

**135 Bowery LLC v Beach Channel Shoppers Mart  
Co. LLC**

2016 NY Slip Op 31025(U)

June 2, 2016

Supreme Court, New York County

Docket Number: 156014/2013

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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135 BOWERY LLC, STEVEN SEITZMAN, and  
JUDITH SEITZMAN,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 156014/2013  
Motion Sequence No.: 001

BEACH CHANNEL SHOPPERS MART CO. LLC,

Defendant.

-----X  
O. PETER SHERWOOD, J.:

The facts of this case are set forth in the Decision and Order rendered this day in the related case, *135 Bowery LLC, et al. v Young, et al.*, Index No. 108020/2011 (“*135 Bowery*”). In that case, the same plaintiffs are suing the estate of Alan Young, Lindenbaum & Young, and other individuals and entities for, among other things, fraud, breach of fiduciary duty, malpractice, and unjust enrichment, related to loss of the same funds at issue in this case. The facts in the related case will not be repeated here except as they relate to funds diverted from the Lindenbaum & Young IOLA Escrow Account into the bank account of defendant Beach Channel Shoppers Mart Co., LLC (Beach Channel).

On this motion sequence number 001, plaintiffs move for summary judgment on their claims of aiding and abetting fraud, conversion, and unjust enrichment. Defendant cross-moves for summary judgment as to all claims or, in the alternative, to consolidate this action with *135 Bowery*. The court heard oral argument on the motion but withheld filing a decision pending a decision on the motions filed in *135 Bowery*.

**I. FACTS**

The Seitzmans purchased the property located at 135 Bowery, New York, New York, (“the Property”) in 1986 and decided to sell in 2007. As part of the planned transaction, the Seitzmans created the entity 135 Bowery LLC in August of 2007 and transferred the Property to it. The Seitzmans state that they intended to invest the proceeds of the sale conservatively to fund their retirement. Alan Young convinced the Seitzmans to purchase property instead, in order to defer the taxes from the sale pursuant to Section 1031 of the Internal Revenue Code. Young pitched the

purchase of certain properties in Sullivan County, New York, near the site of what he said would shortly become a casino. Young claimed the new casino would cause the value of the properties to spike. To induce the Seitzmans to agree to this investment plan, Young promised to pay the Seitzmans \$15,000 each month as an advance against the Seitzmans' future profits on this investment. Some of the \$5,055,000 in proceeds from the sale was deposited with Raymond Liebman (the Trustee) who had been retained by the Seitzmans, on Young's recommendation, as the trustee to hold the money between transactions. On January 3, 2008, \$3,500,000 was transferred from the trust account to the Lindenbaum & Young IOLA account.

On January 4, 2008, Young wrote a check for \$1,600,000 from the Lindenbaum & Young IOLA escrow account to defendant Beach Channel (NYSCEF Doc. No. 22). Young was the manager and member of Beach Channel, as well as the sole signatory on its accounts. Immediately before the transfer, the Beach Channel bank account had a negative balance of \$19,694.44 (NYSCEF Doc. No. 29). Beach Channel then issued checks as follows: \$1,200,000 to 10707 LLC<sup>1</sup> on January 4, 2008; \$355,000 to Lindenbaum & Young on January 8, 2008; \$607.39 to Long Island Power Authority (LIPA) on January 14; and \$1,590.49 to the New York City Water Board on the same day (NYSCEF Docs. No. 24-27).

Young's brother, Robert Young (Robert), became the manager of Beach Channel after Young's death in March 2011. Robert testified at his deposition in the related case that Beach Channel was owned by Young and by trusts of which Young family members are beneficiaries (NYSCEF Doc. No. 28 at p. 55). Additionally, Robert stated that he had reviewed Beach Channel's bank records and "discovered my brother was washing money that he got through the Beach Channel account. That was the first time I learned of money going through Beach Channel that I had any reason to suspect there was any wrongdoing by my brother" (Robert tr, NYSCEF Doc. No. 112, at 92, lines 6-12). When asked "[s]o is it your testimony here today that Alan Young was washing money through the Beach Channel Shoppers Mart account," Robert answered "Absolutely, positively, damn right I am telling you that. Listen to me, I have told you this over and over. My brother washed money through Beach Channel and many other accounts" (*id.* at lines 13-20).

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<sup>1</sup>Young was a member of 10717 LLC, as well.

