

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT

SARGENT DOCKS AND TERMINAL, INC,
SARGENT SAND COMPANY, LLC, and
WILLIAM WEBBER,

Plaintiffs,

v

THOMAS WEBBER,
AVANT LOGISITCS, LLC,
f/k/a SARGENT LOGISTICS, LLC,
MARCELLUS ENERGY SERVICES, LLC,
and ERIC STRANG,

Defendants.

Thomas J. McGraw (P48817)
McGraw Morris PC
Attorneys for Plaintiff
2075 W. Big Beaver Road, Suite 750
Troy, Michigan 48084
Telephone: (248) 502-4000

Byron J. Walker, pro hac vice
The Rose Law Firm
Attorneys for Avant Logistics and
Marcellus Energy Systems
120 E. Fourth Street
Little Rock, Arkansas 72201-2893
Telephone: (501) 375-9131

Case No. 11-014229-CB

Judge: M. Randall Jurrens (P27637)

OPINION AND ORDER
RE: DEFENDANTS'
MOTION FOR SUMMARY
DISPOSITION No. 5
(Conversion / Fraud)

Peter A. Poznak (P27948)
Poznak Dyer Kanar Garchow PLC
Attorneys for Defendants Webber and Strang
and co-counsel for Avant Logistics and
Marcellus Energy Systems
143 McDonald Street
Midland, Michigan 48640
Telephone: (989) 832-1770

The plaintiffs' amended complaint states several causes of action related to a failed business venture.

In the present motion, the defendants seek dismissal of Count III, *Conversion*, and Count VI, *Fraud*.

For the reasons stated in this opinion, the court concludes that there is no genuine issue as to any material fact involving those claims, thus justifying dismissal of both Count III, *Conversion*, and Count VI, *Fraud*.

Background / Standards

The Factual Background, Procedural Background, and Summary Disposition Standards included in the court’s Opinion and Order re: Defendants’ Motion for Summary Disposition No. 1 are adopted and incorporated by reference.

Analysis

Conversion

Count III of the plaintiffs’ Amended Complaint, *Conversion*, alleges the defendants “converted, dissipated, absconded with, and otherwise commandeered the assets, funds and personalty to which the Plaintiffs were entitled” (Amended Complaint, ¶ 61) by receiving proceeds of usurped business opportunities, as well as spending LLC funds while pursuing those opportunities (Amended Complaint, ¶ 59).

With discovery now concluded, the defendants argue that there is no genuine issue of material fact regarding the monies¹ involved in the plaintiffs’ conversion claim and, therefore, pursuant to MCR 2.116(C)(10), that they are entitled to dismissal of Count III, *Conversion*, as a matter of law.

Conversion, in both the common law and pursuant to statute, *MCL 600.2919a*², is defined as “any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.” *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 283 (2004). Common law conversion does not necessarily require a conversion of property to one’s own use, but a conversion of property for one’s own use is one of the statutory

¹ As framed by the defendants’ statement of the issue (Plaintiffs’ Brief in Support, p 4), they similarly assert that “neither the business opportunities . . . nor goodwill are personal property upon which conversion can be based”. However, since the plaintiffs’ amended complaint (¶¶ 59-63) as well as their argument (Plaintiffs’ Response, pp 44-49) appear to focus on “funds” and “monies”, the court similarly limits its opinion to whether a cause of action lies for conversion of money.

² MCL 600.2919a, as amended, 2005 PA 44, provides:

- (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
 - (a) Another person’s stealing or embezzling property or converting property to the other person’s own use.
 - (b) Another person’s buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
- (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

requirements under MCL 600.2919a(1)(a). *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, __ Mich __; __ NW2d __ (2015) (2015 WL 3772434).

Conversion, being based on the legal fiction of losing and finding, was originally limited to tangible chattel; with intangible rights, which are not susceptible to being lost or found, incapable of supporting a claim of conversion. Over time, however, courts recognized conversion of documents in which intangible rights were merged, so that the one became the symbol of the other. Prosser & Keeton, *Torts* (5th ed), § 15, p 102.

