

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-001256

04/08/2004

HON. PAUL A KATZ

CLERK OF THE COURT
B. Navarro
Deputy

FILED: 04/14/2004

PAULETTE J J'SEN

BRIAN M MUELLER

v.

STEPHEN M GERNI

JOSEPH E COLLINS

UNDER ADVISEMENT RULING

The Court having conducted a bench trial in this matter on or about February 10, 2004; having reviewed the evidence presented at said trial and the post-trial memoranda of the parties; and good cause appearing, enters the following Findings of Fact and Conclusions of Law, Verdicts and Orders:

FINDINGS OF FACT AND CONCLUSTIONS OF LAW

Paulette J. J'Sen ("J'Sen") and Stephen M. Gerni ("Gerni") were formally married, but were divorced in Colorado in November of 1999. As part of the divorce proceedings, the parties entered into a Settlement Agreement, Exhibit 1 at trial. Pursuant to the Settlement Agreement, J'Sen was awarded the parties' residence located at University Circle, Charlottesville, VA, as her sole and separate property.

In early 2000, J'Sen sold the residence and deposited the sale proceeds in a separate bank account with First Security Network Bank. In April, 2000, J'Sen, at the suggestion of Gerni, transferred \$300,000.00 from her First Security account via three separate checks, each in the amount of \$100,000.00 (trial Exhibits 7, 8 and 9) to an account opened by Gerni on her behalf at Firsthand Funds. As an aside, this Court would note, that since the parties' divorce, Gerni has continued to provide J'Sen with financial advice regarding both her business and personal affairs. Trial Exhibit 2, is a copy of an April 26, 2000 application Gerni prepared for J'Sen's signature in order to open the account with Firsthand Funds. This is the same date on which J'Sen drew the three checks previously discussed. On the first page of the new account

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-001256

04/08/2004

application, there is a designation that the \$300,000.00 is to be invested in three separate mutual funds with \$100,000.00 to be placed in each of said funds. The first page of the application further designates J'Sen as the owner of the account, but also lists Gerni as a joint owner. The second page of the application lists only J'Sen's social security number and the third page of the application is signed by both Plaintiff and Defendant.

It is clear to this Court from the testimony and actions of the parties, that J'Sen in authorizing Gerni to open up this account on her behalf, was not gifting 50% of its proceeds to him or making him a joint tenant in said account. This Court is compelled to conclude that Gerni listed himself as a co-owner of the account, not for purposes of gaining control over it, but for purposes of assisting J'Sen in the management of the monies placed within said account. While Plaintiff contends that the application, presented to her for her signature by Defendant, contained only her name as an owner, this Court believes that the application was in its current form when presented by Gerni to J'Sen for her signature. This Court also believes that J'Sen did not pay careful attention to the application as it was presented to her, as she had no reason to distrust Gerni whose financial advice she had relied upon throughout their marriage. This Court is also compelled to conclude that Gerni, at the time he provided J'Sen with the advice to invest in Firsthand Funds, procured signature on the application and deposited her checks into the account, he did not have the intent to defraud J'Sen, nor was he, by listing himself as a co-owner, attempting to assert an ownership interest in the account. The Court is also compelled to conclude that Gerni did not have the intent to defraud J'Sen, nor was he, by listing himself as a co-owner, attempting to assert an ownership interest in the account at the time he provided J'Sen with the advice to invest in Firsthand Funds, procured her signature on the application and deposited her checks into the account.

