**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**CIVIL TRIAL DIVISION**

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| WILLIAM R. LISS | : | |
| | : | June Term, 2002 |
| Plaintiff, | : | No. 03502 |
| v. | : | |
| | : | Commerce Program |
| SHELDON J. LISS | : | |
| | : | Control No. 082273 |
| Defendant. | : | |

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**ORDER and MEMORANDUM**

**AND NOW**, this 29TH day of June 2005, upon consideration of the Motion for Summary Judgment of Defendant Sheldon J. Liss, all responses in opposition, the respective memoranda, all matters of record and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** that said Motion is **GRANTED** and Plaintiff's Complaint is **DISMISSED** in its entirety.

**BY THE COURT:**

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**C. DARNELL JONES, J.**

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## MEMORANDUM OPINION

***C. DARNELL JONES, J.***

Currently before the court is the Motion for Summary Judgment of Defendant Sheldon Liss. For the reasons fully set forth below, said Motion is **granted.**

## BACKGROUND

The instant litigation stems from a shareholder dispute between two brothers, William R. Liss ("William") and Sheldon J. Liss ("Sheldon"), each of whom owned fifty percent of the issued and outstanding shares of stock of Liss Brothers, Inc. ("LBI"), prior to its liquidation. William filed the instant lawsuit claiming, *inter alia*, that Sheldon forced the liquidation of LBI without William's knowledge or consent and re-formed the business as Liss Global, Inc. ("Global"), of which Sheldon is the sole shareholder.

This case involves a long and complex procedural history. William filed a complaint against Sheldon in June 2001, and thereafter filed an amended complaint asserting the following claims: 1) breach of fiduciary duty; 2) breach of contract; 3) breach of duty of good faith; 4) promissory estoppel; 5) conversion; 6) fraud; 7) intentional misrepresentation; 8) appointment of a custodian/receiver; 9) appointment of a constructive trust; and 10) conspiracy. *Liss v. Liss, No.*

*010602063 (C.C.P. Phila.).* Sheldon filed preliminary objections to the amended complaint, which were granted in part and, as a result, Counts II (breach of contract) and III (breach of duty of good faith) were dismissed.[1] Shortly thereafter, William also filed a Motion for the Appointment of a Receiver and Imposition of a Constructive Trust as to Global (the "Receivership Motion"). A hearing was conducted over the course of several months in connection with the Receivership Motion. The hearing, which took place over several days between January 30, 2002 and July 23, 2002, generated nearly 1,000 pages of testimony and extensive hearing exhibits (the "Receivership Hearing"). On January, 29, 2003, following the Receivership Hearing, The Hon. John Herron issued Findings of Fact and Conclusions of Law, along with a lengthy opinion (the "Receivership Opinion").[2] In the Receivership Opinion, Judge Herron rejected each of William's factual contentions and denied his request for a receivership or the imposition of a constructive trust. Specifically, Judge Herron concluded that the record and arguments presented failed to establish that Sheldon acted "illegally, oppressively, or fraudulently" towards William. Receivership Op. at 25.

On June 26, 2002, William brought a second action asserting the same claims against the same defendants, seeking the same non-equitable relief (the "Complaint"). This action also included a jury demand, which had been stricken from the prior action. Sheldon filed Preliminary Objections to this Complaint, which this court overruled on August 12, 2003 and, at the same time, consolidated the two actions. As a result, the claims currently before the court

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1 This court dismissed Counts II and III of the amended complaint with a detailed analysis, holding that William failed to plead an enforceable agreement based on the attached May 31, 2000 Letter of Intent. Liss v. Liss, 2002 Phila. Ct. Com. PL. LEXIS 89, 2002 WL 576510 at *11-14 (C.C.P. Phila. 2002). Specifically, this court concluded that the Letter of Intent did not constitute a binding contract for Sheldon to pay William $ 3,200,000 for his interests in LBI because the letter explicitly stated that "this agreement is subject to the preparation of an agreed final agreement of sale." Id. It is also of importance that, at the same time, the court struck William's demand for a jury.