Accordingly, an action may now lie in conversion of money. But the availability of a cause of action for conversion of money is subject to important provisos limiting application to situations where “there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified.” *Garras v Bekiares*, 315 Mich 141, 148; 23 NW2d 239 (1946); *Sarver v Detroit Edison Co*, 225 Mich App 580, 585-586; 571 NW2d 759 (1997).

“To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care. The defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship.” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111–112; 593 NW2d 595 (1999) (citations and quotation marks omitted). When money is placed in a general deposit account, it will inevitably “mingle[] with the money of other depositors in a general fund chargeable with the payment of general deposits, possess[] no trust quality, and lose[] its special identity in its general comingling with the funds of the bank.” *Owosso Masonic Temple Ass'n v State Savings Bank*, 273 Mich. 682, 690; 263 NW 771 (1935). The effect of this comingling makes it impossible for a plaintiff who deposits money in a general deposit account to claim conversion of money placed in the account, as the defendant will not have “an obligation to return the specific money entrusted to his care.” *Head, supra*, at 111.³

Here, the plaintiffs have presented no evidence (or even an allegation) of the rule’s proviso – there must be an obligation on the part of the defendant(s) to separately maintain specifically identifiable money.⁴

³ With due respect, the LLC’s argument that the monies were “diverted” before making it into its general account is a distinction without a difference. Whether “diverted” before the LLC took possession or removed from the its possession, there remains no specifically identifiable tangible personal property to be found and returned.

⁴ With due respect, the plaintiffs’ reliance on *Stockbridge Capital, LLC v Watcke*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2014 (Docket No. 313241) (2014 WL 860353), appears misplaced. In *Watcke*, unlike here, the defendant had a specific mortgage/contractual obligation to provide insurance proceeds to the plaintiff but, instead, he received, cashed, and deposited into his own account the proceeds of an insurance check which had included the plaintiff’s name as a payee. In affirming the trial court’s grant of summary disposition in favor of the plaintiff, the Court of Appeals relying on *Citizens Ins Co v Delcamp Truck Ctr, Inc*, 178 Mich App 570; 444 NW2d 210 (1989) (“[a]n action for conversion lies where an individual cashes a check and retains the full amount of the check when he is entitled to only a portion of that amount”), noted that “[p]laintiff’s conversion claims against defendant were not destroyed simply because the money was not specifically delineated to each payee on the check”. This is markedly different from the plaintiffs’ present claim of entitlement to “funds” received and “monies” spent generally (Amended Complaint, ¶ 59), which, with discovery now complete, they “identify the specific monies” only as those received when “Defendant Strang reduced the price of sand sold the Cudd while

Accordingly, there being no genuine issue as to any material fact, the defendants are entitled, pursuant to MCR 2.116(C)(10)⁵, to summary disposition and dismissal of Count III, *Conversion*.⁶

Fraud

The plaintiffs allege in Count VI, *Fraud*, that the defendants “misappropriated credit information and made false statements about themselves in order to obtain credit . . . with the expectation and intent that customers and/or lenders would reasonably rely on those statements” (Amended Complaint, ¶¶ 79 and 81).

With discovery now complete, the defendants assert that there is no dispute that they did not make material misrepresentations upon which the plaintiffs detrimentally relied, and that they are, therefore, entitled to dismissal of Count VI, *Fraud*, as a matter of law.

A plaintiff claiming actionable fraud (fraudulent misrepresentation) must show that,

(1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), aff’d 483 Mich 1089 (2009).]

Additionally, fraud must be pled with particularity, *MCR 2.112(B)(1)*; *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014).

Here, although it may have been overlooked in the voluminous documentary evidence the parties submitted, the court is not aware of any proof that the defendants “misappropriated credit information and made false statements about themselves in order to obtain credit . . . with the expectation and intent that customers and/or lenders would reasonably rely on those statements”.

increasing the price of logistics services offered by [the defendants’ independent ventures]” (Plaintiffs’ Response, pp 47-49).