On or about June 7, 2000, J'Sen attempted to withdraw \$175,000.00 from the Firsthand account for the purchase of a new home. Firsthand funds did not allow J'Sen to withdraw the funds from the account without Gerni's agreement or authorization, as they were both listed as co-owners on the account application. On this same date, Gerni wrote a letter to a Mr. Fuller at Northern Arizona Mortgage Corporation who was working with J'Sen in the purchase of her new home, that the \$293,601.00 in the Firsthand account "belong entirely to Paulette Sen Gerni" *see*, trial Exhibit 5. Between June 7 and June 19, 2000, it is evident that both J'Sen and Gerni were working together to procure the release of funds from Firsthand Funds, as is indicated by trial Exhibit 4. This letter from Firsthand Funds to J'Sen and Gerni acknowledges that Firsthand Funds had received a request from both of the listed owners to transfer shares in the account so that J'Sen could deposit said funds into escrow and close the purchase contract for her new home. The letter advises the parties that in order to transfer the shares, they would be required to submit new instructions to Firsthand Funds signed by each of them as their names both appeared on the account application. They were further instructed that their signatures must bear a "signature guarantee", with specific instructions in that regard, and that the verification of their signatures by a notary public was not acceptable.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-001256

04/08/2004

After this point in time, the Court is left somewhat confused by the evidence, and is uncertain as to what, if any, attempts either J'Sen or Gerni made to procure and submit new instructions to Firsthand Funds with proper signature guarantees, until after J'Sen had procured funds from a mortgage lender in order to enable her close escrow on her new home. It is clear that as of June 13, 2000, as is evidenced by Exhibit 14, Gerni was actively attempting to assist J'Sen in procuring the release of funds so that \$175,000.00 could be wire transferred to J'Sen for the close of said escrow. Plaintiff has failed to present competent evidence to suggest what, if any, efforts she made prior to the close of escrow to procure Gerni's signature, with guarantee, and what, if any, action he took to interfere with such efforts to do so.

Subsequent to J'Sen's close of escrow, which required her to take out a mortgage in an amount of \$113,000.00 in excess of what she anticipated borrowing had she had the \$175,000.00 available to her from her account, for some unexplained reason, Gerni has been uncooperative with J'Sen in executing the necessary signature guarantees to release the funds back to her. This Court cannot understand why Gerni continued to interfere with J'Sen's right to access her own funds and then at trial, under oath, admitted, consistent with his actions through June 2000, that these funds are entirely Plaintiff's. This interference with Plaintiff's right to the quiet use and enjoyment of her money constitutes a conversion of her funds under Arizona law. *See, e.g., Shartzer v. Ulmer*, 85 Ariz. 179 (1959) and *Western Coach Corp. v. Kincheloe*, 24 Ariz. App. 55 (1975). On the other hand, this Court cannot conclude that when Gerni procured J'Sen's signature on the account application, submitted the application with himself as a co-owner and deposited the funds on behalf of J'Sen, that it was his intent to defraud her or convert her assets. His testimony, as well as his actions through June 2000, inconsistent with an individual who had the desire to perpetrate a fraud at the inception of this transaction. It does not appear that there were any attempts by Gerni to interfere with J'Sen's use of her funds until after June 2000. It remains a mystery to this Court what, if anything, triggered the antagonism between the parties or caused Gerni to become uncooperative with J'Sen in her efforts, if any, to procure the release of these funds after June 19, 2000. In order to maintain an action for fraud, a plaintiff must demonstrate that it was the intent of the defendant to procure a benefit through the intentional misrepresentation of material facts. Intent to deceive at the time of the false representation or inducement is an essential element of fraud. *See McAlister v. Citibank*, 171 Ariz. 207 (App. 1992).

While Defendant has tortuously interfered with Plaintiff's right to have access to her funds, he has not acted with conscious awareness of the evil of his actions or with conduct that is so outrageous, oppressive or intolerable that it created a substantial risk of tremendous harm to the Plaintiff. There is no evidence before this Court to suggest that Defendant acted with malice, spite, evil intent or bad motives. Plaintiff is not entitled to an award of punitive damages under the standards set forth in *Rawlings v. Apodaca*, 151 Ariz. 149 (1986); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326 (1986); and their progeny.