2 Liss v. Liss, 2003 Phila. Ct. Com. Pl. LEXIS 48 (C.C.P. Phila. 2003).

include: 1) breach of fiduciary duty; 2) promissory estoppel; 3) conversion; 4) fraud; 5) intentional misrepresentation; and 6) conspiracy.

The factual background of this matter is lengthy, indeed. Thus, for the purpose of brevity, this court incorporates the uncontested facts set forth in the background section of the Receivership Opinion, which is attached hereto as Appendix A, and will proceed directly to the analysis of the instant motion.

## DISCUSSION

### I. Rule of Coordinate Jurisdiction

One of the primary issues facing this court is the effect of the Receivership Opinion on the instant Motion. Sheldon contends that the Receivership Opinion serves as a bar to most, if not all of the remaining claims under the Rule of Coordinate Jurisdiction, which bars a "transferee court from disturbing the findings of fact and conclusions of law of the transferor court." *See* Riccio v. American Republic Ins. Co., 550 Pa. 254, 705 A.2d 422, 425 (1997). Sheldon takes the position that the sufficiency of William's evidence was tested at the Receivership Hearing, therefore, the matter has already been adjudicated on the merits. Since there has been no substantial change in facts or evidence from that which was presented at the Receivership Hearing, Sheldon argues, summary judgment should be granted in his favor.[3] In opposition, William argues that the Receivership Opinion should have no effect on the instant action because Judge Herron's ruling was solely for preliminary relief,[4] thus there has been no final adjudication on the merits. Moreover, William argues that different legal issues are

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3 Sheldon admits that the Receivership Opinion would not impact William's promissory estoppel claim. Def. Mem. at 29, n.26.

4 Interestingly, there are no cases directly on point in Pennsylvania as to whether a hearing in connection with the appointment of a receiver or custodian is a final adjudication on the merits or preliminary relief.

involved at bar and that, as a result, he did not have a full and fair opportunity at the Receivership Hearing to present all evidence pertinent to his law claims.

It is a settled principle that "judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions." Riccio, 705 A.2d at 425; Rivera v. Home Depot USA, Inc., 2003 Pa. Super. 326 (2003); Ryan v. Berman, 572 Pa. 156, 813 A.2d 792, 795 (2002). Upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a "legal question" previously decided by the transferor trial court. Kroptavich v. Pa. Power & Light Co., 2002 Pa. Super. 87, 795 A.2d 1048 (2002). "Departure . . . is allowed only in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed." Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326 (1995).

This court recognizes the significance of the Rule of Coordinate Jurisdiction and is cognizant of its potential impact in this case. While Sheldon's arguments are quite persuasive, this court finds that the Rule of Coordinate Jurisdiction does not apply here and that Judge Herron's legal conclusions are not binding upon this court, as the only claims considered and resolved at the Receivership Hearing included whether William was entitled to the appointment of a receiver or the imposition of a constructive trust. William's law claims were not resolved by Judge Herron nor were they presented for consideration. This court is further mindful of the fact that such claims require different inquiries and different burdens of proof. Moreover, and perhaps most significantly, it remains that this court is faced with the fact that William has demanded a jury with respect to his law claims. Reliance upon the Receivership Opinion concerning issues of credibility would deprive William of his right to a jury. Thus, any credibility determinations made by Judge Herron will not be considered and likewise are not

binding upon this court.

That being said, this court may still apply the summary judgment standard based on the evidence presented. "Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035.2; Horne v. Haladay, 1999 Pa. Super. 64, 728 A.2d 954 (1999). This burden rests with the moving party and the court is required to examine the entire record in a light most favorable to the non-moving party. First Wisconsin Trust Co. v. Strausser, 439 Pa. Super. 192, 198, 653 A.2d 688, 691 (1995). At bar, this court is benefited by an extensive record from the Receivership Hearing to consider just as it would deposition transcripts or affidavits.

