances in good faith." *Colon v. City of New York, supra*, at 82.(citations omitted).

Somewhat related is the tort of malicious prosecution which has the following elements: "1) the termination of a proceeding, 2) its termination favorably to [the claimant], 3) lack of probable cause and 4) malice." *Id.; see, also, Martinez v. City of Schenectady, supra.* A CPL § 30:30 so-called "speedy trial" dismissal has been considered a favorable termination of the prerequisite proceeding *(Smith-Hunter v. Harvey,* 95 NY2d 191 [2000]) although the same panel acknowledged that there might be cases where the circumstances surrounding such a dismissal would be inconsistent with the claimant's innocence. *See, also, Sinagra v. City of New York*, 38 Misc. 3d 234 (Sup. Ct. Kings Cty 2012). Indeed, *Smith-Hunter v. Harvey, supra,* specifically notes

that "[a] termination is not favorable to the accused . . . if the charge is withdrawn or the prosecution abandoned pursuant to a compromise with the accused. Indeed, it is hornbook law that 'where charges are withdrawn or the prosecution is terminated . . . by reason of a compromise into which [the accused] has entered voluntarily, there is no sufficient termination in favor of the accused." 95 NY2d at 196-97.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As regards the witnesses and there credibility, the initial children, Jason and Nicholas Montanino were reasonably credible, but, with perhaps one chief exception, not particularly informative. They did not add to their family's defense; to the contrary, they added to that of the plaintiff by indicating they were not even made aware of the transfer of the house to them.

Neil Montanino was somewhat credible but his brief testimony, chiefly that which dealt with the transfer, was unpersuasive. Additionally, he appeared guarded and his testimony less than forthcoming. As with his sons' testimony, however, he helped to support the plaintiff's theory.

Michael J. Sinke was clearly credible and capable. He was professional, informative, logical. He maintained his demeanor and objectivity throughout his presentation and his credibility and the persuasiveness of his account was undisturbed by cross-examination. As a result, his testimony remains and established and is accepted as valid.

Alida LaMothe was undeniably credible. Her bearing, respectfulness of her duties as a witness, and tone of voice were impressive. Her portrait of her former employer was very informative, and she gave what no doubt appears even in the cold record as an honest and open explanation and description of him and his practices. The authority and candor with which she spoke both credit her as well as the accuracy of her account. Moreover, she maintained this posture under cross-examination. Her rendition of the relevant facts is, therefore, accepted and established.

Unfortunately for Patricia Montanino, the same cannot be said about her presentation. Indeed, it could be argued that it was shameless. Her explanations, excuses, and accounts are individually far from convincing and, when taken as a whole, overwhelm any sense of believability.

For example, a review of the stenographic and documentary record alone discloses that:

1) neither she (nor her husband) discussed the transfer of the house with the children and they kept them ignorant of it;
2) although her (and her husband) were under the tutelage of an attorney, her (and her husband's) purported "estate planning" ignored or overlooked the fact that the home was already being held by the entirety and, if undisturbed, that would provide some protection if she died or became infirm;
3) while under the same legal supervision and counsel, her health concerns and "estate planning" motivation for the conveyance did not include a health

care proxy or so much as a simple will;
4) she satisfied the mortgage on the family home but did not discuss it with her husband;
5) she undertook another loan (for $186,500.00) without discussing it with him;
6) other than a one-page memorandum she composed, there is no signed documentary evidence of that indebtedness—no guarantee, no note, no mortgage (nor does the memo so much as include the due date or payments);
7) that unsecured loan was volunteered by a man who "counted stamps";
8) she opened up a bank account with him but listed her address, herself as the contact person, and, in lieu of his personal information, provided that of her husband;
9) she provided the bank with her forged her water bill so as to reflect his address as hers;
10) a man who was meticulous and systematic in issuing checks purportedly ordered signature stamps;
11) she destroyed the signature stamp;
12) although her civil suit yielded in excess of $400,000.00, other than the $100,000.00 she deposited for her two children, she had no idea what she did with the balance[4].

