

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

JOHN J. CIAFONE, ESQ., x

Plaintiff,

- against -

DIANE CARTER, AARONSON RAPPAPORT,
FEINSTEIN & DEUTSCH, LLP, NORMAN C.
WEITZMAN, ESQ., and DAVID A.
JASKOWIAK, ESQ.,

Defendants.
_____ x

Index
Number 519 2009

Motion
Date June 17, 2009

Motion
Cal. Number 7

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion by defendant Aaronson Rappaport Feinstein & Deutsch, LLP for an order dismissing the complaint with prejudice, pursuant to CPLR 3211(a)(7). Defendant David A. Jaskowiak, Esq. separately moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7).

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Upon the foregoing papers these motions are consolidated for the purpose of a single decision and are determined as follows:

It is undisputed that Christopher Taylor, the son of Diane Carter and Donald Taylor was killed in an automobile accident in Pennsylvania, and that Ms. Carter and Mr. Taylor were not married to one another. Other passengers in the same vehicle brought an action in the United States District Court for the Middle District of Pennsylvania entitled *Wilson v IESI NY and Emerald Isle Transport Inc.* (Wilson action).

Temporary Letters of Administration, which allowed for the filing of a lawsuit on behalf of the Estate of Christopher Taylor, were issued to Donald Taylor and his attorney Vivia Joseph, Esq. by the Surrogate's Court in Westchester County on August 26, 2005. Vivia Joseph thereafter retained David A. Jaskowiak, a Pennsylvania attorney, who commenced an action in the United States District Court for the Middle District of Pennsylvania entitled *Estate of Christopher Taylor v IESI NY and Emerald Isle Transport Inc. and Rhona Wilson, Administratrix of the Estate of Horace Wilson, deceased* (Taylor action). The Taylor action was later consolidated with the Wilson action.

Two months after the Taylor action was commenced, Mr. Ciafone commenced a wrongful death action in the United States District Court for the Middle District of Pennsylvania entitled *Carter v IESI, et al.* (Carter action). The Hon. Christopher Connor of the United States District Court in an order dated October 26, 2005, determined that Pennsylvania law barred the Carter action, as there was a prior pending action for wrongful death. Judge Connor further determined that Diane Carter was not the administrator of the estate when the complaint was filed nor was she the current administrator, that as a beneficiary she was not entitled to bring a wrongful death claim, and that she lacked standing to institute said action. Mr. Ciafone pursuant to the order of October 26, 2005 withdrew the Carter action.

Judge Connor, in a memorandum decision dated January 18, 2006, stated that the possibility of Rule 11 sanctions against Mr. Ciafone was raised by the court on its own initiative when it discovered that the Carter complaint misrepresented that Ms. Carter was the administratrix of the Estate of Christopher Taylor and that no other action had been commenced on behalf of the estate. Judge Conner found that sanctions were warranted, but as Mr. Ciafone's misrepresentations were not attributable to malicious design, he issued an order dated January 18, 2006 which directed Mr. Ciafone to complete accredited continuing legal education programs geared towards federal civil procedure and professional conduct.

Mr. Ciafone was discharged by Ms. Carter and she retained Norman C. Weitzman to represent her claims as a beneficiary of her son's estate. The plaintiffs in the Taylor wrongful death action entered into a settlement, and said settlement and distribution of funds, including the payment of Mr. Jaskowiak's legal fees was approved by Magistrate Judge Andrew Smyser, in an order dated October 12, 2006, and by the Westchester County

Surrogate, the Hon. Anthony A. Scarpino, Jr., in a decision and decree dated May 24, 2007. Mr. Ciafone was not awarded legal fees by either Magistrate Judge Smyser or Judge Scarpino.

Plaintiff John J. Ciafone, Esq., alleges in his complaint that he is entitled to recover his fee share from the settlement obtained on behalf of the Estate of Christopher Taylor in the Pennsylvania wrongful death action. It is alleged that on September 25, 2006, and thereafter, Norman C. Weitzman, Esq. was employed by the law firm of Aaronson Rappaport Feinstein & Deutsch, LLP (ARFD); that on July 18, 2003 Christopher Taylor was killed in an automobile accident; that the decedent's mother, Diane Carter retained Mr. Ciafone to pursue a wrongful death action and that she executed a retainer agreement whereby he would receive 33 1/3 percent of any sum recovered; that he commenced the Taylor action; that Ms. Carter then retained ARFD to pursue the Taylor case; that Mr. Ciafone executed a consent to change attorneys at Carter's request; that ARFD assigned the case to Weitzman; that at the time of the substitution plaintiff had accrued \$7,830.00 in costs and disbursements in the Taylor case; that ARFD retained David A. Jaskowiak, as Pennsylvania counsel to pursue the Taylor case; that the Taylor action was settled on September 25, 2006 for \$425,000.00; that Ms. Carter received \$212,500.00; and therefore plaintiff is entitled to recover \$70,762.50, plus his costs of \$7,830.00, and that he has not received any sums from the defendants despite his demands.