However, the simple fact that Sheldon bears the burden as the moving party does not mean that William is entitled to a trial simply based on the allegations of his Complaint. To withstand summary judgment, William must actually produce evidence of facts which would entitle him to a jury trial; he may not just claim that such evidence exists in opposition to summary judgment and expect his claims to survive. This is not an opportunity for William to present the same evidence and legal theories to a different fact finder with the hope of a different result. Once the moving party has met its burden, the adverse party may not rest upon the mere allegations or denials of his pleading, but his response must set forth specific facts showing that there is a genuine issue for trial. Pa.R.C.P. 1035.2(2); s*ee also* Fennell v. Nationwide Mut. Fire Ins. Co., 412 Pa. Super. 534, 540, 603 A.2d 1064, 1067 (1992); Aimco Imports, Ltd. v. Industrial Valley Bank & Trust Co., 291 Pa. Super. 233, 236, 435 A.2d 884 (1981); Amabile v. Auto Kleen Car Wash, 249 Pa. Super. 240, 376 A.2d 247 (1977). Pa.R.C.P. 1035.2(2) provides that summary judgment is appropriate:

> (2) if, after the completion of discovery relevant to the motion,

> including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2 (2). As stated by the Superior Court, "[o]ur rules of civil procedure are designed to eliminate the poker game aspect of litigation and compel the players to put their cards face up on the table before trial begins." Paparelli v. GAF Corp., 379 Pa. Super. 62, 549 A.2d 597 (1988); Roland v. Kravco, Inc., 355 Pa. Super. 493, 513 A.2d 1029 (1986). This is exactly what this court requires at bar.

Thus, while the particular inquiry and burden of proof may differ from that which was before Judge Herron, the facts upon which the claims are based are essentially the same. Judge Herron found the record to be devoid of evidence to establish that Sheldon acted "illegally, oppressively, or fraudulently" towards William for purposes of the appointment of a receivership. The issue then becomes whether the current record contains any further evidence, in addition to that which was presented at the Receivership Hearing, to support William's law claims. Even when viewing this substantial record in the light most favorable to him, this court finds that William has failed to demonstrate facts essential to any of the causes of action pled. As a result, summary judgment is granted in favor of Sheldon.

**II. William Has Not Demonstrated A Breach of Fiduciary Duty**

Count I of William's Complaint purports to state a claim for breach of fiduciary duty against Sheldon. William claims that Sheldon breached a fiduciary duty to him by "engag[ing] in a pattern of oppressive conduct intended to substantially deprive William of his reasonable expectations regarding his interest" in LBI. Compl. ¶ 71. Specifically, William claims that Sheldon acted to:

1. Deprive William of any active roll in the management of LBI;

2. Undermine William's duties as an officer and director of LBI;

3. Cause the liquidation of LBI and prevent William from receiving any consideration for his interest in LBI;

4. Ensure that Global would be in place and immediately take over the operation of LBI for the sole and exclusive use and benefit of Sheldon.

Compl. ¶ 72.

A breach of fiduciary duty essentially is a breach of trust which does not require a professional relationship or a professional standard of care but instead focuses on a "confidential relationship." Nardella v. Dattilo, 36 Pa. D. & C. 4th 364, 380 (Pa. Com. Pl. 1997). "In essence a [confidential] relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." Id. at 4 (*quoting* In re Estate of Scott, 455 Pa. 429, 432, 316 A.2d 883, 885 (1974). A confidential relationship exists where the parties do not deal on equal terms, "but, on the one side there is an overmastering influence, or on the other, weakness, dependence or trust, justifiably reposed." Id. (*quoting* Frowen v. Blank, 293 Pa. 137, 145-46, 425 A.2d 412, 416-17 (1981)).