As further discussed below, she was incredible, her tale unworthy of belief, and her testimony rejected.

With regard to the plaintiff's appearance and the acceptance of his deposition, it should be noted that he couldn't even recognize the defendant Patricia Montanino. Despite efforts by the Court and others, he couldn't give elementary responses, and those he did were substantially delayed, hesitant and seemingly difficult to formulate as well as to articulate. Moreover, on the one day he appeared and having observed him in the audience during the course of another witness' testimony, the undersigned, *sua sponte,* determined and thereafter requested that the courtroom staff have emergency medical personnel available *before* he was called. In a wheelchair, ninety (90) years of age[5] and accompanied by a nurse, he was clearly not up to the task. Moreover, while the defense indicated that he may have other matters presently being litigated in

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[4] There were a number of her other responses which appeared illogical and contrary to what might be normally anticipated. For example, she had had a conversation with Pasculli wherein Pasculli told her she had been accused of stealing from the plaintiff. When faced with such scurrilous and criminal accusations, one might be expected to remember the details of such a pivotal and upsetting conversation. She said she did not; nor did she remember responding with righteous indignation, denial, questions, etc.

[5] His age alone was sufficient for his trial's preference. CPLR § 3403.

his name, that is not determinative[6].

Against that backdrop and as a matter of law and fact, the decision of the Court is as follows:

First and foremost, so much of the sixth count—fraudulent conveyance—which alleges the liability of Jason and Nicholas Montanino is dismissed. There is an absence of proof that either or both caused or conspired to cause, aided or abetted, the transfer. Indeed, the proof demonstrates they were ignorant of the transaction and not made aware of it until the after litigation began.

As to their parents, however, the Court finds against them and for the plaintiff as that claim is supported more than a preponderance of the credible evidence. Clearly, the transfer was voluntary and motivated by a mischievous intent and in an attempt to place it beyond the reach of any creditors. As such, that the conveyance places it under the scrutiny of the law. *See, Loeschick v. Addison, supra;* see, also *Debtor & Creditor Law* § 275. Moreover, and compounding their culpability is the fact that it was transferred to family members without any tangible consideration. *See e.g., Manor v. Vidal, supra.* Additionally, the trial testimony clearly demonstrated that they had good cause to anticipate they would have insufficient assets to satisfy future claim (in particular the instant lawsuit). Such proof, an essential to support such a cause of action (*Parsons & Whittemore, Inc. v. Abady, Luttati, Kaiser, Saurbon & Mair, P.C., supra*) has been provided. Indeed, Patricia Montanino's contention that she now has no idea what happen to the six-figured balance of her lawsuit is consistent with her motivation to hide and/or safeguard assets from creditors. As to her husband, he was a necessary and apparently willing co-conspirator for the property's conveyance. Additionally, their alleged motivation - "estate planning" - is not only is rejected, it underscores their continuing and wrongful efforts to protect their property.

The Court, however, finds that the credible evidence does not support any of the other claims against Neil Montanino, i.e., 1) conversion of moneys; 2) breach of fiduciary duty; 3) unjust enrichment; 4) fraud; or 5) aiding and abetting a breech of fiduciary duty. In this regard, there is not sufficient credible evidence that he aided or assisted his wife in her acts or omissions, much less that he was aware of them. In the face of such ignorance, he can not be held responsible. *Bullmore v. Ernst & Young Cayman Is.,supra.*

As to his wife, Patricia Montanino, the Court finds that the plaintiff has presented sufficient credible evidence to support all of the claims against her. Indeed, as an employee, especially in the special, exclusive role she played in her position, she held a fiduciary duty to her employer. *CBS Corp. v. Dumsday, supra. Bullmore v. Ernst & Young Cayman Is., supra.* Notwithstanding that position and the trust it entailed, she acted in a disloyal and dishonest manner, at all times placing her interests first. Moreover, the record is clear that time and again she stole from her employer. Her schemes were not only nefarious, they were pre-meditated, planned, on-going, multifaceted

