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

CHARLES JACQUIN et CIE., INC.	:	February Term, 2012
Plaintiff	:	Case No. 01225
v.	:	
MARK SMALL et al.	:	Commerce Program
Defendant	:	Control Nos. 13072064, 13070631

MARK SMALL	:	July Term, 2012
Plaintiff	:	Case No. 02062
v.	:	
NORTON "SKY" COOPER and **CHATHAM INTERNATIONAL, INC.**	:	Commerce Program
Defendants	:	

DOCKETED
JUN 19 2014
C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 18th day of June, 2014, upon consideration of the motions for summary judgment of Charles Jacquin et Cie., Inc. and of Mark Small, Small Games Company and Wildland, Inc., the respective responses in opposition, *memoranda* of law, reply briefs and supplemental briefs, and all documents of record, it is **ORDERED** as follows:

1. the motion for summary judgment of Charles Jacquin et Cie., Inc. is **DENIED** ;
2. the motion for summary judgment of Mark Small, Small Games Company and Wildland, Inc. is **GRANTED-IN-PART AND DENIED-IN-PART**, and the claims of

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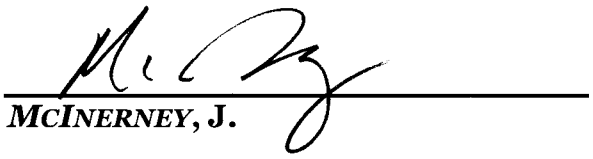
Conversion, Fraud, Civil Conspiracy, Unjust Enrichment / Quantum Meruit, Action for Accounting and Action for Constructive Trust are **DISMISSED**. In addition, the portion of the claim of Negligence asserted by Charles Jacquin et Cie., Inc. against Small Games Company and Wildland, Inc. is **DISMISSED**.

3. The claims sounding in Breach of Fiduciary Duty, Waste and Negligence against Mark Small, and the claims sounding in defamation against Norton "Sky" Cooper, Chatham and Charles Jacquin et Cie., Inc., shall proceed to trial.

BY THE COURT,



***MCINERNEY*, J.**

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MEMORANDUM OPINION

Before the court are two motions for summary judgment filed under two consolidated actions. The motion for summary judgment of Mark Small *et al.*, which was filed under the lead action, asks this court to dismiss the complaint of Charles Jacquin et Cie., Inc. in its entirety. The motion for summary judgment of Charles Jacquin et Cie, Inc. asks this court to dismiss two claims of defamation asserted as a counterclaim in the lead action, and as a single-count complaint in the subordinate action. For the reasons below, the motion of Mark Small *et al.* is granted-in-part and the claims of Charles Jacquin et Cie., Inc. asserting conversion, fraud, civil conspiracy

unjust enrichment, action for accounting and action for constructive trust are dismissed. The motion for summary judgment of Charles Jacquin et Cie., Inc. is denied.

Background[1]

Plaintiff, Charles Jacquin et Cie., Inc. ("Jacquin") is a business located in Philadelphia, Pennsylvania. Defendant, Mark Small ("Small"), is an individual residing in Pennsylvania. At all times relevant to this action, Small was the chief financial officer ("CFO") of Jacquin. Defendants Small Games Co. and Wildland, Inc. (the "Small Entities"), are Pennsylvania companies owned or controlled by individual defendant Small. Defendant Norton "Sky" Cooper ("Cooper" or "Sky Cooper"), is the chief executive officer of Jacquin. Defendant Chatham International, Inc. ("Chatham"), is the parent company of Jacquin. Chatham is owned by Sky Cooper and by an individual not a party in the instant actions, John Cooper ("John Cooper").

On March 22, 2012, Jacquin filed a complaint against Small and the Small Entities (the "Jacquin Action"). The complaint thereof alleges that subsequent to Small's resignation, Jacquin began to investigate "what appeared to be certain discrepancies in the finances and management of the company." [2] Specifically, the complaint alleges that under Small's tenure as CFO, over $1.6 million became unaccounted from Jacquin's accounts; in addition, the complaint alleges that Small had abdicated his officer's responsibilities by allowing the company's auditors to manage the financial books and statements in a manner which deviated from normal financial practices.[3] The complaint also avers that Small improperly devoted company time to

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[1] Unless noted otherwise, the facts described in this *Memorandum* Opinion are gleaned from the parties' respective motions for summary judgment and the responses in opposition thereto, control nos. 13070631, 13072064.
[2] Complaint,¶ 9.
[3] Id. ¶¶ 11—12.

the creation and development of the Small Entities, diverted Jacquin's resources for the exclusive benefit of the Small Entities, used Jacquin's connections to facilitate business deals on behalf of the Small Entities, failed to compensate Jacquin for the unauthorized use of its resources, and failed to pay Jacquin any profits, commissions and fees which the Small Entities earned thanks to Small's unauthorized use of company resources.[4] Finally, the complaint avers that Small, in his capacity as chief financial officer of Jacquin, allowed Jacquin to unnecessarily overpay for business services received. The complaint specifically asserts the claims of breach of fiduciary duty, waste and an action for accounting against Small individually, as well as the claims of conversion, fraud, negligence, civil conspiracy, unjust enrichment, and an action for constructive trust, against Small individually and the Small Entities.