## II. ARGUMENTS

Plaintiffs argue that summary judgment should be granted on the aiding and abetting fraud claim as there is no disputed issue of material fact that Beach Channel had knowledge (through Young) of the underlying fraud, and participated substantially in the “washing” of the \$1,600,000 stolen from 135 Bowery. As to the unjust enrichment claim, plaintiffs argue that there is no disputed issue of material fact that Beach Channel received plaintiffs’ funds and used those funds for the benefit of its principals and to pay its own debts. Plaintiffs seek summary judgment on the conversion claim because the undisputed evidence allows funds from the sale of the Property to be traced to Beach Channel accounts and through its re-direction to unauthorized uses. Plaintiffs also argue that each of Beach Channel’s twenty affirmative defenses should be dismissed for a variety of reasons. Defendant claims that Robert Young’s deposition cannot be used to establish the fraud, as Robert did not have any firsthand knowledge of Young’s activities. Therefore, the plaintiffs here cannot establish a fraud sufficient to meet the fraud elements of an aiding and abetting fraud claim.

Defendant argues there is an issue of fact as to whether Beach Channel holding the money for only one day is sufficient for either a conversion or an unjust enrichment claim. Defendant also claims the three-year statute of limitations applies to a claim for aiding and abetting conversion. Since the \$1.6 million check was deposited into Beach Channel’s account in 2007, the conversion claim is untimely. Further, insofar as the conversion claim is based on fraud, defendant argues the claim should be dismissed, as no direct fraud by Beach Channel is alleged.

Defendant does not dispute any of the facts set out by the plaintiffs. The only factual issue raised relates to the meaning of statements made by Robert at his deposition. In an affidavit submitted in opposition to the motion, Robert claims that the statements made at his deposition are being taken out of context. Robert states that the

“statement that ‘my brother was washing money through Beach Channel’ was made by me after having reviewed a bank transaction statement of Beach Channel where the bank statement appeared to show that a large sum of money had been deposited into and out of Beach Channel[’]s account on the same day. The statements by me upon which plaintiff relies are by no means an admission of any liability on part of Beach Channel nor is it any direct evidence of any fraud of Alan Young . . . . I have no first hand knowledge about the apparent shady dealings between the plaintiff and Alan Young.”

(Robert aff, ¶ 3-6). Beach Channel apparently takes the position that his statement that “Absolutely, positively, damn right I am telling you that [Alan Young was washing money through the Beach Channel Shoppers Mart account]. Listen to me, I have told you this over and over. My brother washed money through Beach Channel and many other accounts” (Robert tr. at page 92, lines 13-20) was an opinion, and not an admission. Defendant does not offer any additional evidence regarding the events described by the plaintiffs.

Defendant seeks partial summary judgment in its favor on the ground that any potential decision against it should be limited to the \$2,197.98 alleged to have been used by Beach Channel for its own expenses, specifically the \$607.49 paid to LIPA and the \$1,590.49 paid to the NYC Water Board. Defendant argues that the rest of the funds were sent to other entities, with no benefit to Beach Channel.

### III. DISCUSSION

Defendant claims that the facts set out by the plaintiffs show that this action and the related action arise out of the same underlying facts and for those reasons, the cases should be consolidated. Because the related case is decided this day, the cross-motion to consolidate is denied as moot. For the reasons stated in that decision, that branch of defendant’s opposition seeking denial of the motion for summary judgment on the ground that the fraud underlying the aiding and abetting claims has not been established is also denied.

#### A. Legal Standard

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 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]).

Lastly, “[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

## **B. Plaintiffs’ Summary Judgment Motion**

### **1. Aiding and Abetting Fraud Claim**

The elements of a claim for aiding and abetting fraud are: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving this fraud (*Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Insurance Co.*, 64 AD3d 472 [1st Dept 2009]). The elements for the underlying fraud are: (a) a misrepresentation or a material omission of fact which was false and known to be false, (b) made for the purpose of inducing the other party to rely upon it, (c) justifiable reliance of the other party on the misrepresentation or material omission, and (d) injury (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Tanzman v La Pietra*, 8 AD3d 706 [3rd Dept 2004]).

Plaintiffs have demonstrated that Young made misrepresentations of fact to the plaintiffs

regarding the investment of proceeds from sale of the Property, which he knew to be false, to induce the plaintiffs to agree to participate in the investment. In reliance on the advice of their counsel, plaintiffs entrusted funds to the custody of Young and were injured by the loss of millions of dollars. Additionally, plaintiffs have made a prima facie showing that defendant knew of the fraud (as Young, the manager of Beach Channel, was the main actor in the underlying fraud). Beach Channel provided substantial assistance in execution of the fraud, in that Beach Channel affirmatively helped Young by knowingly accepting stolen funds, disbursing them from Beach Channel to other entities, and retaining a portion of the funds for its own uses. Its actions were a proximate cause of the harm on which the primary liability is based. Defendant does not dispute any of these facts.