There is some debate regarding breach of fiduciary duty claims as respects shareholders of closely-held corporations, particularly where they hold equal shares of the company. At bar, Sheldon and William were each 50 percent shareholders in LBI. The law is unsettled as to whether such a claim may lie. Sheldon has taken the position that it may not, citing the absence of case law permitting such a claim. To support his claim, William cites Leech v. Leech, 2000 Pa. Super. 334, 762 A.2d 718 (2000), [5] which coincidentally involved two brothers each of whom were 50 percent shareholders as well as officers and directors of a closely-held

5 William also relies on Baron v. Pritzker, 52 D&C.4th 14 (C.C.P. Phila. 2001), in which the court allowed a breach of fiduciary duty claim to proceed in a derivative action between 50/50 shareholders, holding that such duties are owed between them. As the opinion related to preliminary objections, it does not address the merits of the claim and does not give much insight as to what specifically constitutes

corporation. Id. In Leech, the court appointed a custodian, on the basis that defendant engaged in "oppressive" conduct, finding that even though the parties held equal shares, the facts demonstrated that they were no longer "equal" in their share of control over the corporation. Id. However, Leech is distinguishable from the instant matter in several respects. First, the court in Leech considered the conduct in accordance with the specific language of the Pennsylvania Business Corporation Law, namely 15 Pa.C.S.A. §1767, which specifically deals with the appointment of a custodian; the Court did not consider this issue in the context of breach of fiduciary duty. However, for purposes of this instant Motion, this court will proceed as if such an action may lie between equal shareholders of a closely-held corporation.

Leech is also factually distinguishable. Upon returning from a leave of absence, the plaintiff in Leech was given only limited access to the corporation's books and records and was denied both income and access to corporate accounts, as well as relieved of his authority to sign corporate checks, despite that fact that he was the corporation's secretary/treasurer. Leech, 762 A.2d at 720. The Court found that this constituted "oppressive conduct," recognizing that there existed some sort of disparity between the shareholders regarding control, despite their equal shares of the company.

This court makes no such finding here, as the record is devoid of evidence sufficient to support such a theory. William asserts that Sheldon engaged in such conduct by: 1) depriving William of any active roll in the management of LBI; and/or 2) undermining William's duties as an officer and director of LBI. Compl. at ¶ 72. William contends that, after the sale of the Townsend Road property, he was "effectively frozen out" of LBI, while Sheldon eliminated William's office, revoked his access to the computer system and virtually eliminated the payment of William's corporate benefits.

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"oppressive" conduct.

First, this court is unpersuaded by William's claims that he was deprived of an office and computer access, as such contentions are belied by Williams' own testimony. William has conceded that computer access was restored to him after intervention by his attorney. Moreover, it is undisputed that, after the sale of the Townsend Road Property, LBI no longer had access to the area that had been William's office, but he was provided with an area elsewhere in which to work. N.T. 1/30/02 at 65-66. However, even if Sheldon did fail to provide William office space in Global, this act alone is insufficient to demonstrate the "oppressive" conduct necessary to succeed on a claim for breach of fiduciary duty. Further, and perhaps more significantly, William has not demonstrated any "overmastering influence" on the part of Sheldon or a "weakness, dependence or trust, justifiably reposed" on his own behalf. Despite William's contentions that his role was minimized as Sheldon began to "implement his scheme" to take over LBI, the record makes clear that William did not fully participate – or even work a full day – even when he was "actively participating" in the management of LBI, yet he continued to receive his full salary notwithstanding. N.T. 1/30/02 at 17, 154.

