

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

<b>DENNIS KERRIGAN,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>A. WILLIAM VILLEI,</b>	:	
	:	
<b>Defendant -</b>	:	<b>NO. 95-4334</b>
<b>Third-Party Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>LESTER TAUBMAN, SHIRLEY</b>	:	
<b>TAUBMAN AND ALADDIN</b>	:	
<b>ACCEPTANCE, INC.,</b>	:	
	:	
<b>Third-Party Defendants.</b>	:	

**Reed, J.**

**June 17, 1997**

**MEMORANDUM**

Plaintiff Dennis Kerrigan ("Kerrigan" or "plaintiff") seeks to recover \$250,000 in United States currency from A. William Villei ("Villei" or "defendant"), who acted as trustee of such monies for anticipated business transactions involving several individuals and corporate entities, only some of which are named parties in this lawsuit. The intended transactions failed to materialize and plaintiff demands that Villei return to plaintiff the sum of \$250,000 based upon theories of breach of contract, breach of fiduciary duty, conversion, and fraud.<sup>1</sup>

The complaint alleges that plaintiff Kerrigan is a citizen of Minnesota, that defendant Villei is a citizen of Pennsylvania, and that the amount in controversy exceeds \$50,000. Therefore, jurisdiction is founded upon 28 U.S.C. § 1332.

Pending before this Court are the motion of plaintiff for summary judgment (Document

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1. The complaint instituting this lawsuit also included a claim for civil theft, which this Court dismissed upon consideration of a motion to dismiss. See Memorandum and Order of this Court dated February 26, 1996. At the same time, this Court denied the request of plaintiff for a preliminary injunction. See id.

No. 29) and the motion of defendant for summary judgment (Document No. 33) pursuant to Rule 56 of the Federal Rules of Civil Procedure. Upon consideration of the motions of plaintiff and defendant, and the various responses and briefs of the parties thereto, the motion of plaintiff will be denied and the motion of defendant will be denied based upon the following analysis.

### **I. FACTUAL BACKGROUND**<sup>2</sup>

Although the pending motions for summary judgment raise issues that concern the relationship of only two individuals and U.S. \$250,000, the factual background of this case involves several players and overwhelming sums of money. It is necessary to present the lengthy factual background to understand the relationship between plaintiff and defendant and the circumstances surrounding the transfer of the U.S. \$250,000 at issue in the case.

In 1993, third party defendants Aladdin Acceptance, Inc. ("AAI"), its president Lester Taubman ("Taubman"), and Shirley Taubman (collectively referred to as "third party defendants") intended to engage in business transactions involving bank debentures known as "standby letters of credit" and "prime bank guarantees." The third party defendants contacted Villei to serve as a trustee and closing agent on the transactions. Villei had formed Villei International Trust, S.A. in the British Virgin Islands and had opened full currency accounts with National Westminster Bank and Barclays Bank on behalf of the Villei International Trust.

Taubman sent to Villei a summary of the intended transactions involving Villei's accounts. The expected transactions involved U.S. \$10 billion of "prime bank guarantees." Villei and Taubman, on behalf of AAI, signed an agreement on August 24, 1993 ("Trust Agreement"). These bank accounts effectively were to serve as escrow accounts for the transfer

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2. On cross-motions for summary judgment, the court must determine separately on each party's motion whether judgment may be entered in accordance with the summary judgment standard. See Sobczak v. JC Penny Life Ins. Co., No. CIV.A.96-3924, 1997 WL 83749 (E.D. Pa. Feb. 18, 1997). In his motion for summary judgment and in his brief in opposition to the motion of defendant for summary judgment, plaintiff Kerrigan recites only the procedural history of the case. Therefore, this Court must rely on the factual recitation of defendant as supported by the evidence of record. In accordance with the standard of review for a motion for summary judgment, the facts shall be viewed in the light most favorable to plaintiff and all inferences shall be taken in favor of the plaintiff, the nonmoving party, as to the defendant's motion for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997). As to the plaintiff's motion for summary judgment, the facts and inferences shall be considered in the light most favorable to defendant.

of money involved in the intended transactions of AAI. For the use of the accounts and the services of Villei as trustee, AAI agreed to pay a .25% of the monies, calculated in United States dollars, placed in the accounts for AAI transactions.

