

SUPERIOR COURT  
STAMFORD-NORWALK  
JUDICIAL DISTRICT

2008 FEB -5 P 3:59

D.N. CV 04 4001931 S : SUPERIOR COURT  
BARBARA TUNICK, ET AL : J.D. OF STAMFORD/NORWALK  
v. : AT STAMFORD  
STEPHEN TUNICK : January 28, 2008

*Memorandum of Decision*

The First Count of the plaintiffs' Second Revised Complaint alleges that the defendant breached his fiduciary obligations to the plaintiffs from 1991 until the time of his resignation as general partner of Simplex Realty Associates LP in 2005 by misappropriating partnership assets and income and negligently managing the partnership property and assets.

The Second Count of the plaintiffs' Second Revised Complaint alleges that the defendant failed to pay the plaintiffs the required income generated by the partnership's assets and failed to provide them with an accounting of said income.

The Third Count of the plaintiffs' Second Revised Complaint is based upon a theory of statutory theft pursuant to the provisions of § 52-564 C.G.S. The plaintiffs allege that the defendant intended to deprive and did so deprive the plaintiffs of their share of the rental income from the partnership assets.

The Fourth Count of the plaintiffs' Second Revised Complaint sounds in the tort of conversion. The plaintiffs allege that the defendant appropriated and converted the plaintiffs' share of the profits of Simplex to himself.

The plaintiffs' complaint seeks compensatory damages, common law punitive damages, attorneys' fees, and treble damages.

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*Facts*

After hearing the witnesses and evaluating their credibility, this court has come to the conclusion that the witnesses presented by the plaintiffs were credible and convincing and the defendant's testimony lacked credibility. As a result of weighing all of the credible evidence admitted at the hearing, this court finds the following facts to be proven:

In August 1991, David Tunick formed Simplex Realty Associates, LP ("Simplex"), a Connecticut limited partnership, in order to own and manage certain real estate.

Simplex currently owns and manages a building on Greenwich Avenue in Greenwich, Connecticut that houses a restaurant and four apartments, as well as an improved parcel of land in Jupiter Florida that houses a day care center.

From 1991 until 2005, defendant Stephen Tunick served as Simplex's general partner, and the plaintiffs Roberta and Barbara Tunick, the defendant's sisters, were Simplex's limited partners.

Pursuant to the Simplex Agreement, the plaintiffs and the defendant were each entitled to receive one-third (1/3) of Simplex's profits.

In his role as Simplex's general partner, the defendant was responsible for the management and supervision of Simplex's business and affairs, and was obligated to provide the plaintiffs with Simplex financial statements each year including, but not limited to, profit and loss statements, balance sheets, computations of the distributions and allocations to each partner of Simplex's profits or losses, and the balances in the capital accounts of each partner.

The Simplex Agreement also required the defendant, as general partner, to properly manage and conduct the business and to act in good faith and exercise due diligence.

In or about November 2004, the plaintiffs filed an Application for Appointment of Temporary Receiver for Simplex alleging that the defendant failed to abide by his contractual and other duties as Simplex's general partner.

On January 18, 2005, the plaintiffs' Application was granted by consent and Pyramid Real Estate Group (hereinafter "Pyramid") began managing Simplex's affairs as the partnership's temporary receiver.

On or about November 15, 2006, the court granted the plaintiffs' Motion for Default for Failure to Plead, and on or about December 1, 2006, this action was claimed to the hearing in damages list.

From at least 1996 until Pyramid's appointment as temporary receiver in January 2005, the defendant failed to distribute one-third (1/3) of Simplex's profits to either of the plaintiffs.

In 2003 and 2004, the last years the defendant managed Simplex as general partner, the plaintiffs received no distributions from the partnership.

In sworn testimony in a Superior Court family matter before Judge Carol Wolven, the defendant testified that he paid himself approximately one hundred and sixty thousand dollars (\$160,000.00) from Simplex from in or about October 2003 until April 2005 – even though he failed to distribute any money to the plaintiffs during this same time period.

