

At an IAS Term, Commercial Division I of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30<sup>th</sup> day of March, 2007.

P R E S E N T:

HON. CAROLYN DEMAREST,

Justice.

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NICK DONATO and ARIDNA DONATO,

Index No. 32113/04

Plaintiffs,

- against -

RAPID TRANSPORTATION SERVICES, INC., et al.,

Defendants.

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The following papers numbered 1 to 7 read on this motion:

Papers Numbered

|   |                 |
|---|-----------------|
| Notice of Motion/Order to Show Cause/<br>Petition/Cross Motion and<br>Affidavits (Affirmations) Annexed _____ | <u>1-3, 5-6</u> |
| Opposing Affidavits (Affirmations) _____  | _____           |
| Reply Affidavits (Affirmations) _____   | <u>7</u>        |
| _____ Affidavits (Affirmations) _____   | _____           |
| Other Papers: <u>Memorandum of Law</u> _____  | <u>4</u>        |

Upon the foregoing papers, defendants move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs' complaint. Plaintiffs Nick Donato and Aridna Donato cross-move for an order, pursuant to CPLR 3212, granting them summary judgment against defendants.

## *Background*

In or around 2001, defendant Michael Viola decided to start a business delivering home heating oil. Mr. Viola testified that the business consisted of three entities, defendant Rapid Transportation Services, Inc. (Rapid), the parent company, New York Fuel Distributor, an oil company, and Viodon Transportation, a trucking company. Mr. Viola testified that he and his wife, defendant Marie Viola, were Rapid's sole shareholders, officers and directors.

According to both parties, Nick Donato, Jr. (Nick Jr.), the son of plaintiffs Nick Donato and Aridna Donato, was to have become involved in the subject business. Plaintiffs allege that the Violas promised that Nick Jr. would become a partner in the business if plaintiffs agreed to loan money to the business. Plaintiffs allege that they made various loans based upon that representation, totaling \$85,000. The parties submit no documents regarding the alleged loans or the terms thereof.

In an affidavit, Mr. Viola concedes that "plaintiffs, or one of the plaintiffs, did loan money to Rapid," but also states that he is uncertain as to the amount loaned. In their memorandum of law, defendants further allege that, while some of the money at issue was loaned to Rapid, "[s]ome of the loans were made directly to Nick Jr. and then deposited into Rapid or expended on behalf of Rapid."<sup>1</sup> The Violas deny that any money was lent to or used by them personally.

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<sup>1</sup> Similarly, in his deposition testimony, Mr. Viola at times indicated that plaintiffs loaned some money directly to Nick Jr.

Both parties agree that Nick Jr. never became a partner in Rapid. Mr. Viola contends that this was due to a “number of reasons,” including Nick Jr.’s failure to clear his credit rating, pay back taxes, or obtain a driver’s license. Defendants state that “Rapid ultimately went out of business.”

On or about October 8, 2004, plaintiffs commenced this suit against Rapid, as well as Michael and Marie Viola individually, alleging causes of action for fraud, conversion, and non-payment of loan. The Violas now move to dismiss plaintiffs’ complaint as against them, arguing that there is no cause of action against them as individuals. Defendants also argue that plaintiffs have failed to make out a fraud or conversion claim. Plaintiffs cross-move for summary judgment, apparently on all three causes of action.

### ***Fraud***

Plaintiffs base their fraud claim on defendants’ alleged misrepresentation that Nick Jr. would become a partner if they loaned money to the corporation. Plaintiffs allege that defendants “knew such misrepresentation was false,” presumably at the time defendants allegedly made the representation.

Defendants argue that the fraud claim must be dismissed because, among other things, the complaint does not specifically indicate who made the representation, when the representation was made, or what exactly was said. Further, defendants contend that plaintiffs fail to plead that they reasonably relied on the false representation. In addition, defendants allege that the statement that Nick Jr. “would become” a partner is a mere

promissory statement about a future event, and cannot form the basis for a fraud claim. Defendants also contend that plaintiffs cannot establish damages for any alleged fraud because it was Nick, Jr. (who is not a party to this action), not plaintiffs, who was to have received the partnership position. Defendants thus argue that “[a]ssuming, arguendo, that plaintiffs[’] loan was repaid in full, the damages they are now claiming based on fraud - the very same \$85,000 which they allegedly loaned the Corporation, would no longer exist.” Defendants further argue that plaintiffs are attempting to convert a breach of contract claim for the non-payment of a loan into a fraud claim.

