8-31-2007

Order on Motions for Summary Judgment & Motion to Strike Testimony (EUROPEAN AMERICAN REALTY, LTD.)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

EUROPEAN AMERICAN REALTY, LTD. and SCOTT K. TOBERMAN,

Plaintiffs,

v.

DAVID LANG,

Defendant.

Civil Action File No. 2005-CV-105849

ORDER ON MOTIONS FOR SUMMARY JUDGMENT & MOTION TO STRIKE TESTIMONY

The above-styled case is before the Court on Defendant's motion for summary judgment, Plaintiffs' motion for summary judgment on the counterclaims, and Defendant's motion to strike contradictory testimony. The Court held a hearing on these motions on August 23, 2007. Plaintiffs European American Realty, LTD ("EAR") and Scott K. Toberman ("Mr. Toberman") did not participate in the hearing. After considering the briefs filed on behalf of the parties (including Plaintiffs'), the case record, and the oral argument presented by Defendant, the Court finds as follows:

I. Facts

This case arises from Defendant Lang's final months of employment with EAR, his termination from EAR, and the months following his termination. The undisputed facts, which form the basis of this Order, are summarized below.

Defendant Lang was an Executive Vice President of EAR and worked closely with Mr. Toberman overseeing the development and sales of condominiums. EAR, Mr. Toberman, and Mr. Lang also worked with VEF V Holdings LLC ("VEF") and the

entities referred to as the GEF Partnerships[1] on three (3) condo conversion projects. In addition to the condo conversion projects, the parties were jointly involved in other business ventures. For example, VEF acted as a lender to La Tour Partners LLC (in which Mr. Lang claims an indirect ownership interest), Austerlitz Partners LLC (in which Mr. Lang claims to be a member and an indirect owner), and Bonapart Partners LLC (in which Mr. Lang claims an indirect ownership interest through his ownership interest in Austerlitz). Mr. Toberman and/or EAR hold a primary ownership interest in each of the three (3) companies to which VEF acted as a lender. The GEF Partnerships, through their investment in Montrachet Partnership LLC, also hold an ownership interest in Bonapart Partners LLC, in addition to other Mr. Toberman/EAR controlled entities.

In the spring of 2005, a dispute arose between Mr. Toberman and the GEF Partnerships, which ultimately resulted in Mr. Toberman and the GEF Partnerships entering into a binding term sheet (the "BTS"). In the BTS, Mr. Toberman agreed to pay to the GEF Partnerships cash, real estate, interests in condominium project, and partnership interests in exchange for a release of potential claims against him. The BTS contained a confidentiality provision that stated:

> This term sheet shall be kept confidential and not disclosed to any third parties, except as may be necessary (i) to the parties' respective partners, members, attorneys, agents, employees, accountants and banks, (ii) to comply with the terms hereof or to enforce the rights and/or obligations of the parties hereto, or (iii) in response to any court order or lawful subpoena.

[1] The GEF Partnerships include Mr. Gootrad, Mr. Engerman, & Mr. Frishman, individually, and their various entities.

In April of 2005, Mr. Toberman and Mr. Lang had a conference call with Kenneth Kraft, Esq., counsel to EAR at the time. Mr. Kraft advised Mr. Lang and Mr. Toberman to disclose to VEF the dispute[2] between Mr. Toberman and the GEF Partnerships.

On July 24, 2005, Mr. Lang met with Mr. Huang, CFO of VEF. During this meeting, Mr. Lang disclosed the dispute between Mr. Toberman and the GEF Partnerships, and showed him the BTS. On July 29, 2005, Mr. Huang circulated an action plan to Mr. Gootrad, a primary investor in the GEF Partnerships, to mitigate the effects of the dispute on outstanding condo conversion projects. Mr. Huang's plan included having Mr. Lang create a new management company to oversee the final stages of the condo conversion projects. During a conference call on August 3, 2005, Mr. Huang, Mr. Toberman, and Mr. Gootrad discussed the outstanding condo conversion projects. Mr. Huang stated in his affidavit that during this conversation, the three men agreed that Mr. Lang would form a new company to finish the projects. On August 4, 2005, William Bettman, attorney for EAR and Mr. Toberman, sent an email to counsel for the GEF Partnerships which proposed that Mr. Lang was to form a new entity and then hire Thomas Spiro, a then-current EAR employee, to finish the condo conversion projects and which stated that Mr. Huang agreed to the proposed restructuring.