In sworn testimony in a Superior Court family matter before Judge Brian Fisher in October 2004, the defendant testified that he was drawing out funds from Simplex as his income.

The defendant further testified that he paid his own family's medical insurance out of partnership funds.

The plaintiffs did not give the defendant permission to take any more from Simplex than three and one-half percent (3.5%) of Simplex's gross rentals, as set forth in the Simplex Partnership Agreement, and they never gave the defendant permission to pay his family's insurance or personal expenses out of Simplex funds.

When the plaintiffs became convinced that the defendant was misappropriating Simplex's income, they requested to see Simplex's books and records, but the defendant denied the plaintiffs' requests.

After Pyramid became receiver for Simplex, it was unable to obtain relevant records and documents from the defendant and was forced to obtain documents directly from tenants and vendors.<sup>1</sup>

From 1993 through 2003, Ms. Steinke worked as Simplex's bookkeeper.

The defendant continued to pay Ms. Steinke out of Simplex funds even after she ceased working for Simple.

During her tenure as Simplex's bookkeeper, Ms. Steinke observed that the defendant paid personal expenses out of Simplex's funds

Ms. Steinke credibly testified that the defendant purchased ornate knives for his personal collection, some of which cost three or four thousand dollars, with Simplex funds.

The defendant used Simplex funds to operate a knife business called the "CustomKnife.com."

The defendant used Simplex funds to ship knives using Federal Express and UPS and would use Simplex funds to speak to potential customers from all over the world.

Mr. Russell Munz, Pyramid's Chief Operating Officer and Senior Property Manager, testified on behalf of the plaintiffs both as a fact witness as well as an expert witness.

Mr. Munz is familiar with the operation of real estate businesses similar to Simplex and is knowledgeable about revenues generated and expenses incurred in the management of by properties similar to those held by Simplex.

For a period of almost three (3) years Pyramid acted either as receiver or property manager for Simplex. During this time Mr. Munz became familiar with both the income generated and the expenses incurred by Simplex.

Mr. Munz was able to ascertain the amount of revenue actually generated by Simplex from 1996 through 2004 through his review of Simplex's tax returns as well as leases relating to Simplex's properties.

Mr. Munz was able to calculate the expenses incurred by Simplex from 1996 through 2004 based on his experience in the real estate management industry, the knowledge gained from managing Simplex from January 2005 through September 2007, as well as his review of public records and Simplex documentation which he was able to obtain.<sup>2</sup>

Mr. Munz prepared a summary that he asserts reflects the revenue generated and expenses incurred by Simplex from 1996 through 2004.

By subtracting the expenses from the revenue generated by Simplex from 1996 through 2004, Mr. Munz was able to compute Simplex's "net operating income" for those years.

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<sup>1</sup> See footnote 3.

<sup>2</sup> See footnote 3.

The net operating income calculated by Mr. Munz was conservative in that in his opinion it overstated expenses such as utilities, maintenance expenses, commission expenses, structural reserves, and used a generous vacancy allowance. It further included a four percent (4%) management fee when the defendant was only entitled to three and one-half (3.5%) in the Simplex Agreement. The plaintiffs assert that these calculations benefit the defendant by reducing Simplex's net operating income during the years the period of time in question.

Edward M. Axelrod, a certified public accountant, testified as the accountant for the plaintiffs. He calculated the amount of income "available for distribution" to Simplex's partners from 1996 through 2004 by subtracting Simplex's debt service from its net operating income for those years. He then compared the amount of income "available for distribution" to the plaintiffs with the amount of income the defendant actually distributed from 1996 through 2004.