William also maintains that, between May 2000 and December 20, 2000, Sheldon charged extravagant personal expenses to the corporate credit card for such things as expensive restaurants, family vacations, theater and train tickets. The testimony at the Receivership Hearing clearly demonstrated that, through much of its existence, LBI employed a generous expense reimbursement policy from which both Sheldon and William reaped personal benefit. N.T. Exh. P-6 through P-19; N.T. 1/31/02 at 233-4. In response to company's financial problems, Sheldon instituted a new reimbursement policy effective January 1, 2001 which tightened the reigns on expense accounts, requiring a legitimate business purpose for reimbursement. Id. William has presented no evidence that this new expense reimbursement policy was applied differently between himself and Sheldon. These "restrictions" on William's

expense reimbursements do not constitute shareholder oppression, but rather a means for LBI to combat its economic problems. The evidence demonstrates that, whatever his role in the company, William's salary remained in place and his reimbursement for business-related expenses was never reduced. What he lost, just like every other LBI employee including Sheldon, was the ability to use LBI as his own personal cash register. N.T. 1/30/02 at 67. This does not constitute oppression, just good business sense, albeit too little too late.

As previously indicated, one of the central themes of William's case is that Sheldon engaged in an intricate scheme to bring about the improper liquidation of LBI and deprive William of his interests in that company by creating Liss Global ("Global"). Specifically, in support of his breach of fiduciary duty claim, William alleges that Sheldon acted to: 1) cause the liquidation of LBI to prevent William from receiving any consideration for his interest therein and; 2) ensure that Global would be in place and immediately take over the operation of LBI for the sole and exclusive use and benefit of Sheldon. Compl. ¶ 72. In its opposition to Sheldon's Motion for Summary Judgment, William appears to have now taken the untenable position that LBI was not in fact experiencing the dire financial problems in early 2001 which lead to its eventual demise. However, the record is devoid of any evidence to support such a far-fetched theory and, actually, the facts of record belie such a contention, including William's own testimony at the Receivership Hearing.[6] N.T. 1/30/02 at 130-1. The expert report attached to William's opposition to Sheldon's Motion does not constitute sufficient evidence, in and of itself, to withstand summary judgment

6 William has conceded that Summit Bank held a mortgage on the Townsend Road Property and in its original loan documents, Summit required that the proceeds from a sale of the real estate be invested into Liss Brothers up to $ 3,000,000 or be returned to the bank. Thus, Sheldon, and not only William, invested the his proceeds from the real estate sale back into LBI as a capital contribution. William concedes that this infusion of capital allowed the company to pay its debts: 1/30/2002 N.T. at 63.

It is undisputed that LBI was continuously in default under the Summit Bank Loan and that, as a result, Summit Bank desired to terminate its relationship with LBI and imposed a deadline of February 28, 2001. N.T. 1/30/02 at 123-4; N.T. 2/21/0 at 113-4; N.T. 5/9/02 at 11-14. It is also undisputed that once Summit Bank called the loan, that it would have been the end of LBI. Id. It is important to note that Summit Bank did not call the loan after the plan to liquidate, rather it did so before learning of it and had made clear that it wanted to end the relationship many months earlier, even before the Townsend Road Property had been sold. In opposition to the Motion, William has repeatedly asserted that Summit Bank would have extended the loans for a sufficient time to enable LBI to obtain alternate financing based on Summit Bank's past history of repeatedly extending the loans. However, this is pure supposition and speculation. Again, William has produced no such evidence that this was actually the case, just baseless conclusions.

The record clearly demonstrates that liquidation of LBI was the only real option in light of the company's agreement with Summit Bank, its dire financial situation, as well as the unworkable relationship of the two brothers. It is further undisputed that William and his counsel knew about Summit Bank's deadline and were aware of the plan to liquidate.[7] N.T.

