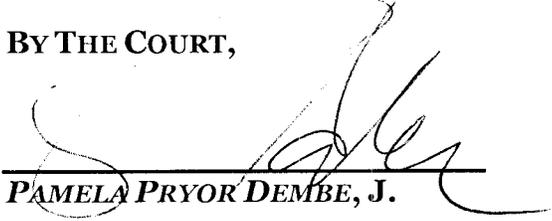


of fraud in its entirety is **DENIED**.

2. The motion for summary judgment is **GRANTED-IN-PART** and **DENIED-IN-PART** as to the claim of conversion asserted in count V of the second amended complaint. The motion is **GRANTED** regarding the portion of the claim alleging that Chesco Coring & Cutting, Inc. and Todd A. Cliggett converted Plaintiffs' "equipment and materials" while performing work at the "Barnes & Noble Project." The motion is also **GRANTED** regarding the portion of the claim alleging that Chesco Coring & Cutting, Inc. and Todd A. Cliggett converted \$4,000.00 of Plaintiffs' money for work performed at the "Mod 7 Project." Plaintiffs may not maintain such portions of their claim of conversion. The remainder of the motion seeking to dismiss the claim of conversion in its entirety is **DENIED**.
3. The remainder of Defendants' motion for summary judgment is **DENIED**.

BY THE COURT,



PAMELA PRYOR DEMBE, J.

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

MEGA CONCRETE, INC., MEGA SITEWORK AND CAPPONI ENTERPRISES, INC.	:	April Term, 2011
	:	
	:	Case No. 00997
<i>Plaintiffs</i>	:	
v.	:	
	:	
SHOEMAKER CONSTRUCTION, CO., ROGER BALL, PLUMBLINE CONSTRUCTION, INC., JOHN MATTER, ANDREW UHRIK, CHESCO CORING & CUTTING, INC. and TODD A. CLIGGETT	:	Commerce Program
	:	
<i>Defendants</i>	:	Control No. 13091826
	:	

MEMORANDUM OPINION

The motion for summary judgment of defendants Chesco Coring & Cutting, Inc. and Todd A. Cliggett require this court to determine *inter alia* whether plaintiffs may maintain the claims of fraud and conversion asserted against such defendants. For the reasons below, the motion for summary judgment is granted-in-part and denied-in-part as to both claims. The remainder of the motion is denied.

Background

Plaintiffs, Mega Concrete, Inc., Mega Sitework, LLC and Capponi Enterprises, Inc. (collectively, “Mega Construction” or “Plaintiff”), are entities sharing a common address in Philadelphia, Pennsylvania. Mega Construction operates primarily as a subcontractor in the construction trade. At all times relevant to this action, Mr. Michael Smith (“Smith”), served Mega Construction as its Chief Operating Officer. Smith is not a party to this action but is a defendant in a related pending federal action filed by Mega

Construction. While serving as Chief Operating Officer of Mega Construction, Smith incorporated, controlled and managed a construction company allegedly in competition with his employer. Defendant Chesco Coring & Cutting, Inc. (“Chesco”), is a Pennsylvania entity engaged in the construction trade. Individual defendant Todd A. Cliggett (“Cliggett”) owned or controlled Chesco at all times relevant to this action.

On September 17, 2009, Mega Construction filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania. This action, styled Mega Concrete, Inc. v. Michael Smith et al., case No. 09-4234, asserted causes of action based on federal and Pennsylvania law against a number of defendants, including its former employee, Smith, as well as Chesco and Cliggett. The District Court dismissed the federal causes of action asserted against Chesco and Cliggett, and provided for the transfer of any remaining Pennsylvania claims to a Court of Common Pleas in Pennsylvania. The instant litigation in the Court of Common Pleas, Philadelphia County, commenced on April 8, 2011, when the surviving claims from the federal action were transferred to this court. On January 10, 2013, Mega Construction filed its second amended complaint in this litigation. The second amended complaint asserts against the Chesco and Cliggett defendants the claims of fraud, conversion, aiding-and-abetting breach of fiduciary duty and unjust enrichment.