There is no dispute that Mr. Toberman was aware that Mr. Lang was planning to form a new company, and that Mr. Lang intended to offer Mr. Spiro a position with the new company. On August 4, 2005, Mr. Toberman discussed this potential job offer with Mr. Spiro and asked to be informed of the details. On August 4, 2005, Mr. Lang offered Mr. Spiro a job with the new company. Mr. Lang, however, never formed a new

[2] Mr. Lang provided deposition testimony that Mr. Kraft encouraged the disclosure of the Toberman/GEF Partnerships dispute to VEF. Mr. Toberman provided an affidavit that Mr. Kraft did not encourage disclosure of the BTS to VEF.

company; consequently, Mr. Spiro was not hired. By August 26, 2005,[3] Mr. Lang's relationship with Mr. Toberman and employment with EAR were terminated.

On September 22, 2005, Kevin Dorr, an at-will EAR employee, sent a letter to Mr. Lang, at Mr. Lang's request, describing the financial and operating conditions of the Discovery Palms condos, which was one of the three (3) ongoing condo conversion projects.

On September 26, 2005, Mr. Lang's EAR email account was accessed and an August 18, 2005, email chain containing the budget of the Discovery Palms project was forwarded to Lisa Richards, another EAR employee who was working with GEF Partnerships to supply them with information of Mr. Toberman's alleged embezzlement. That same day, Ms. Richards then forwarded the August 18th email chain to a second email account of Mr. Lang's (dave@earpmi.com),[4] and from there the email was sent to the GEF Partnerships and VEF.

II. Standard of Law

To prevail on a motion for summary judgment, the moving party must demonstrate that "there is no genuine issue of material facts, viewed in the light most favorable to the non-moving party, to warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491 (1991). See also, Danforth v. Bullman, 276 Ga. 531, 532 (2005).

III. Defendant David Lang's Motion for Summary Judgment

Defendant David Lang brought a motion for summary judgment on all nine (9) counts of Plaintiffs' complaint.

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[3] There is some dispute in the record about whether Mr. Lang was terminated on August 25th or August 26th.

[4] The dave@earpmi.com email account is not the EAR email account. EAR PMI was a separate company from EAR which was created by Mr. Gootrad and in which Mr. Lang had an email account.

A. Counts III and IX, Breach of Duty

Plaintiffs Mr. Toberman and EAR allege that Mr. Lang breached his fiduciary duty as an officer of EAR by (1) establishing a competitive company, (2) soliciting EAR employees, and (3) divulging EAR confidential information. Additionally, Plaintiffs allege that Mr. Lang breached his duty of good faith to EAR by (4) approaching VEF, a business contact of EAR.

The internal affairs of foreign corporations are governed by the laws of the state of incorporation. Diedrich v. Miller & Meier & Assoc., Architects and Planners, Inc., 254 Ga. 734, 735-736 (1985); see also, Multi-Media Holdings, Inc. v. Piedmont 15 LLC, 262 Ga. App. 283 (2003). EAR is a corporation formed under the laws of the state of Illinois. Obligations of officers and fiduciary duties are questions of internal affairs; thus, the breach of duty counts shall be evaluated under Illinois law. Id.; see also, RESTATEMENT (SECOND) CONFLICTS OF LAW § 309 (2007).