Several days later, on August 31, 1993, Taubman, on behalf of AAI, agreed to sell and deliver to Hammani Enterprises, Ltd. U.S. \$20 billion in standby letters of credit. Mr. Mohamad Hammani ("Hammani"), his broker Lonnie Kennemer ("Kennemer"), and Taubman, on behalf of AAI, signed an agreement to effectuate the sale ("Buy/Sell contract"). The Buy/Sell contract included a provision that modifications and changes could be made only in writing executed by Taubman and Hammani. Under the terms of the Buy/Sell contract, Taubman required that Hammani transmit U.S. \$250,000 into a bank account at National Westminster Bank as a performance guarantee. Although not stated in the Buy/Sell contract, this bank account at National Westminster bank belonged to Villei International Trust. Accordingly Mr. Eddy Buegels ("Buegels") wired U.S. \$250,000 from the bank account of "Interfina B.V." ("Interfina") at Fvan Lanschot Bankiers N.V. in Maastricht, Holland to the designated bank account held by the Villei International Trust at National Westminster Bank. Interfina is a company owned by Buegels. The connection between Hammani, Kennemer and Buegels is not stated in the record.

The Buy/Sell contract is not the only document signed by Taubman, on behalf of AAI, on August 31, 1997. On the same date, Taubman executed an agreement ("Letter Agreement") with plaintiff Kerrigan. In paragraph 1 of the Letter Agreement plaintiff Kerrigan held himself out to be the representative of Hammani Enterprises. The record indicates that Kennemer prepared the Letter Agreement and with authorization of Kerrigan, signed Kerrigan's name. Upon instruction from Taubman, Villei signed the Letter Agreement as well. The Letter Agreement incorporates the transaction code for the Buy/Sell contract between Hammani and Taubman but does not contain Hammani's signature. Under the terms of the Letter Agreement, AAI promised to obtain and provide Kerrigan with particular banking securities and Kerrigan promised to forward a

performance bond in the amount of U.S. \$250,000 to Villei, who would act as trustee of the money. In this regard, the Letter Agreement appears to restate the terms of the Buy/Sell contract. The Letter Agreement further provided that the U.S. \$250,000 performance bond would be returned to Kerrigan should there be no "movement" in the transaction with AAI within ten banking days. This constituted a change from the terms of the Buy/Sell contract. It is unclear whether the U.S. \$250,000 at issue was transferred to the Villei International Trust account at National Westminster bank pursuant to the terms of the Buy/Sell contract or the terms of the Letter Agreement as these two documents bear the same date of signature.

Several delays precluded the transaction intended by the Buy/Sell contract. A letter dated October 11, 1997 with Kerrigan's signature advised Villei that should the intended transaction between Taubman and Hammani fail to materialize by October 15, 1993, Villei is instructed to send the U.S. \$250,000 deposit to a person or persons as instructed by AAI or Taubman. Villei agreed to abide by such instruction conditioned upon (1) the payment of all commissions and fees to Villei within five banking days and (2) a release of Villei from any claims. Taubman refused to accept these two conditions unless Villei agreed to reduce his fees and receive only .0125% of the first U.S. \$500 million transaction in negotiations with another entity called "Via Kazazian," which amounted to approximately U.S. \$125,000. Villei never accepted Taubman's proposed reduction in fee as it differed significantly from that previously agreed upon in the Trust Agreement.

While attempting to complete the transaction with Hammani, Taubman sought to open accounts at other banks for similar business ventures. Taubman and Villei opened a joint account at Dresdner Bank in Kassel, Germany. On October 1, 1993, Villei received confirmation that National Australia Bank Ltd. in Melbourne, Australia wired U.S. \$250,000 into the Dresdner Bank account. At the end of November, however, Dresdner Bank advised Villei that the intended transactions violated an Interagency Advisory of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union

Administration, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision. Accordingly, Dresdner Bank returned the U.S. \$250,000 to National Australia Bank.

When the intended transaction with Hammani Enterprises failed, Kerrigan himself or Kennemer, under the name of Kerrigan, contacted National Westminster Bank in an effort to retrieve the U.S. \$250,000 deposit. At the present time the U.S. \$250,000 remains in the possession of Villei.

Kerrigan filed a lawsuit against AAI and Villei in the United States District Court for the Southern District of Florida in April, 1995. Villei filed a motion to dismiss for lack of personal jurisdiction. As a result, plaintiff Kerrigan withdrew the claims against Villei.

Plaintiff filed the instant lawsuit against Villei, who commenced an action against third party defendants Lester Taubman, Shirley Taubman and AAI. The third party defendants have failed to answer or otherwise plead to the third party complaint. However, Lester Taubman has submitted a letter in reference to the pending motions, which has been filed as of record, and will be considered by this Court.