Damages for fraud is indemnity for the actual pecuniary loss sustained as a direct result of the wrong (*see Continental Gas Co. v Pricewaterhouse-Coopers LLP*, 15 NY3d 264 [2010]). Plaintiffs proved that as a result of the fraud by Young and the participation of Beach Channel, they lost \$1.6 million. Along with Young, Beach Channel is jointly and severally liable to plaintiffs on the aiding and abetting fraud claim.

## 2. Conversion

Defendant argues that a three year statute of limitations bars the conversion claim (Response at ¶2, citing *Heffernan v Marine Midland Bank*, 283 AD2d 337, 338 [1st Dept 2001]). *Heffernan*, however, held that the three year statute of limitations for actions to recover chattel under CPLR section 214(3) applied instead of the six year limitations period for actions based on fraud under CPLR section 213(8), because the court in that case had already dismissed the fraud action and the conversion action could no longer be considered to be based on fraud (*Heffernan*, 283 AD2d at 338). Here, the conversion claim is based on the fraudulent actions of Young, and the six year statute of limitations applies. This claim is not time-barred.

The elements of conversion are plaintiff's possessory right or interest in the property and defendant's domination over the property or interference with it in derogation of plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see Employers' Fire Ins. Co. v Cotten*, 245 NY 102 [1927]; *see also Meese v Miller*, 79 AD2d 237 [4th Dept 1981]). Plaintiffs have made a *prima facie* showing that money belonging to 135 Bowery and identified as being proceeds from the sale of the Property was diverted into the accounts of Beach Channel, and that

Beach Channel distributed those funds elsewhere. Such showing (which is undisputed) is sufficient to satisfy the requirements of a claim of conversion (*see Salatino v Salatino*, 64 AD3d 923 [3rd Dept 2009]; *Key Bank v Grossi*, 227 AD2d 841 [3rd Dept 1996]).

Beach Channel argues, without citation, that since its possession of the funds was for less than a day, plaintiff's showing is insufficient to fulfill the requirements of a conversion claim. To the contrary, the requirements of a conversion claim are not only met by "domination" over the funds, but also by "interference" with the plaintiffs' use and enjoyment of the property (*Gillet v Roberts*, 57 NY 28 [1874]; *Boyce v Brockway*, 31 NY 490 [1865]). Beach Channel's distribution of the funds served that end. Plaintiff is entitled to prevail on the conversion claim.

As a general rule, damages recoverable in an action for conversion are the value of the property, i.e., the amount required to replace it, at the time and place of the taking (*see Fantis Foods, Inc. v Standard Importing Co., Inc.*, 49 NY2d 317 [1980]). Here, the value of the property taken is \$1,600,000. The fact that Young is also personally liable does not allow for Beach Channel to escape liability for the same loss.

### 3. Unjust Enrichment

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1<sup>st</sup> Dept 2011], *aff'd* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense . . ." (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d, 408 [1st Dept 2011]). Defendant argues that, since the funds were immediately disbursed from Beach Channel's accounts, Beach Channel was not actually enriched at plaintiffs' expense. Neither party cites to any cases on this point. Defendant has admitted that it held \$1.6 million to which it had no right. The fact that its manager then diverted a portion of those funds in violation of his fiduciary duty to Beach Channel cannot serve to exonerate Beach Channel. Moreover, at least some of the money was paid to Beach Channel's creditors: \$19,694.44 to eliminate the negative balance in the Beach Channel account, \$607.49 to LIPA, and \$1,590.49 to the New York City Water Board (Response at ¶ 5). The funds

benefitted the defendant directly. Accordingly, there is no disputed issue of material fact as to whether there was unjust enrichment of the defendant. Only the extent of the enrichment is disputed.

Having shown that \$1,600,000 of funds stolen from plaintiffs were received and used by defendant for unauthorized purposes, plaintiffs are entitled to judgment against defendant in that amount, together with interest from the date of receipt of the funds.

Accordingly, it is

**ORDERED** that the motion of plaintiffs for summary judgment is GRANTED as to the First (aiding and abetting fraud), Second (conversion), and Third (unjust enrichment) Causes of Action; and it is further

**ORDERED** that defendant's cross-motion is DENIED in its entirety; and it is further

**ORDERED** that judgment shall be GRANTED in favor of plaintiff, 135 Bowery LLC and against defendant, Beach Channel Shoppers Mart Co., LLC in the amount of \$1,600,000.00 together with interest at the statutory rate of 9% per annum from January 4, 2008, until the date judgment is entered as calculated by the Clerk of the Court together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

**DATED: June 2, 2016**

**ENTER,**

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