Under Illinois law, a corporate officer owes a fiduciary duty of loyalty to their corporate employer not to exploit their position for their own gain (self-dealing) or to impede the operation of the corporation (obstacle to corporate objectives). The following are examples of officer fiduciary duty breaches under Illinois law:

> (1) fail[ing] to inform the company that employees are forming a rival company or engaging in other fiduciary breaches; (2) solicit[ing] the business of a single customer before leaving the company; (3) us[ing] the company's facilities or equipment to assist them in developing their new business; or (4) solicit[ing] fellow employees to join a rival business.

Cooper Linse Hallman Capital Mgmt., Inc. v. Hallman, 856 N.E. 2d 585, 589 (Ill. App. Ct. 2006). In addition, officers may also breach their fiduciary duty if they use "the company's confidential business information for the new business, either before or after

[their] departure." Id. (finding a breach of fiduciary duty for failing to inform the company of the formation of a competing corporation, soliciting fellow employees, soliciting business contacts prior to resignation, and using confidential corporate information); see also, Dowd & Dowd, Ltd. v. Gleason, 816 N.E. 2d 754, 762 (Ill. App. Ct. 2004).

1. Forming a Rival Business & Soliciting EAR Employees

Plaintiffs allege that Mr. Lang's offer of employment in a new company to Mr. Spiro while both were employed by EAR breached Mr. Lang's duty of fiduciary duty to EAR.

Mr. Gootrad, Mr. Huang, and Mr. Lang provided testimony that it was the agreement of EAR, the GEF Partnerships, and VEF that Mr. Lang would form a new company to finalize the condo conversion projects. Mr. Toberman also acknowledged that he told Mr. Spiro of Mr. Lang's impending job offer with the new company and asked him to report back the details of it. Mr. Toberman, however, disputes that Mr. Lang ever had "authority" to form the new company. Additionally, all of the evidence is that the new company was not to be a ***rival*** company in competition with EAR, but was to be a company that would facilitate the completion of the three (3) condo conversion projects put in jeopardy as a result of the Toberman/GEF Partnerships dispute and the BTS.

Agreement speaks to an understanding or a meeting of the minds whereas authority speaks to procedures or formal steps to approve an action.[5] Thus, this Court finds that it was agreed that Mr. Lang make plans to form a new company and that he

[5] 'Agreement' is defined as "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances..." and 'authority' is defined as "the right or permission to act legally on another's behalf; the power delegated by a principal to an agent." BLACK'S LAW DICTIONARY, 7th Ed. (1999).

subsequently approached Mr. Spiro with the understanding of the parties, including Plaintiffs. Mr. Lang breached no duty in so acting; even if he did so without authorization.

Additionally, there is **no** evidence in the record that Mr. Lang was forming a rival or competing company. Even though Mr. Lang made plans to form a new company to assist with the condo conversion projects, he breach no fiduciary duty owed to Plaintiffs because the new company was not intended to be a rival.

Regardless, even assuming that Mr. Lang did breach a duty owed to Plaintiffs, Mr. Lang never formed the new company and Mr. Spiro never left EAR. Thus, Plaintiffs incurred no damages. Summary judgment is appropriate where, regardless of any breach, plaintiff suffered no damages. Grot v. First Bank of Schaumburg, 684 N.E.2d 1016, 1017 (Ill. App. Ct. 1997) (affirming a trial court's grant of summary judgment regardless of whether or not defendants breached a fiduciary duty because the plaintiffs suffered no damages "cognizable at law".).

2. Divulging Confidential EAR Information

Plaintiffs allege that Mr. Lang breached his fiduciary duty when he disclosed to VEF's Mr. Huang the terms of the BTS during their July meeting. The BTS contained a confidentiality provision that allowed disclosure to the parties' "partners, members, attorneys, agents, employees, accountants and banks." The BTS was entered into by Mr. Toberman, his wife, Beth Toberman, the Toberman Entities, and the GEF Partnerships. VEF was EAR's partner in the three condo conversion projects and acted as a lender to both La Tour Partners LLC, and Austerlitz Partners LLC. EAR, La Tour, and Austerlitz are three (3) of the named businesses defined as the "Toberman Entities" in the BTS. Therefore, the disclosure of the BTS to Mr. Huang was within the contemplated scope of

the confidentially exception contained in paragraph 2 of the BTS, and breached no duty owed to by Defendant to Plaintiffs.