## **II. LEGAL STANDARD**

The standards by which a court decides a motion for summary judgment do not change when the parties file cross motions. See Duff Supply Co. v. Crum & Forster Ins. Co., No. CIV.A.96-8481, 1997 WL 255483 (E.D. Pa. May 8, 1997). The standard for a summary judgment motion in federal court is set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states that:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In addition, a dispute over a material fact must be "genuine," i.e., the evidence must be such "that a

reasonable jury could return a verdict in favor of the non-moving party." Id.

The moving party has the initial burden to identify evidence that it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing'--that is, pointing out to the District Court--that there is an absence of evidence to support the non-moving party's case." Id. at 325. If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). The court must consider the evidence of the non-moving party as true, drawing all justifiable inferences arising from the evidence in favor of the non-moving party. Anderson, 477 U.S. at 255. Yet, if the evidence of the non-moving party is "merely colorable," or is "not significantly probative," summary judgment may be granted. Id. at 249-50. To defeat the motion for summary judgment, the non-moving party must offer specific facts contradicting those set forth by the movant, thereby showing that there is a genuine issue for trial. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

### **III. DISCUSSION**

Each party contends that there are no genuine issues of material fact and that summary judgment should be granted on all four counts remaining in the case: breach of contract, breach of fiduciary duty, conversion and fraud. Although it is clear from the record that

plaintiff Kerrigan is a citizen of Minnesota and that defendant Villei is a citizen of Pennsylvania, it remains unclear as to where the events giving rise to the claims at issue in this lawsuit transpired. Part of the confusion stems from the appearance that the parties signed the relevant documents at separate locations, sending the copies to each other by telefax. However, neither

party has raised the issue before this Court at any point in time during this litigation. In resolving the prior motion to dismiss, I applied Pennsylvania law and the parties did not object, nor did they raise the choice of law issue at the current stage of the litigation. In their motions for summary judgment and respective briefs the parties cite to Pennsylvania law; accordingly I find that the parties agree to the application of Pennsylvania law. Having found that both parties cite to Pennsylvania law and that this Court finds no reason to utilize the law of any other jurisdiction, I shall apply Pennsylvania law as I consider each claim in seriatim.

A. Breach of Contract

In Count I of the complaint plaintiff alleges that Villei breached the terms of the Trust Agreement dated August 24, 1993, and the Letter Agreement dated August 31, 1993. The only signatures that appear on the Trust Agreement are those of Villei and Taubman, in his capacity as President of AAI. Although not a contracting party to the Trust Agreement, plaintiff contends that he is a third party beneficiary of the Trust Agreement executed by AAI and Villei.

The Supreme Court of Pennsylvania defined the circumstances under which third party beneficiary status arises by stating:

[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promise performance.

Scarpitti v. Weborg, 609 A.2d 147, 152 (Pa. 1992) (emphasis in original) (citations omitted).

Plaintiff relies on page 1, paragraph 2; page 1, paragraph 5; and page 2, paragraph 2 of the Trust Agreement as evidence of his status as third party beneficiary. Page 1, paragraph 2 of the Trust Agreement provides:

The trustee agrees to operate the said bank account in a fiduciary capacity for the trustor upon the terms and conditions hereinafter mentioned.

Page 1, paragraph 5 of the Trust Agreement provides:

In reliance upon the representations of the trustor, and in consideration of the

commission as hereinafter provided, the trustee is agreeable to acting as trustee and to hold and disburse such funds and securities as trustee, for the benefit of the trustor as he shall nominate and/or direct.

Page 2, paragraph 2 of the Trust Agreement provides:

The trustee shall act upon the written instructions which may be telefaxed by the trustor, his duly appointed entity (ies) or other means of communication as deemed necessary, in connection with each transaction, and trustee shall comply within twenty four hours upon receipt of such instructions. These instructions shall include by not be limited to: the distribution of funds for commissions, bank fees, and such other indicia as the trustor may direct.

These three paragraphs do not manifest, in the contract itself, an intention of the contracting parties to benefit a third party. Rather, each paragraph refers only to the benefit flowing to the trustor of the Trust Agreement -- AAI.<sup>3</sup>

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3. Page 1, paragraph 2 specifically states "for the trustor," and page 1, paragraph 5 expressly states "for the benefit of the trustor." The provisions of page 2, paragraph 2 allow Taubman, on behalf of AAI, to instruct Villei in connection with each transaction. To this end, plaintiff contends that he became a third party beneficiary of the Trust Agreement when Taubman signed the Letter Agreement, which, in effect, instructed Villei to return the sum of \$250,000 if designated events failed to transpire. I disagree.