To state an actionable fraud claim, a plaintiff must show, among other things, that he or she was “justified in relying on the information supplied, and as a consequence, suffered damages” (*Goldman v Strough Real Estate, Inc.*, 2 AD3d 677, 678 [2003]). “General allegations that a defendant entered into a contract while lacking the intent to perform it are insufficient to state a cause of action for fraud” (*Place v Ginsburg*, 280 AD2d 656, 657 [2001], *lv denied* 96 NY2d 714 [2001]). However, a “misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud” (*Ross v DeLorenzo*, 28 AD3d 631, 636 [2006] [internal quotation marks and citation omitted]). While “merely promissory statements about what is to be done in the future” will not form the basis for fraud in the inducement, “misstatements of material fact or promises made with a present, albeit undisclosed, intent not to perform them” can be actionable (*Moon v Clear Channel*

*Communications, Inc.*, 307 AD2d 628, 631 [2003] [internal quotation marks and citation omitted]).

In this case, plaintiffs do allege that defendants repeatedly “promised” that plaintiffs’ son would become a partner in the business, and they further allege that defendants had no present intention of making Nick Jr. a partner when they made such promises. However, even assuming that plaintiffs could show that such statements were material and that plaintiffs justifiably relied upon such statements, plaintiffs have not shown how they were damaged by the alleged fraud. Plaintiffs contend that the money they gave to Rapid was only a loan, which they are asking to be repaid. Thus, as defendants argue, if the plaintiffs were repaid the full amount of money they loaned the corporation, they would be unable to establish any damages from making that loan, even if their son did not become a partner. Therefore, the only damages plaintiffs can claim in their fraud cause of action are duplicative of the damages flowing from their non-payment of loan claim. Accordingly, the fraud claim must be dismissed (*see e.g. Ross*, 28 AD3d at 636; *Bronx Store Equip. Co., Inc. v Westbury Brooklyn Assoc., L.P.*, 280 AD2d 352, 352 [2001]).

### ***Conversion***

“Conversion is the unauthorized exercise of dominion or control over specifically identified property which interferes with the owner’s rights” (*Hoffman v Unterberg*, 9 AD3d 386, 388 [2004]). “Where the property is money, it must be specifically identifiable

and be subject to an obligation to be returned or to be otherwise treated in a particular manner” (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1995]). For example, the funds of a specific, named bank account are sufficiently identifiable for purposes of establishing a conversion claim (*see e.g. Republic of Haiti*, 211 AD2d at 384).

The basis of plaintiffs’ conversion claim appears to be the allegation that defendants used “approximately \$20,000 of the funds to set up a moving company” and that defendants “converted the money acquired from Plaintiffs to [their] own use and ownership without right.” As to the \$20,000 allegedly used for a moving company, plaintiffs do not specifically identify what fund or source of funds they are referring to. If “allegedly converted money is incapable of being described or identified in the same manner as a specific chattel, it is not the proper subject of a conversion action” (*9310 Third Ave. Assoc., Inc. v Schaffer Food Serv. Co.*, 210 AD2d 207, 208 [1994] [internal quotation marks and citation omitted]). Moreover, although plaintiffs indicate for what purpose the \$20,000 was allegedly used, they do not identify for what specific purpose that money was intended to be used. If the funds in question, even if specifically identifiable, were not earmarked for a particular purpose, it cannot be said that the funds were used for an unauthorized purpose (*cf. e.g. Hoffman*, 9 AD3d at 388; *Republic of Haiti*, 211 AD2d at 384). Similarly, plaintiffs do not identify a specific purpose for which the overall alleged loan of \$85,000 was to be used. Moreover, plaintiffs did not allege or testify that defendants were obligated to return any specific sum to plaintiffs within any

definite time (*cf. e.g. Key Bank of New York v Grossi*, 227 AD2d 841, 843-844 [1996]).

If there was no specific purpose or deadline attached to the money in question, there can be no claim that the money was not used for the purpose for which it was given.

Accordingly, plaintiffs' allegations fail to establish the requisite elements of a conversion claim, and that cause of action is therefore dismissed.

### ***Non-Payment of Loan***

In their motion, the Violas admit that plaintiffs "did loan money to Rapid," although they contend that they are unsure of the total amount. Defendants do not contend that all of the money loaned to Rapid by plaintiffs was repaid. Accordingly, plaintiffs' motion for summary judgment as to liability against Rapid on their non-payment of loan claim is granted. However, there are issues of fact as to the amount loaned and/or repaid.

