

4-18-2011

# Order on Plaintiffs' Partial Motion to Dismiss and Motion for More Definite Statement (SOUTH COAST LIFE LIQUIDITY, LLP)

Elizabeth E. Long  
*Superior Court of Fulton County*

Follow this and additional works at: <https://readingroom.law.gsu.edu/businesscourt>

---

## Institutional Repository Citation

Long, Elizabeth E., "Order on Plaintiffs' Partial Motion to Dismiss and Motion for More Definite Statement (SOUTH COAST LIFE LIQUIDITY, LLP)" (2011). *Georgia Business Court Opinions*. 186.  
<https://readingroom.law.gsu.edu/businesscourt/186>

This Court Order is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).



Plaintiffs have moved to dismiss Defendants' claims for fraud in the inducement, theft by conversion, and unjust enrichment and seek a more definite statement of Defendants' fraud claim.

### **1. Standard**

In reviewing a motion to dismiss pursuant to O.C.G.A. § 9-11-12(b)(6), the Court must determine whether plaintiffs have stated a claim upon which relief can be granted. Under this standard, the Court must analyze whether “(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.” Stendahl v. Cobb Cty., 284 Ga. 525, 525 (2008). Under this analysis, the Court “must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff.” Cunningham v. Gage, 301 Ga. App. 306, 307 (2009).

### **2. Fraud in the Inducement**

Plaintiffs argue that Defendants' fraud in the inducement claim, as pled, must fail because a claimant cannot recover under this tort theory without rescinding the contract, and Defendants' counterclaim fails to allege adequately that Defendants rescinded the Joint Venture Agreement. The Court finds no merit to Plaintiffs' position. The law is replete with authority supporting a party's right to recover in damages in tort for fraud regardless of whether the party elects to rescind or affirm the contract at issue. See Ekeledo v. Amporful, 281 Ga. 817, 819 (2007), Corbin v. Lee, 121 Ga. App. 784, 785 (1970), Authentic Architectural Millworks, Inc. v. SCM Group, USA, Inc., 262 Ga. App. 826, 827 (2003), Giacomantonio v. Romagnoli, 306 Ga. App. 26, 31 (2010). The failure to rescind a contract only impacts a fraud claim when the

contract at issue contains a merger clause, which expressly disclaims a party's right to rely on misrepresentations outside the contract. In such a case, the party who opts not to rescind a contract is bound by its terms, including any merger clause, that may preclude a claim of fraud. See Authentic Architectural Millworks, Inc. v. SCM Group, USA, Inc., 262 Ga. App. 826, 827 (Ga. App. 2003). Here, the Plaintiffs have not alleged that a merger clause exists, and with no copy of the contract at issue attached to a pleading, the Court cannot properly consider on a motion to dismiss whether such a merger clause would prevent Defendants from bringing a claim for fraud in the inducement. See Bakhtiarnejad v. Cox Enterprises, Inc., 247 Ga. App. 205, 208-209 (2000). As such, Defendants fraud in the inducement claim can proceed even if, as Plaintiffs' contend, Defendants failed to allege they rescinded the Joint Venture Agreement.

### **3. Conversion**

Turning to Defendants' counterclaim for conversion, Plaintiffs seek dismissal on the basis that a conversion claim is not appropriate for a class of property that cannot be specifically identified, like money. However, the law is clear that a claim of conversion can exist, so long as the allegedly converted money is specific and identifiable or earmarked for a certain purpose. See Hudspeth v. A&H Construction, Inc., 230 Ga. App. 70, 71 (1997); Taylor v. Powertel, Inc., 250 Ga. App. 356, 359 (2001).

Plaintiffs also argue that, in any event, Defendants failed to make a prima facie showing to recover under this cause of action because they failed to show that they made a demand for the return of the property and that Plaintiffs failed to comply with said demand. The Court finds that there is no threshold requirement that a party must first make a demand for the property's return along with refusal of same, so long as the party has alleged actual conversion.

