

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

REICHHOLD CHEMICALS, INC.	:	
Plaintiff,	:	Civil Action
v.	:	
	:	No. 99-799
MILLENNIUM INTERNATIONAL :		
TECHNOLOGIES, INC., and LEROY W. :		
ANDERSON :		
Defendants.	:	

MEMORANDUM-ORDER

GREEN, S.J.

May , 1999

Presently before the court is Defendants' Motion to Dismiss Counts I and II of Plaintiff's Complaint and Plaintiff's Response thereto. For the following reasons, Defendant's Motion to Dismiss will be denied on both counts.

FACTUAL BACKGROUND

Plaintiff Reichhold Chemicals, Inc. ("Reichhold") alleges that in December 1997, it mistakenly sent payments in the form of two separate checks, amounting in total to \$159,170.00 to Defendant Millenium International Technologies, Inc. ("MIT"), a company with which Reichhold did business. The two checks were made payable to MIT. (Compl., ¶¶ 8 and 11.) Reichhold alleges that MIT and Defendant Anderson, President of MIT, cashed both checks and unlawfully retained the proceeds thereof, despite actual knowledge that the checks were not rightfully theirs. (Compl., ¶¶ 8-13.) MIT and Anderson allegedly knew that the checks were not rightfully theirs because the first check that they received, on or about December 1, 1997, represented over 36 times the amount that MIT had billed Reichhold for products and services during 1997, which bills Reichhold had already paid in full, while the second check, received on or about December 15, 1997, represented over 70 times that amount. (Compl., ¶¶ 9 and 12.)

Reichhold alleges that it did not learn that it had sent the money to MIT until a year later when another company, Millennium Petrochemicals, inquired about payment for two invoices which the checks made payable to MIT were intended to pay. (Compl., ¶ 16.) Reichhold contacted MIT to request that the misdirected funds be returned. Anderson allegedly admitted during conversations with Reichhold's representatives that he knew when he received these checks that neither he nor MIT had any right to the proceeds thereof, but that he had nevertheless cashed both checks and retained or spent the proceeds thereof. (Compl., ¶¶ 18-19.) Reichhold requested that MIT and Anderson repay the \$159, 170.00 throughout January and February 1999, but MIT and Anderson have refused to do so. (Compl., ¶¶ 20-21.) Reichhold filed the Complaint in this matter on February 16, 1999 alleging claims for conversion, fraud and unjust enrichment. MIT and Anderson seek to dismiss by this motion those claims related to conversion and fraud.

DISCUSSION

A motion to dismiss a complaint for failure to state a claim may not be granted unless it appears from the face of the complaint that the plaintiff can establish no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The facts must be taken as true and reviewed in the light most favorable to the plaintiff. Id.

Under Pennsylvania law, conversion is the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification. Bernhardt v. Needleman, 705 A.2d 875, 878 (Pa. Super. 1997). Money may the subject of conversion. Id. Defendants argue, however, that Pennsylvania courts have only recognized money as the subject of conversion in cases where there is some fiduciary or other trust

relationship citing Martin v. National Surety Corporation, 262 A.2d 672 (Pa. 1970). The court in Martin, however, makes no mention that the existence of some fiduciary or other trust relationship is a necessary element in an action for conversion of money, and Defendants have not provided any case law from Pennsylvania that establishes such a requirement. To the contrary, in Bernhardt, the Pennsylvania Superior Court held that a referral fee owed to the referring attorney by contract could be the subject of conversion, and no fiduciary or trust relationship existed between the attorneys in that case. See Bernhardt, 705 A.2d 875. Thus, Plaintiff has properly pled a cause of action for conversion based on Defendants' alleged unlawful retention of funds belonging to Reichhold without Reichhold's consent. Accordingly, Defendants' Motion to Dismiss Count I of Plaintiff's Complaint for conversion will be denied.

The essential elements of a cause of action for fraud are a misrepresentation, a fraudulent utterance thereof, an intention to induce action thereby, justifiable reliance thereon and damage as a proximate result. Wilson v. Donegal Mut. Ins. Co., 598 A.2d 1310, 1315-16 (1991). Fraud can arise under three circumstances: (1) where a party makes a representation which is knowingly false, (2) where a party engages in concealment calculated to deceive, or (3) where there is a nonprivileged failure to disclose. DeJoseph v. Zambelli, 139 A.2d 644, 647 (Pa. 1958). Concealment can be a sufficient basis for finding that a party engaged in fraudulent conduct, provided that the other requisite elements of fraud are established. Wilson, 598 A.2d 1315-16. Mere silence, however, is not sufficient to prove fraud in the absence of a duty to speak. Id. Pennsylvania courts have found that a duty to speak may arise out of an agreement between parties or as a result of one party's reliance on the other's representations, if one party is the only source of information to the other party, or the problems are not discoverable by other reasonable

means. See Duquesne Light Co. v. Westinghouse Electric Corp., 66 F.3d 604, 611-12 (3d Cir. 1995). The duty to speak arises in these circumstances because “it cannot be said fairly that by failing to disclose the seller is legitimately enhancing his or her bargain.” Id.

Plaintiff alleges that Defendant Anderson admitted that he knew when he received the checks that neither he nor MIT had any right to the proceeds thereof, but that he had nevertheless cashed both checks and retained or spent the proceeds thereof. Based on these allegations, Plaintiff has sufficiently pled a claim for fraudulent concealment. This court also concludes that Defendants may have had a duty to speak under Pennsylvania law because the Plaintiff and Defendants were engaged in a buyer/seller relationship and the Defendants’ actions cannot be said to be a legitimate way to conduct business or to enhance their bargain under any circumstances. Thus, Plaintiff also states a claim for fraud under a theory of nondisclosure of a material fact under a duty to speak. Accordingly, Defendants’ Motion to Dismiss Plaintiff’s claim for fraud in Count II of the Complaint will be denied.

Defendants argue that Plaintiff has failed to plead fraud with particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. The purpose of Rule 9(b) is “to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.” Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984). Based on the allegations in the Complaint, this court concludes that the Complaint sufficiently put the defendants on notice of the precise conduct with which they are charged.

Finally, Defendants argue that Anderson cannot be held personally liable for actions taken in his capacity as President of MIT. Under Pennsylvania law, a corporate officer who personally

participates in a wrongful act may be held personally liable therefore. Wicks v. Milzoco Builders, Inc., 470 A.2d 86, 90 (Pa. 1983). In the present case, Plaintiff has alleged sufficient facts to state a claims against Anderson for conversion, fraud and unjust enrichment.

An appropriate Order follows.

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ANDERSON	:	
Defendants.	:	

ORDER

AND NOW, this day of May 1999, upon consideration of Defendants' Motion to Dismiss Counts I and II of Plaintiff's Complaint and Plaintiff's Response thereto, IT IS HEREBY ORDERED that Defendants' Motion is DENIED on both counts.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.