3. Approaching EAR Contacts

Plaintiffs allege that Mr. Lang breached the duty of good faith that he owed to Plaintiffs by approaching VEF while he was still employed by EAR.

As stated above, the record is undisputed that Mr. Lang discussed the new company with Mr. Huang with the agreement of the parties involved, including Mr. Toberman and EAR. Additionally, Mr. Lang never formed the new company and never took the business away from EAR. Finally, despite the fact that VEF terminated its professional relationship with Plaintiffs, Mr. Haung stated in his affidavit that he did not terminate VEF's relationship with EAR because of Mr. Lang, but as a result of his conversations with Mr. Gootrad concerning the BTS and the underlying dispute that gave rise to it.

Accordingly, this Court **GRANTS** Defendant's motion for summary judgment on Counts III and IX of Plaintiff's complaint.

***B.* Count IV, Tortious Interference with Business Relations**

Plaintiffs allege that Mr. Lang tortiously interfered with EAR's business relationship with VEF when Mr. Lang met with Mr. Huang and disclosed the terms of the BTS.

To prevail on a claim of tortious interference, the plaintiff must demonstrate that the defendant (1) acted without privilege, (2) acted with intent to injure, (3) induced a third party to act, and (4) caused financial injury. Tom's Amusement Co., Inc., v. Total Vending Servs., 243 Ga. App. 294 (2000); Willis v. United Family Life Ins., 226 Ga. App. 661, 665 (1997). The first prong, which requires that the defendant acted without

privilege, is commonly referred to as the "stranger doctrine". Under a claim for tortious interference, the tortfeasor must be a stranger to both the contractual relationship at question and to the underlying business relationship. Id. at 296.

At the time that Mr. Lang and Mr. Huang met, Mr. Lang was the Executive Vice President of Acquisitions at EAR and the key contact between EAR and VEF. In addition, Mr. Lang held ownership interests (whether direct or indirect) in La Tour Partners LLC, Trafalgar Partners LLC, Austerliz Partners LLC, and Bonapart Partners LLC, which are companies under the Toberman/EAR umbrella and which had business relationships with VEF. As such, Mr. Lang was not a "stranger" to EAR's relationship with VEF.

Accordingly, this Court **GRANTS** Defendant's motion for summary judgment on Count IV Plaintiff's complaint.

C. Count VIII, Conspiracy to Breach Fiduciary Duty

Plaintiffs allege that Mr. Lang induced Kevin Dorr, an EAR employee, to breach his duty to EAR by providing to Mr. Lang the September 22, 2005, letter that contained confidential financial information related to one of the condo conversion projects. At that time, Mr. Lang was no longer an EAR employee.

Georgia recently recognized an action for conspiracy to breach fiduciary duty or for "aiding and abetting" a breach of fiduciary duty. Insight Tech., Inc. v. Freight Check, LLC, 280 Ga. App. 19 (2006). The elements of a conspiracy to breach fiduciary duty claim are:

> (1) through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer's fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and

> with malice and the intent to injure; (3) the defendant's wrongful conduct procured a breach of the primary wrongdoer's fiduciary duty; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Id. at 25-26.

Looking at these elements, and the evidence provided, Mr. Lang stated that he was a member of Montrachet Partnership LLC which was invested in the Discovery Palms condo conversion project. He therefore was entitled to information regarding the project.[6] Perhaps Mr. Door was not the proper person to disclose the information, but Mr. Door, "the primary wrongdoer" could have refused to give the information. There is no evidence in the record that Mr. Lang acted with malice or intent to injure.

Accordingly, this Court **GRANTS** Defendant's motion for summary judgment on Count VIII of Plaintiff's complaint.