The Letter Agreement does not express by Villei any obligation to plaintiff Kerrigan. Page 2, paragraph 2 reveals that Villei agreed to perform services as trustee according to the instructions of AAI, as stated in the Letter Agreement, for the benefit of AAI. See Higgins Erectors & Haulers, Inc. v. E.E. Austin & Son, Inc., 714 F. Supp. 756 (W.D. Pa. 1989). In Higgins, Hammermill Paper Company ("Hammermill") selected E.E. Austin & Sons, Inc. ("E.E. Austin") as the prime contractor for construction work. E.E. Austin, in turn, selected Higgins Erectors & Haulers, Inc. ("Higgins") as a subcontractor and entered into a subcontract agreement. Hammermill filed a claim against subcontractor Higgins for failure to complete the work by the established deadline. Hammermill contended that it was a third party beneficiary to the subcontract agreement between E.E. Austin and Higgins because Higgins had agreed to perform according to the specifications of Hammermill. The district court found that the subcontract agreement did not give Hammermill third party beneficiary status because Higgins agreed to perform in accordance with Hammermill's specifications for the benefit of E.E. Austin, the prime contractor who, in turn, had to answer to the property owner. Id. at 760. Similarly, I find  
(continued...)

The Supreme Court of Pennsylvania recognizes a narrow exception to the requirement that the intention of the parties be manifested in the contract itself where compelling circumstances arise. Adopting the Restatement (Second) of Contracts § 302 in Guy v. Liederbach, the Supreme Court of Pennsylvania carved out the exception and allowed the beneficiary of a will to recover for legal malpractice against an attorney, despite the fact that the beneficiary was not in privity of contract with the attorney and was not named specifically as an intended beneficiary of the contract. Guy v. Liederbach, 459 A.2d 744 (Pa. 1983). To fall within the parameters of this narrow exception of compelling circumstances, the party claiming third party beneficiary status must meet a two-part test:

(1) the recognition of the beneficiary's right must be appropriate to effectuate the intention of the parties and (2) the performance must satisfy an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Scarpitti, 609 A.2d at 150. The underlying contract in the case sub judice is the Trust Agreement in which Villei acts as the promisor agreeing to act as trustee for the monies deposited into the bank account at National Westminster Bank, and AAI is the promisee. See id. at 151. It is reasonable to assume that AAI established the trust to facilitate its intended transactions with prospective purchasers of bank debentures known as "standby letters of credit" and "prime bank guarantees" such that the prospective purchasers could secure the services of AAI by depositing with Villei a performance bond. Therefore, the third party beneficiary relationship was within the contemplation of the promisor and the promisee at the time they entered into the Trust Agreement. See id. Given the purpose of the Trust Agreement, it is reasonable for the prospective purchaser of the debentures to rely on the services of Villei as trustee. In fact,

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3. (...continued)  
that page 2 paragraph 2 of the Trust Agreement reveals that Villei carries out the instructions stated in the Letter Agreement for the benefit of AAI. Thus, I find no language in the Trust Agreement or the Letter Agreement that manifests the intention of both parties to benefit plaintiff.

plaintiff testified that he knew that Villei acted as an escrow agent for the transaction. See Deposition of Plaintiff at 66. Although the Trust Agreement does not expressly manifest an intent to benefit the intended purchaser of the bank debentures, I find that recognition of a right to secure placement of the performance bond in an escrow account is appropriate to effectuate the intention of AAI and Villei.

The Trust Agreement, in essence, created an escrow account, providing a secure place for each prospective purchaser of bank debentures to place a sum of money in order to retain the services of AAI. Because AAI expected that each prospective purchaser deposit a performance bond in escrow with Villei, I find that AAI, the promisee, intended to give each prospective purchaser, the benefit of Villei's promised performance as a trustee over the monies. See Scarpitti, 609 A.2d at 151. Thus, I find that plaintiff Kerrigan satisfies the second prong of the Guy test and subsection (b) of § 302 of the Restatement (Second) of Contracts. Accordingly, I find that plaintiff has a sufficient cause of action against Villei for breach of contract as a third party beneficiary of the Trust Agreement between AAI and Villei.