Plaintiff has established, by a preponderance of the evidence, that when she attempted to withdraw the funds from her account in June 2000, the account was valued at \$315,990.11. As

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-001256

04/08/2004

of Friday, February 6, 2004, the value of the account was \$82,685.41, or had a diminished value of \$233,304.70. While it is true that Plaintiff, in June 2000, was attempting to only withdraw \$175,000.00 from the account, Defendant has interfered with her rights to access this account, at least through the date of the trial herein. While this Court agrees with Defendant that the investment in stock mutual funds is risky and there is no evidence that Plaintiff would have withdrawn anything more than \$175,000.00 from the account before its diminution in value. Gerni, by refusing J'Sen's access to her funds, deprived her of the opportunity to withdraw, or otherwise, reinvest her funds to prevent or mitigate their loss of value.

This Court also finds that it was not unreasonable for Plaintiff to procure a mortgage in excess of her originally intended expectations in order to close escrow on her new home. However, this Court will take judicial notice of the fact that since June 2000, interest rates have substantially dropped, and that from the date of the filing of the immediate litigation to the present, the Plaintiff could have refinanced said home with a conventional 30-year mortgage interest rate of between 5% and 6% ARP. This Court believes that Plaintiff was obligated to mitigate her damages by procuring a more reasonable interest rate when the same became readily available on the open market, and has failed to do so. While Plaintiff is entitled to recover interest on the \$113,000.00 principle amount that she would not have borrowed, but for the Defendant's conversion of her assets, she is only entitled to do so at an interest rate of 5.5%. Accordingly, this Court will reduce the interest charges incurred as of February 2004 in the amount of \$32,906.50, the percentage difference between 8% and 5.5% APR, and then deduct the actual interest benefit received by Plaintiff, to date, in the amount of \$9,871.95, for total interest damages in the amount of \$12,833.73.

Lastly, this Court believes that the only viable action in this litigation is a tort claim for conversion. Accordingly, there is no basis for the awarding of attorney's fees, pursuant to A.R.S. § 12-341.01. However, this Court finds that Defendant's defense of the conversion claim was substantially without merit and necessitated the unreasonable delay of these proceedings. If, prior to his trial testimony, he had continued to cooperate with Plaintiff and her counsel, the funds in question could have been released back to the Plaintiff on or before the filing of the immediate litigation on or about June 4, 2002. Accordingly, this Court finds that Plaintiff should be awarded reasonable attorney's fees as the prevailing party on her conversion claim, pursuant to A.R.S. § 12-349.

VERDICTS

1) On Count 1, Plaintiff's claim for Fraud, a verdict is entered in favor of the Defendant, Stephen M. Gerni.

2) On Count 2, Plaintiff's claim for Conversion, a verdict is entered in favor of the Plaintiff, Paulette J. J'Sen, and against the Defendant, Stephen M. Gerni, in the amount of \$246,138.43, plus her taxable costs and her attorney's fees, pursuant to A.R.S. § 12-349.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-001256

04/08/2004

3) On Count 3, Plaintiff's claim for Declaratory Relief, a verdict is entered in favor of the Plaintiff, Paulette J. J'Sen, and against the Defendant, Stephen M. Gerni, declaring that all funds now on deposit in Firsthand Funds account number 8134715-1 are the sole and separate property of Plaintiff, Paulette J. J'Sen.

ORDERS

Now, therefore,

IT IS ORDERED that on or before **April 26, 2004**, Plaintiff's counsel shall lodge a form of judgment consistent with the verdicts entered by this Court and shall file her notice of taxation of costs and any application for attorney's fees on or before **April 26, 2004**. A copy of the proposed form of judgment, the notice of taxation of costs and any application for attorney's fees shall be hand-delivered, telefaxed or e-mailed to Defendant's counsel on the date that they are lodged or filed with this Court.

IT IS FURTHER ORDERED that Defendant's counsel shall have **five (5) days from the date of his receipt of these documents** to file any objections to the proposed form of judgment or the awarding of costs and attorney's fees with this Court. Any objections to the proposed form of judgment shall be as to its failure to conform to the Findings and Verdicts of this Court, and shall not be used as a means of re-hearing or reconsideration.

FILED: Exhibit Worksheet; Trial Worksheet