D. Count V, Computer Theft and Computer Trespass

Plaintiffs allege the Mr. Lang accessed his EAR email account in September, after he was terminated, and forwarded an email to Ms. Richards. In support of their opposition to Mr. Lang's motion for summary judgment, Plaintiffs provided a copy of the email chain in which an August 18th email was sent from Mr. Lang's EAR email account on September 26, 2005. Plaintiffs allege that accessing the email account and forwarding the email violated O.C.G.A. § 16-9-93(a)(3), establishing computer theft and trespass torts.[7]

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[6] "A member may:.....(B) Obtain from time to time upon reasonable demand: (1) True and complete information regarding the state of the business and financial condition of the limited liability company... (iii) Other information regarding the affairs of the limited liability company as is just and reasonable..." O.C.G.A. § 14-11-314

[7] "Any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of converting property to such person's use in violation of an agreement or other legal obligation to make a specified application or disposition of such property shall be guilty of the crime of computer theft." O.C.G.A. § 16-9-93(a)(3).

Mr. Lang provided affidavit testimony that he did not access his EAR account, that he did not return to the EAR premises after his termination, and that he had no means to access his EAR account remotely after he was terminated. Ms. Richardson received the forwarded email on September 26th and then forwarded it to Mr. Lang's EAR PMI account (a separate and unrelated-to-EAR company). Ms. Richards also provided affidavit testimony that she may have asked someone to forward her the email from Mr. Lang's former email account.

Plaintiffs provided no evidence that Mr. Lang had access to his EAR email account or to the premises after his termination. The mere inference that Mr. Lang may have accessed the account is insufficient in the face of the evidence and the standards on a motion for summary judgment.

Accordingly, this Court **GRANTS** Defendant's motion for summary judgment on Count V of Plaintiff's complaint.

E. Count I, Deceptive Trade Practice Act

Plaintiffs allege that Mr. Lang violated O.C.G.A. § 10-1-372, the Uniform Deceptive Trade Practices Act, when he wrongfully held himself out as a vice president of EAR, made misleading statements about EAR, and solicited EAR contacts.[8]

Deceptive trade practices are clearly defined under the Act and include actions such as misrepresenting the origins of goods or services, creating confusion with regard to sources or sponsorship of goods/services, or incorrectly representing the quality, uses, or geographic origin of a good/service. O.C.G.A. § 10-1-372. The specific remedy for a

[8] In oral argument, counsel for Defendant asserted that Plaintiffs had "abandoned" their opposition to summary judgment on this Count and Counts II, VI, VII by their omission of argument in the briefs on behalf of Plaintiffs. In light of Plaintiffs' and Plaintiffs' counsel's absence from oral argument, this Court assumes that Plaintiffs have not abandoned their opposition to Defendants' motion for summary judgment on Counts I, II, VI, VII and will evaluate the claims under the appropriate summary judgment standard.

violation of the Act is injunctive relief. Lauria v. Ford Motor Co., 169 Ga. App. 203 (1983) ("While that Act expressly does not preclude other actions based on common law or other statutory authority, the sole remedy provided under this Act is injunctive relief."). Plaintiffs neither allege actions in violation of the Act, nor do they claim remedies available under the Act.

Accordingly, Defendant's motion for summary judgment on Count I of Plaintiff's Complaint is **GRANTED**.

F. Count II, Misappropriation of Trade Secrets

Plaintiffs allege that Mr. Lang took EAR contacts, financial data, and confidential information from EAR when he was terminated, thus misappropriating EAR's trade secrets.