Using a mathematical calculation, Mr. Axelrod was able to determine that the defendant underpaid the two plaintiffs from 1996 to 2004 the sum of \$325,477.00.<sup>3</sup>

When Pyramid became receiver for Simplex, it was required to pay significant late fees and penalties on the behalf of Simplex that resulting from the defendant's failure to

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<sup>3</sup> Although the defendant argues that the plaintiffs failed to use the best evidence to prove their damages, the court notes that defendant failed to give the plaintiff access to the actual income and expense records that were related to the LP. Additionally the court notes that a damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence. *Westport Taxi Serv., Inc. v. Westport Transit District*, 235 Conn. 1, 28 (1995) (proof of damages needs to remove the issue from the realm of speculation); *Deloit v. Roraback*, 179 Conn. 406, 411 (1980) (the plaintiff must present sufficient evidence of damages to afford a basis for a reasonable estimate by the trier of fact).

pay mortgages on the Greenwich and Florida properties. It was also necessary for Pyramid to pay additional expenses in paying overdue debts, resolving building and health department issues, deferred maintenance, and obtaining Simplex documentation which the defendant refused to provide.

From 2005 through the time of the hearing the additional expenses amounted to twenty four thousand four hundred six dollars and eighty-five cents (\$24,406.85). Had these additional expenses not been incurred, the plaintiffs would have been entitled to two-thirds (2/3) of this amount, or sixteen thousand three hundred fifty two dollars and fifty-eight cents (\$16,352.58).

### *Legal Standards*

#### *Fiduciary Relationships*

"Our law on the obligations of a fiduciary is well settled. [A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." (Internal quotation marks omitted.) *Murphy v. Wakelee*, 247 Conn. 396, 400, 721 A.2d 1181 (1998). The court finds that the plaintiffs have met their burden of proof to show that there was a fiduciary relationship between the parties.

Once a fiduciary relationship has been established, the burden of proving fair dealing

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shifts to the defendant as the fiduciary. *Konover Development Corp. v. Zeller*, 228 Conn. at 219; *Dunham v. Dunham*, 204 Conn. 303, 322 (1987) (overturned on other grounds). A fiduciary has the duty to deal fairly with the principal, “not simply to act reasonably based upon the relevant information.” *Konover Dev. Corp. v. Zeller*, 228 Conn. at 221. “[T]he standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but *requires proof by clear and convincing evidence* . . . .” *Id.*, 230 (emphasis added).

#### *Common Law Punitive Damages*

To furnish a basis for recovery of punitive damages, the pleadings must allege and the evidence must show wanton or wilful malicious misconduct, and the language contained in the pleadings must be sufficiently explicit to inform the court and opposing counsel that such damages are being sought. *Markey v. Santangelo*, 195 Conn. 76, 77-78, 485 A.2d 1305 (1985); *Manning v. Michael*, 188 Conn. 607, 619, 452 A.2d 1157 (1982). If awarded, punitive damages are limited to the costs of litigation less taxable costs, but, within that limitation, the extent to which they are awarded is in the sole discretion of the trier. *Chykirda v. Yanush*, 131 Conn. 565, 568, 41 A.2d 449 (1945); *Hanna v. Sweeney*, 78 Conn. 492, 494, 62 A. 785 (1906); *Bennett v. Gibbons*, 55 Conn. 450, 452, 12 A. 99 (1887). Limiting punitive damages to litigation expenses, including attorney’s fees, “fulfills the salutary purpose of fully compensating a victim for the harm inflicted on him while avoiding the potential for injustice which may result from the exercise of

unfettered discretion by a jury.’ *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, [193 Conn. 208, 238, 477 A.2d 988 (1984)].” *Berry v. Loiseau*, 223 Conn. 786, 827, 614 A.2d 414 (1992).

“We have previously held that in order to award punitive damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . Recklessness is a state of consciousness with reference to the consequences of one’s acts. . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. . . . Whether the defendant acted recklessly is a question of fact subject to the clearly erroneous standard of review. (Citations omitted; internal quotation marks omitted.) *Franc v. Bethel Holding Co.*, 73 Conn. App. 114, 137-38, 807 A.2d 519, cert. granted on other grounds, 262 Conn. 923, 812 A.2d 864 (2002).