The second amended complaint alleges that Smith, Chesco and Cliggett fraudulently agreed “to divert the business opportunity” of Mega Construction to work on a construction site (the “Barnes & Noble Project”), “while fraudulently causing Mega Construction to provide labor and materials [thereto] for their benefit.”¹ In essence, Mega Construction alleges that Smith, with the complicity of Chesco and Cliggett,

¹ Second Amended Complaint, ¶¶ 167.

“scheduled certain Mega Construction employees to perform work at the Barnes & Noble Project” while passing the benefits from that work to themselves.²

The second amended complaint also avers that Chesco, with the complicity of Smith and Cliggett, fraudulently invoiced Mega Construction in the amount of \$4,000 for “Downtime, Delays and Remod[eling Work]” while Chesco performed sub-contracting work on behalf of Mega Construction at another construction site, the “Mod 7 Project.”³ Specifically, the second amended complaint asserts that “Chesco doctored its business record by falsely representing that it incurred \$4,000 of downtime in its work at the Mod 7 Project.”⁴

On September 16, 2013, Chesco and Cliggett filed the instant motion for summary judgment. The motion asks this court to dismiss the claims of fraud, civil conspiracy, conversion and unjust enrichment asserted against Chesco and Cliggett in the second amended complaint.⁵ The motion does not ask this court to dismiss the claim of aiding-and-abetting breach of fiduciary duty, asserted against Chesco and Cliggett in Count VI thereof. On October 17, 2013, Mega Construction timely filed its response in opposition to the motion for summary judgment. Discovery in the instant litigation has closed, and the motion for summary judgment is ripe for a ruling.

² *Id.* at ¶177; see generally ¶¶ 168-176, 178-180.

³ *Id.* at ¶ 182.

⁴ *Id.* See also Invoice No. 6891 issued by Chesco Coring & Cutting, Inc. to Mega Construction, Exhibit 28 to the Second Amended Complaint.

⁵ In their motion for summary judgment, Chesco and Cliggett incorrectly referenced certain paragraphs contained in Mega Construction’s second amended complaint. Specifically, Chesco and Cliggett “skipped backwards” the properly enumerated paragraphs by eleven positions. For example, when Chesco and Cliggett referenced paragraph 157 of the second amended complaint, they actually cited the language of paragraph 168; when they referenced paragraph 171, they actually cited paragraph 182. This inadvertent, incorrect enumeration is harmless. “A scrivener’s error ... may ... be rectified....” *Bokoch v. Noon*, 420 Pa. 80, 85, 215 A.2d 899, 901 (1966).

Discussion

Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.⁶

Summary judgment is properly granted as a matter of law if, after the completion of discovery relevant to the motion ..., 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 which in a jury trial would require the issues to be submitted to a jury.... The adverse party who bears the burden of proof at trial must come forward with evidence essential to preserve his cause of action.... If such a party fails to produce such essential evidence, the moving party is entitled to judgment as a matter of law.⁷

I. Mega Construction cannot prove fraud.

In Pennsylvania, the elements of fraud are:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and,
- (6) the resulting injury was proximately caused by the reliance.⁸

THE BARNES & NOBLE PROJECT

The second amended complaint alleges that Chesco and Cliggett “made false representations of fact and deliberately concealed material facts in connection with the transactions and conduct embodying [their] fraudulent schemes....”⁹

In this case, the second amended complaint of Mega Construction enumerates

⁶ Roche v. Ugly Duckling Car Sales, Inc., 2005 Pa. Super 225, 879 A.2d 785, 789 (Pa. Super. 2005).

⁷ Chaney v. Meadville Med. Ctr., 2006 Pa. Super 295; 912 A.2d 300, 306 (Pa. Super. 2006) (citing and explaining Pa. R.C.P. 1035.2).