Subsequent to the commencement of the Jacquin Action, Small commenced a separate action against Cooper and Chatham in the Court of Common Pleas, Philadelphia County (the "Small Action").[5] In the amended complaint thereof, Small asserts the claim of defamation against Cooper and Chatham.

On April 16, 2012, Small and the Small Entities filed an answer with new matter and a counterclaim to the complaint in the Jacquin Action. On July 27, 2012, Small filed his third amended counterclaim to the complaint in the Jacquin Action. The third amended counterclaim identifies Jacquin as the sole counterclaim defendant and asserts a single claim of defamation. According to the third amended counterclaim, Sky Cooper and John Cooper, acting as officers of Jacquin, falsely stated to several

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[4] Id. ¶¶ 14—34.
[5] Small v. Norton "Sky" Cooper and Chatham International Incorporated, case No. 1207-02062, Court of Common Pleas, Philadelphia County.

individuals that Small had embezzled funds from the company.[6]

On February 25, 2013, Chatham filed an unopposed motion to consolidate the Small Action with the Jacquin Action. On March 21, 2013, this court granted the unopposed motion, consolidated the Small Action with the Jacquin Action, and determined that the latter act as lead action to the former.

On July 3, 2013, defendants Small and the Small Entities filed a motion for summary judgment. Through this motion, Small and the Small Entities seek dismissal of all claims asserted against them in the Jacquin Action. Jacquin timely filed its response in opposition with accompanying amended *memorandum* of law. In the amended *memorandum* of law, Jacquin stipulates that it is no longer pursuing the claims of conversion, fraud, civil conspiracy and unjust enrichment, nor the claims demanding an accounting and seeking the creation of a constructive trust, and that defendants are entitled to judgment thereon.[7] However, Jacquin asserts that the claims of breach of fiduciary duty, waste and negligence, asserted respectively in Counts I, II and V of the Jacquin Complaint are still viable and should proceed to trial.[8]

On July 15, 2013, Jacquin filed its own motion for summary judgment. Through the motion, Jacquin seeks dismissal of the claims of defamation asserted by counterclaim plaintiffs Small and the Small Entities in the Jacquin Action, and by individual plaintiff Small against Cooper and Chatham in the Small Action.

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[6] Third Amended counterclaim of Mark Small, ¶¶ 20—64.
[7] Amended *memorandum* of law in opposition to the motion for summary judgment of defendants, p. 13. The amended *memorandum* of law specifically states: "To clarify and reiterate, Jacquin's will not pursue and will agree to judgment on, the following Counts in its Complaint: Counts III (Conversion), IV (Fraud), VI (Conspiracy), VII (Unjust Enrichment/Quantum Meruit), VIII (Accounting), and IX (Constructive Trust)."
[8] Id.

Discussion

> The standards which govern summary judgment are well settled. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt.[9]

The claim of negligence asserted in Count V of the Jacquin Complaint alleges that Small, while performing work as Jacquin's CFO, improperly devoted his time to develop and promote the Small Entities, and improperly diverted the resources of Jacquin for their benefit . However, the w*herefore* clause asserting the claim of negligence seeks entry of judgment against all Defendants, which include not only defendant Small in his capacity as CFO of Jacquin, but also the Small Entities under his control.

In Pennsylvania,

> [n]egligence is established by proving the following four elements:
>
> (1) a duty or obligation recognized by law;
> (2) a breach of that duty;
> (3) a causal connection between the conduct and the resulting injury; and
> (4) actual damages.
>
> Moreover, in any negligence action, establishing a breach

[9] Swords v. Harleysville Ins. Companies, 584 Pa. 382, 389-90, 883 A.2d 562, 566-67 (2005).

> of a legal duty is a condition precedent to a finding of negligence.[10]

In this case, no evidence whatsoever has been produced showing that the Small Entities owed a duty to Jacquin; consequently, Jacquin may not maintain the claim of negligence against the Small Entities, and the portion of that claim is dismissed.[11]

BY THE COURT,

***MCINERNEY*, J.**

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[10] Grossman v. Barke, 2005 Pa. Super 45, 868 A.2d 561, 566 (Pa. Super. 2005).

[11] As noted in footnote 7, supra, Jacquin has stipulated that its claims of conversion, fraud, civil conspiracy and unjust enrichment, as well as its claims demanding an accounting and seeking the creation of a constructive trust, should be dismissed. All the other claims asserted by Jacquin, Small and the Small Entities shall proceed to trial because the Court perceives the existence of genuine issues of material fact as to a necessary element of the cause of action.