Misappropriation of trade secrets involves (1) the acquisition of a trade secret by a person who knows (or has reason to know) that the trade secret was acquired by inappropriate means, or (2) the disclosure of a trade secrete by someone who (a) used improper means to obtain the trade secret, or (b) at the time of the disclosure knew that the trade secret was obtained improperly or held with some duty not to disclose it. CMAX/Cleveland, Inc. v. UCR, Inc., 804 F. Supp. 337, 358 (M.D. Ga., 1992). O.C.G.A. § 10-1-761 defines trade secrets.[9]

In deposition testimony, Mr. Toberman identified the BTS as the trade secret misappropriated by Mr. Lang. The BTS, however, is outside of the definition of trade

[9] O.C.G.A. § 10-1-761 (4) "Trade secret" means information, without regard to form, including, but not limited to, technical or non-technical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information: A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

secrets under O.C.G.A. § 10-1-761. In addition, Mr. Lang submitted the deposition testimony of a Senior VP of EAR (Ms. Brown) and an EAR paralegal (Ms. Black) that EAR held no trade secrets within the definition of O.C.G.A. § 10-1-761. There is no question of fact regarding Mr. Lang's alleged misappropriation of trade secrets.

Accordingly, the Court **GRANTS** Defendant's motion for summary judgment on Count II of Plaintiffs' complaint.

G. Counts VI and VII, Trespass to Chattels and Conversion

Plaintiffs allege that Mr. Lang removed physical files belonging to EAR when he was terminated. In deposition testimony, Mr. Toberman identified only the BTS as the "missing files" that are the basis of these claims. Mr. Lang was a member in and/or had an indirect ownership in several of the Toberman Entity signatories to the BTS. Mr. Lang was also an investor in the condo conversion projects which were assigned to the GEF Partnerships as a result of the BTS. Accordingly, Mr. Lang had an interest in the BTS and his possession of such constitutes neither trespass to chattels nor conversion.

Accordingly, the Court **GRANTS** Defendant's motion for summary judgment on Counts VI and VIII of Plaintiffs' complaint.

IV. Plaintiffs' Motion for Summary Judgment on Defendant's Counterclaims

During oral argument, Defendant abandoned Count II (Conversion of LLC Interests), Count III (Tortious Deprivation of LLC Interests), and Count V (Conversion of other Personal Property). Thus, Count I (Breach of Contract), Count IV (Conversion of Promotional Bonuses), and Count VI (Attorneys Fees and Expenses) remain the subject of Plaintiffs' motion for summary judgment.

A. Count I, Breach of Contract

Defendant Lang alleges that Mr. Toberman and EAR breached the terms of his employment with EAR by not paying bonuses due to Mr. Lang and for generally diluting the amount of previously paid bonuses as a result of Mr. Toberman's alleged embezzlements. Under Mr. Lang's 1999 letter of employment, he was to be paid bonuses that were tied to the acquisition, refinancing, or disposition of property through what was referred as "promote pool bonuses". Mr. Lang's right to receive the bonuses were contingent upon his continued employment with EAR.

Mr. Lang provided the closing documents for the Brookfield Commons property which closed on August 24, 2005, prior to Mr. Lang's termination from EAR. Thus, Mr. Lang claims that he is entitled to a bonus associated with that property. Additionally, Mr. Lang claims that Mr. Toberman breached the implied duty of good faith inherent in his employment contract[10] when Mr. Toberman allegedly embezzled funds which reduced the promote pool on other properties out of which Mr. Lang's previous bonuses were paid or were due.

A promote pool bonus, as described by Mr. Toberman, was a certain employee's share of what EAR earned on a particular real estate asset. Mr. Toberman provided an affidavit stating that no promote pool bonuses were paid to any EAR employees in conjunction with the sale of the Brookfield Commons property and implied that EAR made no money on the transaction.

To the extent that EAR made profits on the disposition of the Brookfield Commons property, which occurred prior to Mr. Lang's termination, Mr. Lang would be

[10] There is an implied covenant of good faith and fair dealing in every contract. S. Bus. Machines of Savannah v. Norwest Fin. Leasing, 194 Ga. App. 253 (1990) ("It is a well-recognized principle of contract law that both parties are under an implied duty of good faith in carrying out the mutual promises of their contract.").

due a portion under the promote pool bonus formula in his employment contract. However, there is no evidence in the record suggesting that either EAR made profits on Brookfield Commons or that any EAR employees received a bonus on that particular property. Without a profit on the property, there is no claim for Mr. Lang's entitlement to a bonus, and thus no breach.