#### B. Breach of Fiduciary Duty

Having found that plaintiff is a third party beneficiary of the Trust Agreement established by Taubman, on behalf of AAI, and Villei, this Court must now determine whether or not Villei owed to plaintiff a fiduciary duty. A fiduciary relationship arises when one party places confidence in another, resulting in the latter party exercising superiority and influence over the former. Harmon Elec., Inc. v. National Signal Corp., No. CIV.A. 94-3-71, 1997 WL 158216 (E.D. Pa. March 31, 1997); Bohm v. Commerce Union Bank, 794 F. Supp. 158, 164 (W.D. Pa. 1992). The parties to a fiduciary relationship do not deal with each other on equal terms. Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F. Supp. 813, 842 (E.D. Pa. 1993). A business association may be the basis for a fiduciary relationship only if one party surrenders substantial control over some portion of the affairs to the other. Id. To demonstrate the existence of a fiduciary duty under Pennsylvania law, plaintiff must show a relationship in which trust and

confidence were reposed by one side, and domination and influence exercised by the other.

Lazin v. Pavilion Partners, No. Civ.A. 95-601, 1995 WL 614018, at \*5 (E.D. Pa. Oct. 11, 1995).

Page 1, paragraph 2 of the Trust Agreement states that "the trustee agrees to operate the said bank account in a fiduciary capacity for the trustor upon the terms and conditions hereinafter mentioned." However, the circumstances indicate that a fiduciary relationship existed between Villei and plaintiff as well. Hammani Enterprises entered into the Buy/Sell contract, intended to purchase from AAI bank debentures in the amount of U.S. \$10 billion, and agreed to deposit U.S. \$250,000 as a performance bond with AAI. On the same date plaintiff, representing Hammani Enterprises, entered into the Letter Agreement making the same promise to deposit U.S. \$250,000 as a performance bond. Although it is unclear from the record whether the U.S. \$250,000 was transferred pursuant to the terms of the Buy/Sell contract or the Letter Agreement, in both circumstances Villei exercised dominion and control over the money. In a motion for summary judgment filed by defendant where the record is unclear I must construe the facts in the light most favorable to plaintiff. Assuming, for purposes of the motion of defendant, that plaintiff transferred the U.S. \$250,000 to Villei, as trustee, pursuant to the terms of the Letter Agreement, I find that a fiduciary relationship arose between plaintiff, the transferor, and Villei, the recipient of the funds who had the obligation and power to control the funds. Representing himself as a trustee, Villei created a situation where plaintiff had trust and confidence that Villei would act as a trustee while exercising dominion and control over the funds deposited into the National Westminster bank account. Villei has continued to exercise dominion despite plaintiff's repeated attempts to retrieve the money deposited as a performance bond. Therefore, I find that a reasonable factfinder could find that Villei breached his fiduciary duty owed to plaintiff. Accordingly, I will deny the motion of defendant for summary judgment with regard to this claim.

Even assuming that a fiduciary relationship existed between Villei and plaintiff, there

remains a genuine issue of material fact as to whether or not Villei did, in fact, breach his fiduciary duty. Therefore, I will deny the motion of plaintiff for summary judgment with regard to this claim.

### C. Conversion

Under Pennsylvania law, conversion is the "deprivation of another's right of property, or use or possession of a chattel, or other interference therewith, without the owner's consent and without legal justification." Universal Premium Acceptance Corp. v. York Bank & Trust Co., 69 F.3d 695, 704 (3d Cir. 1995). Defendant contends in his motion for summary judgment that plaintiff cannot recover upon his conversion claim because plaintiff has no legal or equitable interest in the U.S. \$250,000 at issue. Plaintiff, however, seeks summary judgment as to this claim, asserting that the evidence of record clearly shows that he had a legal or possessory interest in the money and that he transferred the money to Villei.

In support of his motion, defendant emphasizes that plaintiff has failed to point to any documents evidencing his relationship with Interfina B.V., the company that purportedly transferred the U.S. \$250,000 to the account of Villei, pursuant to the terms of the Buy/Sell contract. As stated earlier, it is unclear whether the U.S. \$250,000 was transferred to Villei pursuant to the Buy/Sell contract or the Letter Agreement, and thus I remain confounded as to the source of the transferred U.S. \$250,000. Plaintiff testified in his deposition that investors provided him with the U.S. \$250,000, that he considered the money his responsibility, and that he sent the money to Villei. See Deposition of Plaintiff at 183. Plaintiff has also filed an affidavit stating that he transferred the sum of U.S. \$250,000 to Villei to be held in escrow. See Affidavit of Plaintiff at ¶ 1. Taubman testified in his deposition that plaintiff Kerrigan provided the U.S. \$250,000 deposit into the account at National Westminster Bank and that Villei was aware of Kerrigan's role in the transaction. See Deposition of Taubman at 160. Therefore, there remains a genuine issue of material fact as to the source from which the funds were transferred to Villei and whether or not plaintiff had a legal or possessory interest in the funds. Accordingly, I

will deny the motions of plaintiff and defendant for summary judgment with regard to the claim for conversion.