Plaintiff's first cause of action against Diane Carter is for breach of the retainer contract; the second cause of action against Carter, ARFD, Weitzman and Jaskowiak seeks to recover damages for conversion; the third cause of action against Carter, ARFD, Weitzman and Jaskowiak seeks to recover damages for unjust enrichment; and the fourth cause of action against Carter, ARFD, Weitzman and Jaskowiak seeks to recover damages for "intentional infliction of pecuniary harm."

Defendant ARFD now seeks an order dismissing the complaint with prejudice, pursuant to CPLR 3211(a)(7). Defendant David A. Jaskowiak, Esq. separately moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7).

It is well settled that " '[i]n considering a motion to dismiss for failure to state a cause of action (*see* CPLR 3211[a][7]), the pleadings must be liberally construed (*see* CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez*, 84 NY2d 83, 87-88, [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2003]; *see also Bovino v Village of Wappingers Falls*, 215 AD2d 619 [1995]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as

factual claims flatly contradicted by the record are not entitled to any such consideration (*see 511 W. 232nd Street Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Morone v Morone*, 50 NY2d 481 [1980]; *Danna v Malco Realty, Inc.*, 51 AD3d 621 [2008]; *Gershon v Goldberg*, 30 AD3d 372, 373 [2006]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg*, *supra* at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see Guggenheimer v Ginzburg*, *supra* at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372, [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828,[1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also 511 W. 232nd Street Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]).

Defendant ARFD, in support of its motion to dismiss the compliant pursuant to CPLR 3211(a)(7), has submitted affirmations from Elliott Zucker a member of the law firm ARFD and Mr. Weitzman, as well as relevant documentary evidence pertaining to the Taylor and Carter actions in federal court and the Surrogate's Court proceedings.

Mr. Zucker states in his affirmation that at the time Mr. Weitzman was retained by Ms. Carter, he had been a former and was no longer a contract attorney with ARFD; that Weitzman' status was "of counsel"; that Ms. Carter was Weitzman's private client; that ARFD played no role whatsoever in any aspect of Ms. Carter's lawsuit; that ARFD firm had no knowledge of the lawsuit or the relationship between Weitzman and Carter; and that ARFD did not receive any monies in connection with Ms. Carter's claims.

Mr. Weitzman, in his affirmation, states that he has not been served with process in the within action; that he has never been an equity partner in ARFD; that at the time of the alleged events he was no longer a contract partner and was "of counsel" to ARFD; that he was privately retained by Ms. Carter with regard to her interests as a beneficiary of her son's estate after she discharged Mr. Ciafone; that his retainer agreement, consent to change attorneys and notice of appearance and all other papers in the subject matter contained his

name only and his personal address; that Ms. Carter was never a client of ARFD; and that other than himself, neither ARFD nor any members of the firm received remuneration from his representation of Ms. Carter. Mr. Weitzman further states that all sums he received for his legal work on Ms. Carter's behalf were paid and distributed pursuant to court orders, that Mr. Ciafone never challenged any of these orders, and that no court ever directed that payment be made to ARFD and no such payments have been made.

Defendant David A. Jaskowiak, Esq., in support of his motion to dismiss the complaint has submitted relevant documentary evidence pertaining to the federal Taylor and Carter federal actions and orders, and the Surrogate's Court proceedings. It is asserted that said documentary evidence establishes that Mr. Ciafone never represented the Estate of Christopher Taylor; that Ciafone acted contrary to the interests of the Estate; and that Mr. Jaskowiak was properly paid his legal fees and that Ciafone has no cognizable claim to any part of said fee.

It is noted that Mr. Ciafone's prior counsel served opposing papers to these motions which were not submitted to the court. Mr. Ciafone is now appearing pro se and has served and submitted a single "further affirmation" in opposition to each motion. With respect to ARFD's motion, Mr. Ciafone asserts that Mr. Weitzman's affidavit is fraudulent and claims that Ms. Carter was represented by ARFD. The sole basis of Mr. Ciafone's claim against ARFD is a certificate of service of a petition to settle the federal action filed by Mr. Jaskowiak, which lists the names of counsel representing various parties.