7 At the meeting, Sheldon proposed two scenarios to William that, in his opinion, would have allowed LBI to continue its operations: (1) Sheldon offered to buy out William's interest in LBI for $ 3,000,000 to be paid out over a ten year period; or (2) the parties could maintain the status quo, with William continuing to receive his salary and Sheldon keeping his raise. N.T. 1/30/02 at 106-09, 112, 82-87; N.T. 1/31/2002 at 394-98; N.T. 5/9/2002 at 11-13. When confronted with the proposals, William rejected both and said he would rather liquidate the company. N.T. 1/30/2002 at 87, 112; 116-17, 200; N.T. 1/31/02 at 361; N.T. 2/21/2002 at 110. The court finds it immaterial whether William intended this as an agreement to liquidate or as an "idle" threat. It does nothing to change the fact that both William and his counsel were on notice regarding the plan to liquidate LBI. Interestingly, this "threat" is also one of the bases of William's lawsuit against his attorney, Stephen Foxman, styled William R. Liss v. Eckert Seamans Cherin & Mellot, LLC, et al., No. 040202052 (C.C.P. Phila.) (the "Eckert Seamans Complaint"). In the Eckert Seamans Complaint, William asserts that "Foxman allowed William to threaten the liquidation of Liss Brothers as a negotiating tool." Id. at ¶ 68. William further alleges: "…Defendant Foxman failed to advise William Liss that in the event of a liquidation of Liss Brothers: 1) William would receive very little or nothing for his share in the Corporation; and 2) because of Sheldon's overpowering control of the business, its customers and suppliers over the three year

5/9/02 at 73-4, 90-2;Exh. P-28b, e. Likewise, it is uncontested that there was no "opposition" to the liquidation plan until March 1, 2005, after the deadline had past. Finally, and most importantly, at the insistence of Sheldon, a third-party liquidator was chosen by both shareholders to oversee the dissolution of LBI. This fact alone completely undermines the argument that Sheldon "stole" the business.

Moreover, Sheldon's formation of Global in and of itself does not demonstrate any wrongdoing. There has been no allegation that the neutral liquidator acted improperly or otherwise failed to realized the maximum value possible for the company's assets. There has been no specific evidence of tangible LBI assets that were acquired by Global for less than fair value. Nor was there any impediment or restrictive covenants which precluded either brother from pursuing the same type of business, or even engaging the same clients, after the demise of LBI; there were no exclusivity agreements with any of LBI's suppliers, vendors or customers, including Rite Aid. Thus, neither the formation of Global or Sheldon's continued relationship with Rite Aid give rise to a cause of action for breach of fiduciary duty, or any other cause of action for that matter.

The lengthy record in the case, including William's response to the instant motion for summary judgment, is completely devoid of any evidence to support William's theory. Simply stating that he possesses evidence which constitutes "smoking guns" does not entitle William to

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period prior to the February 13, 2001 meeting, Sheldon could easily form a new corporation and take over the business independently of William. Defendant Foxman never advised William that for these reasons, he should not suggest or threaten liquidation as a ploy to negotiate an acceptable buyout. When William did threaten liquidation at the February 13, 2001 meeting, defendant Foxman should have immediately retracted William's threat." Id. at ¶ 78 (d). In addition, the Eckert Seamans Complaint further states, "…several days after the meeting, Foxman completely failed to respond for weeks to Sheldon's attorney's email that William and Sheldon, had, in fact, agreed to liquidate the Corporation at the meeting. Defendant Foxman's failure to respond to the email (which arguably could be construed as a consent to liquidation on William's behalf) was the ultimate failure in defendant's representation of William." Id. at ¶ 78 (e). These statements constitute judicial admissions and are further demonstrative of the proof problems with William's claims. *See e.g.* Jewelcor Jewelers & Distributors, Inc. v. Corr, 373 Pa. Super. 536, 542, 542 A.2d 72, 75 (1988).

bring his claims before a jury. In order to withstand the instant Motion, he must set forth specific facts showing that there is a genuine issue for trial. He has failed to do so. Summary judgment is therefore granted in favor of Sheldon as to Count I.[8]

**III. William's Promissory Estoppel Fails As A Matter of Law**

In Count II of his Complaint, William purports to state a claim against Sheldon for promissory estoppel. A claim for promissory estoppel lies where: 1) the defendant made a promise that he should have reasonably expected to induce action or forbearance on the part of the plaintiff; 2) plaintiff actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise. Crouse v. Cyclops Industries, 560 Pa. 394, 403, 745 A.2d 606 (2000). A viable promissory estoppel claim must be based on an express promise. Id.

