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

MAURICE ROMY, M.D.,	: MAY TERM, 2002
THE SPINE CENTER OF PENNSYLVANIA, P.C.,	
THE SPINE CENTER OF NEW JERSEY, P.C.	: No. 1236
AMERICAN LIFECARE, INC. and	
TSC MANAGEMENT OF PENNSYLVANIA, INC.	:
v.	
	:
MICHAEL R. BURKE, ESQUIRE,	
KALOGREDIS, SANSWEET, DEARDEN & BURKE, LTD.	: Commerce Program
WILLIAM BLAEUER, DAVID BLAEUER	
PAIN & REHABILITATION INSTITUTE	:
OF PENNSYLVANIA, P.C.,	
PLEASANT HILL CONSULTING, INC.,	:
WILLIAM TINDALL, JR., RIC MARTELLO, CPA,	
HEALTHCARE CONSULTING ASSOCIATES, LLC.,	:
P.M. HEALTHCARE, INC., and	
NORTHEAST MANAGEMENT CONSULTING	: Control Nos. 062869, 072927
ASSOCIATES, INC.,	

O R D E R

AND NOW, this 20th day of January 2005, upon consideration of: (1) the Motion for Summary Judgment of Ric Martello, CPA ("Martello"), Pain and Rehabilitation Institute of Pennsylvania, P.C., Healthcare Consulting Associates, LLC, P.M. Healthcare, Inc., and Northeast Management Consulting Associates, Inc., and (2) the Motion for Summary Judgment of William Blaeuer, David Blaeuer, William Tindall, and Pleasant Hill Consulting, the plaintiffs' responses in opposition, the respective memoranda, all other matters of record, and in accord with the contemporaneously filed Opinion, it is **ORDERED** that said motions are **Granted, in part**. It is **ORDERED** that Count VI of the Sixth Amended Complaint against Martello, and Count VII of the Sixth Amended Complaint against all defendants are **Dismissed**. It is **ORDERED** that otherwise the Motions for Summary Judgment are **Denied.**

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ……. January 20, 2005

This Opinion addresses two Motions for Summary Judgment. The first was filed by of defendants, Ric Martello, CPA ("Martello"), Pain and Rehabilitation Institute of Pennsylvania, P.C. ("PRI"), Healthcare Consulting Associates, LLC ("HCA"), P.M. Healthcare, Inc. ("PMH"), and Northeast Management Consulting Associates, Inc. ("NEMCA"). The second was filed by William Blaeuer ("W. Blaeuer"), David Blaeuer ("D. Blaeuer"), William Tindall and Pleasant Hill Consulting ("PHC").

In this action, the Spine Center of Pennsylvania, P.C. ("SCPa"), the Spine Center of New Jersey, P.C. ("SCNJ"), and TSC Management of Pennsylvania, Inc. ("TSC") (collectively, the "Plaintiffs"),[1] have raised, *inter alia*, the following claims:

> Counts V and VI for Breach of Fiduciary Duty against Martello, W. Blaeuer, D. Blaeuer, and Tindall (collectively, the "Individual Defendants") for the allegedly improper acts they committed in setting up PRI, PHC, and NEMCA (collectively, the "Corporate Defendants") while the Individual Defendants were acting as officers, directors and/or employees of Plaintiffs.
>
> Count VII for Intentional Interference with Contract against all defendants for using non-party Dr. Swartz as a straw man in setting up PRI in alleged breach of his employment agreement with Plaintiffs.
>
> Counts VIII and IX for Conversion against the Individual Defendants because they allegedly took money and resources from Plaintiffs for their own use and for the use of the Corporate Defendants.
>
> Count X for Conspiracy against all defendants based on the Individual Defendants' alleged concerted conversion of Plaintiffs' money and resources for the benefit of themselves and the Corporate Defendants.
>
> Count X[I] for a Constructive Trust against PRI, NEMCA, and HCA with respect to the money and resources they allegedly improperly received from Plaintiffs.

Defendants seek summary judgment on these claims.

> 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. In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999). When confronted with a motion for summary judgment,

> [t]he adverse party may not rest upon the mere allegations or denials of his pleading, but must file a response . . . identifying (1) one or more issues of fact

[1] The claims of plaintiffs, Maurice Romy, M.D. and American Life Care, Inc. were dismissed upon Preliminary Objection.

> arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa. R. Civ. P. 1035.3. Because Plaintiffs have not identified facts essential to two of their causes of action, this court will dismiss them (Count VI and Count VII). However, since Plaintiffs have identified sufficient facts, some of which are disputed, with respect to the remainder of their claims, this court denies the majority of the contentions in the defendants' motions for summary judgment.

I. Plaintiffs Have Failed to Adduce Sufficient Evidence of Their Claim for Breach of Fiduciary Duty Against Martello.

Defendant Martello claims that Plaintiffs have failed to show that he owed them any fiduciary duty, so he cannot be found liable for breaching a non-existent duty. The parties agree that officers, directors, and other agents of a corporation owe fiduciary duties to the corporation. *See, e.g.,* 15 Pa.C.S. § 512. Furthermore, both parties acknowledge that Martello was never formally appointed or hired as an officer, director, or employee of any of the Plaintiffs. However, Plaintiffs claim that, because Martello exercised control over some or all of the Plaintiffs' activities, he should be viewed as a *de facto* corporate agent of the Plaintiffs, and therefore, he owed them a fiduciary duty, which he breached.

However, Plaintiffs have not presented sufficient evidence to establish that Martello was acting as a *de facto* agent of any of the Plaintiffs. Plaintiffs have proffered the following facts in support of their claim that Martello acted (improperly) as their agent:

> 1) Martello once executed a Directors' and Officers' Liability Insurance application as the "President" of American Life Care, Inc. ("ALC").
>
> 2) ALC was the parent company of Plaintiff TLC.

3) Martello ordered Dodge vans by letter written on Defendant HCA's stationary.

4) The vans were paid for by check from SCPa, which was signed by W. Blaeuer and Tindall. A rebate check was issued by the Dodge dealer to HCA, not SCPa.

5) The Attorney Defendants wrote a letter to Martello at HCA, with a carbon copy to W. Blaeuer, in which the Attorney Defendants confirmed that they would represent HCA in connection with their representation of SCPa and that SCPa would be billed for such work, which it apparently was.

6) One of the Attorney Defendants testified that Martello occasionally directed him to bill certain legal work to HCA.

7) Martello wrote a memorandum to the HCA files discussing the "Expansion of [certain surgeons'] activities at TSC." In it, Martello reported that W. Blaeuer asked him "to review the structure of SCPa with the objective of integrating [the surgeons'] practice completely into the Spine Center."

8) W. Blaeuer testified that it would be incorrect to say that Martello was never involved in any management functions of the Spine Center.

At best, this evidence shows that Martello owes a fiduciary duty to defendant HCA, and possibly to ALC, and that he may have acted as a consultant for one or more of the Plaintiffs. This evidence does not demonstrate that Martello exercised the necessary control over Plaintiffs to sustain a claim for breach of fiduciary duty against Martello. This Count will be dismissed.

II. Plaintiffs' Claims For Breach of Fiduciary Duty Against W. Blaeuer, D. Blaeuer, and Tindall Will Not Be Dismissed.

The parties do not dispute that D. Blaeuer, W. Blaeuer, and Tindall were officers, directors and/or employees of Plaintiffs, nor do they dispute that, as such, they owed Plaintiffs a fiduciary duty. Furthermore, the Individual Defendants admit that they were instrumental in setting up the Corporate Defendants. As a result, Plaintiffs claim that the creation and operation of the Corporate Defendants was a breach of W. Blaeuer's, D. Blaeuer's, and Tindall's fiduciary duty to Plaintiffs because the Individual Defendants utilized Plaintiffs' assets to enable the Corporate Defendants to compete with Plaintiffs. However, W. Blaeuer, D. Blaeuer and Tindall

claim that the actions they took to establish the Corporate Defendants were all authorized by, and for the benefit of, Plaintiffs. Clearly, the question whether W. Blaeuer, D. Blaeuer, and Tindall acted wrongfully in breach of their fiduciary duties to Plaintiffs, is a disputed issue of material fact that must be resolved at trial.