⁸ Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

⁹ Second amended complaint, ¶ 185.

several improper omissions and concealments allegedly perpetrated by Chesco and Cliggett regarding their involvement in the Barnes & Noble Project.¹⁰ However, Mega Construction has not identified at this stage of the litigation any “material representation” made by defendants Chesco Coring & Cutting, Inc. or Todd A. Cliggett which would have induced Mega Constructions to “justifiably rely” thereon. With no evidence of the elements required to prove fraud, Mega Concrete may not maintain such a claim against Chesco and Cliggett for their involvement in the Barnes & Noble Project.

II. Mega Construction cannot prove that defendants Chesco and Cliggett converted equipment and materials of Mega Construction, nor that they converted \$4,000.00 through submission of an invoice which charged Mega Construction with “downtime” expenses allegedly not incurred by Chesco and Cliggett.

THE BARNES & NOBLE PROJECT

The second amended complaint alleges that the Chesco defendants “knowingly and intentionally” converted the property of Mega Construction.¹¹ The second amended complaint specifically alleges that “Smith directed Mega Construction employees to provide work and **materials** to the Barnes and Noble Project for the benefit of Chesco.”¹²

In Pennsylvania,

[t]he classic definition of 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.¹³

¹⁰ Id. See, e.g. ¶¶ 174-175, 185.

¹¹ Id., ¶ 221 .

¹² Id. ¶ 178 (emphasis supplied).

¹³ L.B. Foster Co. v. Charles Caracciolo Steel & Metal Yard, Inc., 2001 Pa. Super. 131, 777 A.2d 1090, 1095 (Pa. Super. 2001) (emphasis supplied).

On September 7, 2011, Mr. John F. Capponi, representative on behalf of Mega Construction, offered the following deposition testimony:

Q. Let's talk about the Barnes and Noble Project.

* * *

Are you aware that Chesco used any materials that belonged or were owned by any of the plaintiffs at the Barnes and Noble Project?

A. I'm not aware of that.

Q. Likewise, are you aware of whether or not Chesco used any equipment that belonged to any of the plaintiffs in the Barnes and Noble Project?

A. I don't know.¹⁴

This testimony shows that Mega Construction cannot identify any materials and equipment which Chesco allegedly converted from Mega Construction at the Barnes & Noble Project. Consequently, Mega Construction may not maintain the claim of conversion regarding materials and equipment allegedly used by Chesco at the Barnes & Noble Project.

THE MOD 7 PROJECT

The second amended complaint additionally alleges that Chesco "doctored its business records by falsely representing that it incurred \$4,000 of downtime in its work on the Mod 7 Project."¹⁵ However, Mega Construction may not maintain the claim of conversion regarding payment of the \$4,000 because that claim could only be maintained if Plaintiff had been deprived of its chattel **without consent**. In this case, Mega Construction received the allegedly doctored invoice and paid the \$4,000.00

¹⁴ Deposition of John F. Capponi on behalf of Mega Construction, dated September 7, 2012, Exhibit B to the response in opposition to the motion for summary judgment of Chesco and Cliggett, pp.10:17–19, 12:16–24.

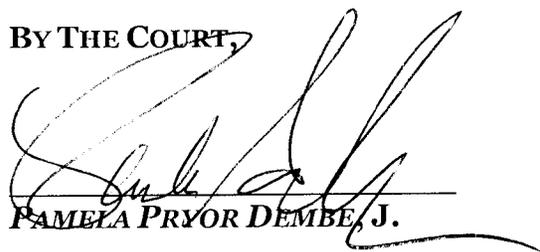
¹⁵ Id. ¶182.

charge therein which Chesco had listed as “downtime.” Mega Construction consented to the taking of its property, albeit upon submissions of an allegedly unlawful invoice, and may not preserve the claim of conversion to recover said payment from Chesco.

The Court shall issue a simultaneous Order consistent with this Memorandum Opinion.¹⁶

2.6.14

BY THE COURT,



PAMELA PRYOR DEMBE, J.

¹⁶ The motion for summary judgment of Chesco and Cligget asks this Court to dismiss a claim based on tortious interference. Examination of the second amended complaint shows that such a claim was not asserted by Mega Construction.