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[6] His health is obviously not a criteria for the vitality of a lawsuit; he might be dead and they could survive. CPLR § 1015; *see, generally, Paterno* v. CYC, LLC 46 AD3d 788 (2d Dept 2007).

and involved hundreds of thousands of dollars. Clearly, if there was a way to steal from her employer, she found it and the schemes she employed were only limited by her imagination and her opportunities. Moreover, and besides the direct evidence of her culpability, her destruction of evidence, attempts to unlawfully protect her home, and her purported ignorance of the substantial remainder of a personal injury award are consistent with her consciousness of her culpability. The destruction of the signature stamps also supports an adverse inference against her and her position. *Squitieri v. City of New York, supra.* Also, it should be noted that even when examined by her own attorney, she could not proffer credible evidence. For example, she denied all of the MBNA charges, particularly those which dealt with political ads, claiming she had no need for them. She was, however, far from apolitical: her tale of the events began with her account of attendance at a political meeting; she managed a website dealing with town expenditures; she met the plaintiff through a political friend; she was hired to do political consulting work; the District Attorney interviewed her regarding a political corruption case; she was given a position with the Board of Elections. Lastly, and for the reasons indicated above and pursuant to the maxim of *falsus in uno, falsus in omnibus*, her explanation and defense is rejected. *See Deering v. Metcalf.*

The plaintiff's demand for punitive damages is denied. Notwithstanding the reprehensible, calculated and cold-blooded fleecing of an old and infirm man, the acts were not "'aimed at the public generally'" nor would any such serve to vindicate any of the public's rights. In the absence of such a finding or result, the application must be denied. *Rocanova v. Equitable Life Assur. Soc. of the U.S., supra; Walker v. Sheldon, supra.*

As regards the defendants' two (2) counterclaims alleging false imprisonment and malicious prosecution, both are dismissed as not proven. Clearly, as was demonstrated during the plaintiff's case, there was sufficient probable cause so as to justify the arrest as well as to serve as an affirmative defense. *Martinez v. City of Schenectady, supra; Rakidjian v. County of Suffolk, supra.* The fact that there was no proof beyond a reasonable doubt that a crime was actually committed is not determinative, or that if fact there was no crime; what is required is that the alleged tortfeasor acted reasonably and in good faith. *Colon v. City of New York, supra.* As to the malicious prosecution claim, the undersigned is similarly unpersuaded to find that the proceeding terminated in a manner "favorable" to defense. Indeed, the circumstances surrounding the dismissal are not totally consistent with innocence. *See, e.g., Sinagra v. City of New York, supra.* The defendant's prosecution apparently was abandoned; that also undercuts any theory that the prosecution was terminated in her favor. *See, e.g., Smith-Hunter v. Harvey, supra.* Moreover, and although the reasoning behind the District Attorney's failure to prosecute has not been made clear within this trial's record, after observing her performance on the witness stand, it could be argued that the prosecutor also had made an assessment of her credibility. As a result, the prosecutor chose to abandon another case where she might have been called to testify (the case she was to cooperate with). That being so, the case against her was not pursued.

It is therefore, the determination of this Court that the claims against Jason and Nicholas Montanino contained within Count Six, fraudulent conveyance, are dismissed.

It is the further determination of this Court that, by a preponderance of the credible evidence, the merits of those allegations against the other defendants, Neil and Patricia Montanino

have been proven and the conveyance is set aside, nullified, and the property restored to the *status quo ante* the attempted conveyance. All other claims against Neil Montanino are dismissed as non-proven. The remaining claims against Patricia Montanino have, however, and by a preponderance of the credible evidence, been proven and the plaintiff is therefore awarded judgment against her in the amount of $117,101.17, with interest.

The defendants' counterclaims of false imprisonment and malicious prosecution are, for the reasons indicated, dismissed as not proven both as a matter of law or fact.

The foregoing constitutes the decision and order of the Court.

Submit judgment on notice.

Dated: 2/25/14
Riverhead, N.Y.

Hon. Ralph T. Gazzillo
A.J.S.C.

Final Disposition