With respect to Mr. Jaskowiak's motion, Mr. Ciafone, in opposition, asserts that he entered into a fee agreement with Mr. Jaskowiak. In support of this claim he has submitted a copy of a letter he received from Mr. Jaskowiak dated September 28, 2004, and two fax cover sheets of the same date. In the letter of September 28, 2004, Mr. Jaskowiak confirmed a conversation of his "potential involvement" as trial counsel; discussed fee arrangements; instructed that "[a] copy of the fee agreement duly signed by the administrator will be forwarded to me. You will promptly undertake to advise and obtain the consent of the administrator regarding my involvement"; discussed responsibilities for payment; stated "[y]ou are in the process of creating the estate and expect to have that completed within a matter of a week or so. You will promptly provide me with all of the necessary documentation for the estate, as well as any other pertinent information from your file, so that this case can proceed as expeditiously as possible"; and stated that they would arrange for a meeting. Mr. Jaskowiak ended the letter by saying "[p]lease review the above and advise whether this accurately reflects our agreement." The first fax cover sheet requests that Mr. Ciafone provide a letter memorializing their agreement, and provide an update on the status of the estate, while the second fax cover sheet requested that Mr. Ciafone respond at his earliest convenience.

Defendants' request to dismiss the second cause of action for conversion is granted. It is well settled that "[c]onversion is the unauthorized exercise of dominion or control over specifically identified property which interferes with the owner's rights (see *Gilman v Abagnale*, 235 AD2d 989, 991 [1997]; *Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1995]). Money may be the subject of conversion if it is specifically identifiable and there is an obligation to return it or treat it in a particular manner (see *Republic of Haiti v Duvalier*, supra at 384). When funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion (see *Meese v Miller*, 79 AD2d 237, 243 [1981]") (*Hoffman v Unterberg*, 9 AD3d 386 [2004]). Proof of a demand for the return of the subject property "is an essential ingredient in a conversion action" (*Tache-Haddad Enters. v Melohn*, 224 AD2d 213 [1996]; *Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785 [2009]; see *Apex Ribbon Co. v Knitwear Supplies*, 22 AD2d 766, 767 [1964]).

Mr. Weitzman and Mr. Zucker's affirmations are sufficient to establish that ARFD did not represent Ms. Carter in connection with the Taylor action. Contrary to Mr. Ciafone's assertion, the fact that Mr. Jaskowiak listed Mr. Weitzman as counsel for Ms. Carter and used ARFD's mailing address, does not constitute proof of the existence of an attorney client relationship between Ms. Carter and ARFD. Plaintiff's claim in this regard, thus, is flatly contradicted by the evidence and is not entitled to any consideration. Furthermore, there is no evidence that said law firm ever received any sums in connection with Mr. Weitzman's private representation of Ms. Carter. Therefore, as ARFD did not represent Ms. Carter and was never in possession of any settlement funds, Mr. Ciafone cannot maintain a claim for conversion against said law firm.

As regards Mr. Jaskowiak, Mr. Ciafone cannot establish that he engaged Mr. Jaskowiak as trial counsel and that they had a valid fee sharing agreement. Rather, the alleged agreement with Mr. Jaskowiak is nothing more than a proposed agreement, which was expressly contingent upon Mr. Ciafone's representation of the Estate of Christopher Taylor, and obtaining the Estate's permission to have Mr. Jaskowiak act as trial counsel. As the federal District Court decisions make clear, it is beyond dispute that Mr. Ciafone never represented the Estate of Christopher Taylor, and that he improperly commenced an action on behalf Diane Carter, with full knowledge that she was not the administratrix of the Estate of Christopher Taylor. Therefore, the allegation set forth in the complaint that Ciafone "commenced the Taylor action" is blatantly untrue, and must be disregarded. Plaintiff thus has no cognizable claim to any portion of the legal fees awarded to Mr. Jaskowiak in the Taylor action.

Defendants' request to dismiss the third cause of action for unjust enrichment is granted. A cause of action for unjust enrichment (or quasi-contract) requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be

inequitable to permit the defendant to retain that which is claimed by the plaintiff (*Cruz v McAneney*, 31 AD3d 54 [2006]; *Clifford R. Gray, Inc. v LeChase Construction Services, LLC*, 31 AD3d 983 [2006]). The essence of an unjust enrichment cause of action is that one party is in possession of money or property that rightly belongs to another (*Clifford R. Gray, Inc. v LeChase Construction Services, LLC*, 31 AD3d at 983). Mr. Ciafone is unable to make any such showing here, as he is not entitled to share in the legal fees earned and awarded to Mr. Jaskowiak. In addition, as no legal fees arising out of the Taylor action were ever earned, awarded or paid to ARFD, no action for unjust enrichment can be maintained against this defendant.

Defendants' request to dismiss the fourth cause of action for "intentional infliction of pecuniary harm" is granted, as this is not a cognizable cause of action.

In view of the foregoing, defendant Aaronson Rappaport Feinstein & Deutsch, LLP's motion for an order dismissing the complaint with prejudice, pursuant to CPLR 3211(a)(7), is granted. Defendant David A. Jaskowiak, Esq. separate motion for an order dismissing the complaint, pursuant to CPLR 3211(a)(1) and (7), is granted.

Dated: August 18, 2009

J.S.C.