⁵ It also appears that, absent allegation of essential elements of conversion of money (Amended Complaint, ¶¶ 58-63), the defendants are alternatively entitled to summary disposition under MCR 2.116(C)(8).

⁶ Hoping to circumvent limitations on their claim of conversion of money, the plaintiffs point out that statutory conversion, *MCL 600.2919a*, is not limited to “converting” property, but also extends to “embezzling” property. However, while Count III, *Conversion*, purports to state a claim for conversion, it never mentions “embezzlement” or otherwise states “specific allegations necessary reasonably to inform [the defendants] of the [embezzlement] nature of the claim[.]”, *MCR 2.111(B)(1)*.

Accordingly, there being no genuine issue as to any material fact, the defendants are entitled, pursuant to MCR 2.116(C)(10)⁷, to summary disposition and dismissal of Count VI, *Fraud*.⁸

Conclusion

The plaintiffs' amended complaint states several causes of action related to a failed business venture. Hoping to reduce the expanse of matters requiring trial, the defendants seek dismissal of Count III, *Conversion*, and Count VI, *Fraud*.

Having reviewed the pleadings and the documentary evidence submitted by the parties, as well as having considered counsels' written and oral arguments, the court concludes that there is no genuine issue as to any material fact involving either claim.

Therefore, pursuant to MCR 2.116(C)(10), the Defendants' Motion for Summary Disposition No. 5 is being **GRANTED**, and Count III, *Conversion*, and Count VI, *Fraud*, are each being dismissed.

⁷ As the defendants point out (Defendants' Supporting Brief, p 9; and Trans March 25, 2015 hearing, pp 15 and 24), by failing to allege that the plaintiffs themselves acted in reliance of the defendants' false statements, the plaintiffs have failed to plead a critical element of actionable fraud. Accordingly, the defendants are alternatively entitled to summary disposition under MCR 2.116(C)(8).

⁸ The plaintiffs' written argument notes that in addition to fraudulent misrepresentation, Michigan law also recognizes innocent misrepresentation and silent fraud (Plaintiffs' Response, pp 42-43). But, without more, merely re-characterizing the allegations in their amended complaint will not salvage the plaintiffs' claim of fraud.

"A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 621; 769 NW2d 911 (2009) (citation and quotation omitted). A plaintiff need not show that the defendant acted with fraudulent intent, but the plaintiff "must show that privity of contract existed between the plaintiff and the defendant." *Id.*

The elements of silent fraud are: (1) the defendant failed to disclose a material fact about the subject matter at issue; (2) the defendant had actual knowledge of the fact; (3) the failure to disclose the fact gave the plaintiff a false impression; (4) when the defendant failed to disclose the fact, he or she knew that the failure to disclose would create a false impression; (5) when the defendant failed to disclose the fact, he or she intended that the plaintiff rely on the resulting false impression; (6) the plaintiff indeed relied on the false impression; and (7) the plaintiff suffered damages resulting from his or her reliance. See *Hord v Environmental Research Institute of Michigan*, 228 Mich App 638, 645; 579 NW2d 133 (1998).

Here, the plaintiffs' [twice amended] complaint does not allege the defendants even made representations to them, much less that they relied on the defendants' representations.

The plaintiffs counter, however, that the defendants' argument is a "technical one" and that they "learned through discovery the details of Defendants' fraud [that] support Plaintiffs' claims" (Plaintiffs' Response, p 42; 03-25-15 hearing Trans, ¶¶ 19-21): e.g. the defendants reported to the LLC that business opportunities were not ripe or viable, while simultaneously pursuing the opportunities for their own personal interest (Plaintiffs' Response, p 43).

However with due respect, without at least pleading with particularity the essential elements of some variation of fraud, the plaintiffs' claim fails to justify further consideration.