III. Plaintiffs Have Failed to Adduce Sufficient Evidence of Their Claim For Intentional Interference With Contract.

Plaintiffs claim that Defendants intentionally interfered with an ongoing business relationship between Plaintiffs and a non-party, Dr. Swartz. Dr. Swartz performed radiological services for Plaintiffs, originally as an independent contractor, and subsequently through a non-party corporation, Center City Medical Associates ("CCMA"). The alleged interference occurred when defendants had Dr. Swartz act as straw (medical) man to hold the stock of Defendant PRI, and subsequently when Dr Swartz ceased to provide radiological services for Plaintiffs.[2]

The written Escrow Agreement between CCMA, Dr. Swartz, and TSC, which embodies the terms of the Plaintiffs' relationship with Dr. Swartz, states that "all parties wish to promote and protect the continuity of [CCMA's] relationship with TSC," but it does not say anything about promoting or protecting a direct relationship between TSC and Dr. Swartz. *See* Martello's Motion for Summary Judgment, Ex. 10. Furthermore, although the Escrow Agreement restricts Dr. Swartz from transferring or encumbering his ownership interest in CCMA, the Agreement does not prohibit him from being involved in other corporations, nor does it require him, personally, to provide services to TSC.

[2] In order to make out a claim for such intentional interference with contract, Plaintiffs must point to evidence of record that defendants "intentionally and improperly interfere[d] with the performance of a contract . . . between [Plaintiffs] and [Dr. Swartz] by inducing or otherwise causing [Dr. Swartz] not to perform the contract . . . [and] pecuniary loss resulting to [Plaintiffs] from the failure of [Dr. Swartz] to perform the contract." Restatement (Second) of Torts § 766 (1979).

Since the Agreement is the only evidence to which Plaintiffs cite, they have not offered sufficient proof of Dr. Swartz' alleged relationship with Plaintiffs, nor have they shown that Dr. Swartz' relationship with Defendants violated or otherwise interfered with his relationship with Plaintiffs. Therefore, Plaintiffs' claim for intentional interference against defendants will be dismissed.

IV. Plaintiffs' Conversion Claims Will Not Be Dismissed.

The Individual Defendants claim that Plaintiffs have failed to proffer any evidence that the Individual Defendants converted any of Plaintiffs' property. "Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 659 n. 3 (Pa. Super. 2000). "Money may be the subject of conversion." *Id.*, 751 A.2d at 659. The use or possession of the converted property need not pass to the converter, but may pass to a third person; the converter is liable if s/he interfered with the plaintiff's right to control the chattel, but the converter need not end up in possession or control of the converted chattel. *See* Restatement (Second) Torts §§ 221-3, 235 (1965).

Plaintiffs have offered evidence of the following alleged acts of conversion, which the Defendants argue were all properly authorized transactions:

1. Individual Defendants and PMH received money from Plaintiffs, but did not provide any consideration to Plaintiffs to justify such payments.

2. Individual Defendants caused Plaintiffs to pay for legal and other services rendered to Corporate Defendants.

3. Individual Defendants caused Plaintiffs to pay for vehicles and other goods that were used by Corporate Defendants.

Clearly, if the jury finds Plaintiffs' evidence credible, then the Individual Defendants may be found liable to Plaintiffs for converting Plaintiffs' money to their own and Corporate

Defendants' use. However, since people are not chattel, Plaintiffs may not base their claim for conversion on the alleged luring away by defendants of Plaintiffs' employees.[3]

V. Summary Judgment Must Be Denied With Respect to Plaintiffs' Remaining Counts Against Defendants.

As the court previously held with respect to Defendants' Preliminary Objections to Plaintiffs' first Complaint, concerted conversion is a sufficient underlying tort upon which to predicate a claim for conspiracy against Defendants. *See* Romy v. Burke, May Term, 2002, No. 01236, pp. 8-9 (May 2, 2003) (Sheppard, J.). Similarly, the court has previously held that a constructive trust is a proper remedy to assert against the recipients of converted chattels. *See id.*, p. 9. Since Plaintiffs' have proffered sufficient evidence to send their claims for conversion to trial, the conspiracy and constructive trust claims predicated on the alleged conversion may also proceed to trial.

CONCLUSION

For these reasons, the defendants' Motions for Summary Judgment are granted in part and denied in part. The court will issue an Order consistent with this Opinion.

BY THE COURT,

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ALBERT SHEPPARD, JR., J.

[3] Although Plaintiffs originally alleged that Individual Defendants converted Plaintiffs' trade secrets and/or business plan in setting up the Corporate Defendants, Plaintiffs no longer assert such a claim. *See* Plaintiffs' Memorandum of Law in Response to Blaeuer's Motion for Summary Judgment, pp. 21-2. Such intangible rights cannot serve as the basis for a claim for conversion. *See* Restatement (Second) Torts § 242 (1965).