In addition, the Violas move to dismiss this claim as against them, contending that no money was loaned to them personally. The Violas note that there are no documents indicating that any money was loaned to them personally. In addition, the Violas point to Mrs. Donato's deposition, in which she testified that Mr. Viola, the person with whom she had the majority of dealings, refused to accept any checks made out to him personally, and insisted that she make the checks out to Rapid instead.<sup>2</sup> Similarly, plaintiffs' complaint states that defendants have failed to pay money "lent to Defendant

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<sup>2</sup> Mr. Donato testified that he was not personally involved in the transactions at issue.

Corporation,” not to the individual defendants. Thus, the Violas have made a prima facie case that they did not receive any money personally from plaintiffs.

In response, plaintiffs argue that Michael Viola “guaranteed the loans” and note that Mrs. Donato answered “yes” when asked at her deposition if Mr. Viola asked to borrow the money. Plaintiffs also allege that Mr. Viola “admitted having a verbal agreement whereby he would [repay] \$60,000 directly to the Plaintiffs.”

Plaintiffs’ contentions fail to raise a genuine issue of fact as to whether they loaned any money to the Violas in their individual capacities. Although Mrs. Donato testified that she spoke to Mr. Viola about starting the business, and claims that he asked her for the money, she did not testify that she gave any money to Mr. Viola in his personal capacity. Nor do plaintiffs submit any documents showing payments made to the Violas in their individual capacity. Moreover, Mrs. Donato testified that she did not know whether the Violas ever used any of the money personally. And, while plaintiffs contend in their cross motion that defendants “have utilized Plaintiffs[’] money for personal purposes,” they cite to no evidence to support such a claim.

Plaintiffs’ evidence of Mr. Viola’s alleged guarantee of the money and/or promise to repay \$60,000 is similarly unavailing. First, plaintiffs submit no documentary evidence that Mr. Viola promised to personally guarantee payment of any loans made to Rapid (*see* General Obligations Law § 5-701 [a] [2]). The proof of Mr. Viola’s guarantee of the loan cited by plaintiffs is Mrs. Donato’s testimony that Mr. Viola told her not to worry, saying:

“You are not going to lose your money. Your money is good. I have been in business, know how to be a businessman.” However, nothing in that statement constitutes a personal guarantee by Mr. Viola to pay any money to plaintiffs.

As to Mr. Viola’s alleged promise to repay \$60,000 to plaintiffs, plaintiffs submit no evidence that Mr. Viola ever promised to pay any money to plaintiffs from his own personal funds. In his affidavit and deposition testimony, Mr. Viola denies that he ever guaranteed any loan or agreed to pay plaintiffs personally. And in the testimony cited to by plaintiffs, Mr. Viola stated that he was helping to “pay [Nick Jr.] off as a partner,” not that he was helping to repay a debt owed to plaintiffs by Rapid.<sup>3</sup> Moreover, nowhere does Mr. Viola say that he promised to pay any money to plaintiffs from his personal accounts. While plaintiffs note that Mr. Viola did testify that he put some of his personal funds into the business, and used some of that money to pay plaintiffs, that does not demonstrate, as plaintiffs appear to argue, that Mr. Viola became personally obligated to pay plaintiffs. Rather, as Mr. Viola testified, it is simply proof that he put some of his own money into the company.

Accordingly, the court finds that plaintiffs have failed to raise a triable issue of fact as to the Violas’ personal liability on the non-payment of loan claim, and so that claim is dismissed as against them. As plaintiffs’ first two causes of action are also dismissed, there are no further causes of action remaining against the Violas personally, and they are

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<sup>3</sup> At other points in his testimony, Mr. Viola indicated that, at times, he helped Nick Jr. pay off money that he (Nick Jr.) owed to his parents.

dismissed as defendants in this action.

***Conclusion***

Accordingly, defendants' motion for summary judgment is granted to the extent that: (1) Michael Viola and Marie Viola are dismissed as defendants from this case, and (2) plaintiffs' fraud and conversion claims are dismissed. Defendants' motion is otherwise denied. Plaintiffs' cross motion for summary judgment is granted as to the issue of liability against defendant Rapid Transportation Services, Inc. on plaintiffs' non-payment of loan claim; plaintiffs' cross motion is otherwise denied. This matter will be referred for inquest on the issue of damages.

This constitutes the decision and order of the court.

E N T E R,