#### D. Fraud

Pennsylvania law requires a plaintiff alleging fraud to prove the following elements by clear and convincing evidence: (1) a misrepresentation; (2) a fraudulent utterance of it; (3) the maker's intent that the recipient be induced thereby to act; (4) the recipient's justifiable reliance on the misrepresentation; and (5) damage to the recipient proximately caused. Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 232 (3d Cir. 1995) (citing Seven v. Kelshaw, 611 A.2d 1232, 1236 (Pa. Super. 1992)). Defendant contends that he made no representations to plaintiff prior to the transfer of U.S. \$250,000 and could not have induced any action on the part of plaintiff. According to defendant, any and all representations made about Villei's ability or title came through Taubman. Defendant cites to the deposition of plaintiff in which plaintiff purportedly admitted that he did not talk to Villei prior to transferring the U.S. \$250,000. However, defendant has failed to provide for this Court the appropriate pages of the deposition revealing this purported admission of plaintiff.

To the extent that plaintiff asserts a claim for fraudulent misrepresentation based upon promises contained in the Trust Agreement and Letter Agreement, such a claim is not permitted. See Complaint ¶ 72(c), (d), (e), (f). Under Pennsylvania law when a plaintiff can pursue a breach of contract claim based upon the alleged failure of a defendant to fulfill promises contained in a contract, that plaintiff cannot usually pursue a tort claim based upon those same promises. See Windsor Sec., Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 664 (3d Cir. 1993); Ross v. Canada Life Assurance Co., No. CIV.A.94-5557, 1996 WL 182561 (E.D. Pa. 1996). Because the representations made by defendant in the Trust Agreement and Letter Agreement that could constitute fraudulent misrepresentation are actionable in the breach of contract claim, the fraudulent misrepresentation claim may not proceed upon these promises alone. It appears from the complaint that plaintiff bases his claim not only upon promises that are actionable through

the breach of contract claim, but also upon representations of defendant as to his status as an attorney and his abilities, expertise, knowledge and qualifications to function as a trustee. See Complaint ¶ 72(a), (b). The record before this Court is incomplete as to whether or not the defendant made any representations of this nature to plaintiff, upon which plaintiff reasonably relied, and which induced plaintiff to act. Therefore, I will deny the motions for summary judgment of both plaintiff and defendant with regard to the claim of misrepresentation.

E. Attorneys' Fees and Punitive Damages

Having found that there remain genuine issues of material fact with regard to the four substantive claims in this case, it is premature for this Court to rule on the issues of attorneys' fees and punitive damages. Further development of the record is necessary before dismissing or granting any claims of plaintiff for attorneys fees or punitive damages. Therefore, to the extent the parties requested summary judgment on these issues, the respective motions are denied.

An appropriate Order follows.

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

<b>DENNIS KERRIGAN,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
<b>v.</b>	:	
<b>A. WILLIAM VILLEI,</b>	:	
<b>Defendant -</b>	:	<b>NO. 95-4334</b>
<b>Third-Party Plaintiff,</b>	:	
<b>v.</b>	:	
<b>LESTER TAUBMAN, SHIRLEY</b>	:	
<b>TAUBMAN AND ALADDIN</b>	:	
<b>ACCEPTANCE, INC.,</b>	:	
<b>Third-Party Defendants.</b>	:	

**ORDER**

**AND NOW**, this 17th day of June, 1997, upon consideration of the motion of plaintiff for summary judgment (Document No. 29) and the motion of defendant for summary judgment (Document No. 33) pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the various responses and briefs of the parties thereto, together with the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, having found that (1) plaintiff is a third party beneficiary of the contract entered into by defendant A. William Villei and third party defendant Lester Taubman, on behalf of Aladdin Acceptance, Inc., (2) defendant A. William Villei owed a fiduciary duty to plaintiff, and (3) there remain genuine issues of material fact at least with regard to the legal or possessory interest of plaintiff in the U.S. \$250,000 at issue, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion of plaintiff is **DENIED** and the motion of defendant is **DENIED** and plaintiff may proceed against defendant upon theories of breach of contract, breach of fiduciary duty, conversion and fraud.

LOWELL A. REED, JR., J.