#### *Conversion and Statutory Theft*

Section 52-564 C.G.S. provides that: “Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages.”

“The elements that the plaintiffs must prove to obtain treble damages under the civil theft statute, § 52-564, are the same as the elements required to prove larceny, pursuant to General Statutes § 53a-119. *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 770-71, 905 A.2d 623 (2006). The elements of civil theft are also largely the same as the elements to prove the tort of conversion, but theft ‘requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion.’ (Internal quotation marks omitted.) *Id.*, 771. ‘A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . . It must be shown that (1) there was an intent to do the act complained of, (2) the act was done wrongfully, and (3) the act was committed against an owner.’ (Internal quotation marks omitted.) *State v. Spillane*, 54 Conn. App. 201, 217-18, 737 A.2d 479 (1999), rev’d on other grounds, 255 Conn. 746, 770 A.2d 898 (2001).”

Conversion is an unauthorized assumption and exercise of the right of ownership over property belonging to another, to the exclusion of the owner's rights. E.g., *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 770, 905 A.2d 623 (2006); *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 43, 761 A.2d 1268 (2000); *Devitt v. Manulik*, 176 Conn. 657, 660, 410 A.2d 465 (1979). Similarly, statutory theft is the stealing of another's property or the knowing receipt and concealment of stolen property. See General Statutes § 52-564 (“[a]ny person who steals any property of another, or

knowingly receives and conceals stolen property, shall pay the owner treble his damages"). Statutory theft, however, requires an element over and above what is necessary to prove conversion, namely, that the defendant intentionally deprived the complaining party of his or her property. *Suarez-Negrete v. Trotta*, 47 Conn. App. 517, 521, 705 A.2d 215 (1998). Nonetheless, to prevail on either claim, the party alleging conversion or statutory theft must prove a sufficient property interest in the items in question. See *Falker v. Samperi*, 190 Conn. 412, 419-20, 461 A.2d 681 (1983) (plaintiff's property rights are at heart of conversion, and proof of ownership is plaintiff's burden); *Discover Leasing, Inc. v. Murphy*, 33 Conn. App. 303, 309, 635 A.2d 843 (1993) (prima facie case for conversion and statutory theft requires proof that property in question "belonged to" plaintiff). Accordingly, a claim for conversion may be brought when the relationship is one of bailor and bailee but not when it is one of debtor and creditor. See *United States v. Johnston*, 268 U.S. 220, 226-27, 45 S. Ct. 496, 69 L. Ed. 925 (1925).

The burden of proof to recover under these theories of liability is by clear and convincing evidence. *Suarez-Negrete v. Trotta*, *Id* at 520.

#### *Conclusion*

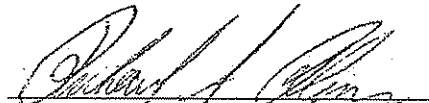
This court finds that the plaintiffs have met their burden of proof as to the allegations of First, Third and Fourth Counts of their complaint. The court further finds that the plaintiffs have met their burden of proof to show that the defendants conduct in

misappropriating the partnership assets and income for his personal use displayed an intentional and wanton disregard for the plaintiffs' rights.

As a result of the defendant's actions, the court finds that the plaintiffs suffered compensatory damages in the amount of three hundred twenty five thousand four hundred and seventy seven dollars (\$325,477.00) and an additional sixteen thousand three hundred fifty two dollars and fifty-eight cents (\$16,352.58) for the breach of fiduciary duty.

The clear and convincing evidence admitted at the hearing shows that the plaintiffs are entitled to recover treble damages as to the compensatory portion of their damages.

Judgment may enter in favor of the plaintiffs and against the defendant in the amount of nine hundred ninety two thousand seven hundred eighty three dollars and fifty-eight cents (\$992,783.58) plus reasonable attorney's fees. So ordered



Richard A. Robinson, J.  
January 28, 2008

Decision entered in accordance  
with the foregoing. All counsel  
and pro se parties notified 2-5-08  
Robert R. O.C.