In the Complaint, William alleges that Sheldon repeatedly "assured, promised and guaranteed William that he would: a) repay William's capital contribution; b) continue to be paid his corporate benefits pursuant to the Proceeds Agreement; and c) that LBI would continue to pay William's PNC loan. Compl. at ¶ 78. William claims that these promises induced him into the sale of the Townsend Road property. In support of his Motion, Sheldon argues that there is no evidence that Sheldon made or that William relied on any alleged representation beyond those expressly contained in the Proceeds Agreement.[9] He further argues that William's own testimony at the Receivership Hearing and at his deposition demonstrates that there was no fraud in the inducement to enter into the Proceeds Agreement. This court agrees. The record in this case is devoid of any evidence which would support such a claim.

8 This court also finds William's damage theory to be unsupported by the record, as well as Pennsylvania law, especially with respect to the issue of causation.

9 *See also*, Eckert Seamans Complaint ¶¶ 54-57.

The law is well settled that a claim for promissory estoppel is not cognizable in the presence of an express contract. Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc., 535 Pa. 469. 477-79, 636 A.2d 156, 160-161 (1994); Blue Mountain Mushroom Co., Inc. v. Monterey Mushroom, Inc. 246 F.Supp.2d 394 (E.D. Pa. 2002). The court finds that the Proceeds Agreement constitutes the entire agreement of the parties, as demonstrated by the facts leading up to its execution.

By way of background, as collateral for the loans, Summit Bank held a mortgage to the Townsend Road Property.[10] It became apparent that the financial straits of LBI required that the Townsend Road property be sold. Pursuant to LBI's agreement with Summit Bank, the proceeds of the sale were to be treated as a capital contribution so that LBI could reduce its debt. N.T. Exh. D-6, P-56. Despite this obligation, William objected and refused to place his share of the proceeds back into the company until Sheldon agreed to enter into the Sales Proceeds Disposition Agreement ("Proceeds Agreement"), pursuant to which Sheldon and William agreed that William's "employment and compensation" with LBI would not be terminated "unless and until" William ceased being a shareholder of LBI or his capital contribution had been paid. Mem. Exh. E. Nonetheless, despite the legal requirement and practical necessities for investing the real estate sale proceeds back into LBI, William required Sheldon to enter into the Proceeds Agreement as precondition for his cooperation with the sale. 1/30/2002 N.T. at 48, 198-99. These facts not only demonstrate that the Proceeds Agreement is the entire agreement between the parties, but also make it clear that William has not demonstrated "injustice" would result

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10 Summit issued the following three separate loans to Liss Brothers pursuant to the Bank Agreement: (1) a working capital line of credit totaling six million five hundred thousand dollars ($ 6,500,000); (2) a letter of credit facility note totaling three million dollars ($ 3,000,000); and (3) a term loan totaling four hundred seventy thousand one hundred dollars ($ 470,100). The notes were secured by Liss Brothers, William and his wife, Sheldon and his wife as well as by the partnership with, *inter alia*, personal guarantees and mortgages against real property.

from failing to enforce Sheldon's alleged promises. The benefit William obtained from the Proceeds Agreement well exceeded the bounds of what justice requires. Accordingly, Count III fails as a matter of law and is dismissed.

## IV. William Has Failed To Prove Conversion (Count III)

In Count III, William purports to assert a conversion claim against Sheldon for his "unlawful acts in stealing and transferring the business of LB to Global without paying any consideration." Conversion is the deprivation of another's right of property in, or use or possession of, chattel, or other interference therewith, without the owner's consent and without lawful justification." McKeeman v. Corestates Bank, N.A., 2000 Pa. Super. 117, 751 A.2d 655, 659 n. 3 (2000). Money constitutes chattel that may be converted, but business goodwill and other intangibles do not, unless they have been merged into a tangible document. Id.; Northcraft v. Edward C. Michener Assoc., Inc., 319 Pa. Super. 432, 466 A.2d 620 (1983). As previously indicated, William's contentions are belied by the presence of an independent third party who oversaw the entire liquidation process, the appointment of whom was agreed upon by both parties. N.T. 7/23/2002 at 89. These facts are flatly inconsistent with William's assertion that Sheldon was attempting to steal LBI and its assets. William has presented no evidence to overcome this conclusion. As such, summary judgment is granted as to Count III.