On Defendant's second claim for breach, he submits the documentation of numerous unjustified account transfers or debits made by Mr. Toberman on behalf of several Toberman Entities, including EAR. The unjustified account transfers and debits, however, were not associated with a particular property for which Mr. Lang was paid a promote pool bonus, nor was there an attempt to explain the connection between those account activities and Mr. Lang's rights arising under his employment contract with EAR. Counsel for Defendant made the analogy during oral argument that in a contract to collect rain water, there is the implied duty not to poke holes in the bucket. Similarly, in a suit for breach of contract, there must be some attempt made to identify which bucket was collecting the rain water and/or the amount of rain water lost as a result of the holes. Without either, the breach of contract claim cannot withstand Plaintiff's motion for summary judgment.

Accordingly, the Court **GRANTS** Plaintiffs' motion for summary judgment on Count I of Defendant's counterclaim.

B. Count 4, Conversion of Promotional Bonuses

Defendant Lang alleges that Mr. Toberman and EAR converted promotional bonuses owed to him under this employment contract with EAR.

To prevail on a claim for conversion, a party must demonstrate that they had title to and right of possession in valuable property, that they made a demand for the property,

and that the other party had possession of the property after refusing to surrender it. City of College Park v. Sheraton Savannah Corp., 235 Ga. App. 561, 563 (1998).

Georgia courts recognize conversion claims for money, but the allegedly converted money must be "specific and identifiable, or specifically 'earmarked' for some particular purpose." Hudspeth v. A & H Constr., 230 Ga. App. 70, 71 (1997); see also, Unified Servs, Inc. v. Home Ins. Co, 218 Ga. App. 85, 89 (1995). Earmarking funds overcomes the presumption that the party in possession of the money also has title to it. Adler v. Hertling, 215 Ga. App. 769, 772-74, (1994) (finding the "specific and identifiable" nature of funds necessary to establish plaintiff's title and right to possess). Defendant Lang points to the detailed chart of alleged embezzlements as proof that the converted funds are specifically identifiable or earmarked. As stated above, however, the alleged embezzlement chart details unjustified account transfers between various Toberman Entities and is not directly tied to any specific property for which Mr. Lang was owed a promotion pool bonus or an augmentation of a previously paid bonus.

Accordingly, the Court **GRANTS** Plaintiffs' motion for summary judgment on Count IV of Defendant's counterclaim.

C. Count VI, Attorneys Fees and Expenses

Defendant Lang seeks to recover attorneys' fees and expenses associated with this litigation under O.C.G.A. § 13-6-11. Because all of the claims in Defendant Lang's counterclaim are disposed of as described in this Order, there is no basis for an award of attorneys' fees or expenses under the statute.

V. Defendant's Motion to Strike the Contradictory Testimony of Plaintiff Scott K. Toberman

Defendant Lang petitioned this Court to strike paragraphs 4 and 5 of Mr. Toberman's Affidavit filed on February 15, 2007, and several lines of Mr. Toberman's deposition testimony under the contradictory testimony doctrine. See, Prophecy Corp. v. Charles Rossignol, Inc., 256 Ga. 27 (1999) ("In a Motion for Summary Judgment where the only evidence presented by the Respondent is contradictory testimony, such testimony shall be stricken and the evidence shall be construed against him if no reasonable explanation is offered for the contradiction.").

This Court, having decided the two pending cross motions for summary judgment without addressing the testimony in question, and in doing so finally resolving all issues in this case, finds this motion moot.

VI. Conclusion

For the foregoing reasons, this Court hereby **GRANTS** Defendant's Motion for Summary Judgment on all Counts of Plaintiff's complaint and **GRANTS** Plaintiff's Motion for Summary Judgment on Counts I , IV, and VI (the remaining counts after Counts II, III, and V were abandoned by Defendant) of Defendant's counterclaim.

SO ORDERED this 31 day of August, 2007.

CYNTHIA D. WRIGHT, JUDGE *for*
ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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