Where, as here, an actual conversion is shown, no demand is necessary, for proof of demand and refusal is required only as evidence of a conversion; and where ... a conversion has been shown by other evidence, such proof is not essential. Demand and refusal is necessary only when the defendant comes into possession of the property lawfully. What is meant by defendant coming lawfully into possession of the property is, where he finds it, and retains it for the true owner: or where he obtains the possession of the property, by the permission or consent of the plaintiff, as where the relation of bailor and bailee exists. In this latter class of cases, a demand and refusal would be necessary, unless it could be shown the defendant had appropriated the article so found to his own use, or had disposed of the property bailed, contrary to the terms and stipulations of the contract of bailment.

Lovinger v. Hix Green Buick Co., 110 Ga. App. 698, 700-701 (1964).

Construing Defendants' pleading in its favor, the Court finds that Defendants have sufficiently pled a claim of actual conversion of money earmarked for a specific purpose to survive dismissal. Defendants have alleged that Plaintiffs converted for their own use certain funds paid by Defendants for the operation of SCS. The Court cannot say with certainty that Defendants would not be entitled to relief under any set of provable facts in support of this allegation, nor have Plaintiffs established that Defendants could not possibly introduce evidence sufficient to warrant an award in their favor on this claim. See Stendahl v. Cobb Cty., 284 Ga. 525, 525 (2008).


#### **4. Unjust Enrichment**

Plaintiffs next seek dismissal of Defendants' unjust enrichment claim on the grounds that the parties had an express contract, which Plaintiffs argue precludes a claimant's right to recover for unjust enrichment. "A claim for unjust enrichment is... an alternative theory of recovery if a contract claim fails." Wachovia Ins. Services, inc. v. Fallon, 299 Ga. App. 440, 449 (2009). Because Defendants are entitled to pursue any number of consistent or inconsistent remedies until a verdict is rendered, O.C.G.A. § 9-2-4, Defendants' unjust enrichment claim may proceed.

## 5. Motion for More Definite Statement

Finally, Plaintiffs ask the Court to order Defendants to provide a more definite statement of their fraud claim, which Plaintiffs contend is not pled with particularity. To the extent Plaintiffs were less than clear as to the basis of Defendants' fraud claim, Plaintiffs have had the opportunity to directly inquire into the facts underlying this claim during many months of discovery. In fact, discovery remains open until May 30, 2011. "[A] defendant seeking greater particularity in a complaint alleging a claim of fraud may either move for a more definite statement or wait for the outcome of discovery." Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 284 Ga. App. 387, 394 (2007). For the foregoing reasons the Court hereby **DENIES** Plaintiffs' Partial Motion to Dismiss Defendants' Counterclaim and Motion for More Definite Statement. Defendants' counterclaims for fraud, fraud in the inducement, theft by conversion, and unjust enrichment may proceed.

**SO ORDERED** this 13 day of April, 2011.

  
\_\_\_\_\_  
JOHN J. GOGER, JUDGE  
for ELIZABETH E. LONG, SENIOR  
JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

**Copies sent via email to:**

<b>Attorneys for Plaintiffs</b>	<b>Attorneys for Defendants</b>
Michael A. Sexton Jonathan R. Friedman 950 East Paces Ferry Road Atlanta Plaza—Suite 3000 Atlanta, GA 30326 Phone: 404-876-2700 Fax: 404-875-9433 <a href="mailto:msexton@wwhgd.com">msexton@wwhgd.com</a> <a href="mailto:jfriedman@wwhgd.com">jfriedman@wwhgd.com</a>	Louis R. Cohan Alexander R. Cutler Weinstock & Scavo, PC 3405 Piedmont Road, NE Suite 300 Atlanta, GA 30305 404-231-3999 <a href="mailto:lcohan@wslaw.net">lcohan@wslaw.net</a>