## V. Counts IV and V Fail As A Matter of Law

In separate claims with nearly identical language, William contends that Sheldon fraudulently and intentionally misrepresented to William that he would: 1) buy out William's interest in LBI pursuant to the letter of intent[11]; 2) reimburse William in the amount of his share of the proceeds from the sale of the Townsend Road Property; 3) continue to pay William's salary and "corporate benefits" pursuant to the Proceeds Agreement; and 4) repay William's

personal loan. Compl. ¶¶ 87-96; 97-106.

The elements for both claims are basically the same. Proof of such a claim requires: 1) a representation; 2) which is material to the transaction at hand; 3) made intentionally with knowledge of its falsity or recklessly without regard to its veracity; 4) with the intent or misleading another to rely upon it; 5) justifiable reliance by the plaintiff; 6) the resulting injury was proximately caused by the reliance. Presbyterian Med. Ctr. v. Budd, 2003 Pa. Super. 323, 832 A.2d 1066 (2003).

William's fraud and intentional misrepresentation claims fail for several reasons. First, both counts are barred by the gist of the action doctrine, which precludes a party from "re-casting ordinary breach of contract claims into tort claims." Etoll, Inc. v. Elias/Savion Advertising Inc., 2002 Pa. Super. 347, 811 A.2d 10, 19 (2002). Tort claims are barred where, as here, "…the duties allegedly breached were created and grounded in the contract itself ... [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." Id. Here, as previously indicated, all of the "promises" at issue were memorialized in the Proceeds Agreement and there has been no evidence presented which demonstrates that Sheldon made or William relied upon any alleged representation beyond those expressly contained in the Proceeds Agreement.

In addition, the law is well settled that a breach of a promise to do something in the future is not actionable. Shoemaker v. Commonwealth Bank, 1997 Pa. Super. LEXIS 3199, 700 A.2d 1003 (1997). Both Count IV and V appear to be just that. As such, Counts IV and V fail as a matter of law.

## VI. William Has Failed To Prove Conspiracy (Count VI)

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11 This court already concluded that Letter of Intent did not constitute a binding contract. *See* n.1.

In Count VI, William alleges that Defendant Jeffrey Waldman combined forces with Sheldon to "steal" LBI from William for the benefit of Sheldon and Global. Compl. ¶¶ 107-112. To prove a claim of conspiracy, plaintiff must demonstrate: 1) a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for an unlawful purpose; 2) an overt act done in furtherance of the common purpose; and 3) actual legal damage. Baker v. Rangos, 229 Pa. Super. 333, 324 A.2d 498, 506 (1974). Proof of malice, or an intent to injure, is an "essential part" of this cause of action. GMH Assoc. v. Prudential Realty Group, 2000 Pa. Super. 59, 752 A.2d 889 (2000). A cause of action for civil conspiracy does not arise until "some overt act is done in pursuance of a common purpose or design…and actual legal damage results." Id.

First, this court has already concluded that William has failed to demonstrate that Sheldon engaged in any unlawful activity. In addition, William's conspiracy claim can not succeed because he has failed to establish the existence of a "conspiracy" insofar as he has produced no evidence which demonstrates that Waldman was involved in any of the decisions at issue. William's unsupported allegations of a conspiracy alone are insufficient to establish a *prima facie* case of conspiracy. Accordingly, Count VI is dismissed.

## CONCLUSION

For the above-stated reasons, Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Complaint is **DISMISSED** in its entirety.

The court will enter a contemporaneous Order consistent with this Opinion.

**BY THE COURT:**

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**C. DARNELL JONES, J.**