UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE,

Plaintiff,

v.

FREDERICK DIMOND, ROBERT DIMOND, and MOST HOLY FAMILY MONASTERY,

Defendants.

DEFENDANTS' REPLY MEMORANDUM OF LAW

Civil Action No. 08-CV-347C

INTRODUCTION

Defendants Frederick Dimond ("Bro. Michael"), Robert Dimond ("Bro. Peter"), and Most Holy Family Monastery ("MHFM") (collectively, "defendants") submit this Reply Memorandum of Law along with the reply Declaration of Frederick Dimond in further support of their motion for summary judgment pursuant to Fed.R.Civ.P. 56 for judgment dismissing the Complaint in its entirety and granting judgment against plaintiff Eric Hoyle ("plaintiff" or "Hoyle") on the specified counterclaims.

Plaintiff has made substantial key admissions both during his deposition and in response to Defendants' Statement of Undisputed Facts (Item 97-4) ("D.Statement of Facts"). These admissions include that plaintiff understood and agreed with defendants' position vis-à-vis the publicly recognized Order of St. Benedict, that the donations plaintiff provided to MHFM were irrevocable gifts, and that plaintiff made the substantial gifts to provide the resources for MHFM to disseminate its religious message. (D.Statement of Facts, ¶¶ 17-18, 46, 60-61).

For the reasons explained below, and those set forth in defendants' moving papers, defendants' motion for summary judgment should be granted.

REPLY ARGUMENT

I. Plaintiff's Opposition DOES NOT Raise a Material Issue of Fact

Rule 56(e) of the Federal Rules of Civil Procedure requires that a party opposing a properly supported motion for summary judgment set forth specific facts, admissible as evidence, showing the existence of a genuine issue of material fact for trial. Plaintiff's claims are premised upon the fallacy that the following statement is material and false:

> **The Founder of our Benedictine community: Brother Joseph Natale O.S.B.**
> Brother Joseph Natale was trained at St. Vincent's Benedictine Arch-abbey in Latrobe, PA. St. Vincent's Arch-abbey was the largest Benedictine monastery in the United States. In the 1960's, Bro. Joseph left with the permission of the then Arch abbot Dennis Strittmatter **to start his own Benedictine community**. Shortly after leaving St. Vincent's, Bro. Joseph started **his Benedictine community** in southern New Jersey. Bro. Joseph never allowed the New Mass to be celebrated at his monastery, only allowing the traditional Roman Rite Mass. Bro. Joseph printed, distributed and sold numerous books, pamphlets and audio tapes defending the Catholic faith and educating Catholics about the true teachings of Catholicism. In 1994, the community was given a piece of land in rural New York. Bro. Joseph wrote and stated on many occasions that he would be moving the community to New York. But Bro. Joseph was not able to complete this desire, due to the fact that he died on November 11, 1995. After Bro. Joseph died, Bro. Michael Dimond, O.S.B. was elected superior of the community. Bro. Michael immediately went to work to fulfill Bro. Joseph's wish to move the community to New York. In late 1997, Most Holy Family Monastery finally finished moving the community and its belongings to New York.

(Item 89-17 "Info On Our Benedictine Community" from defendants' website (Exhibit H to the Declaration of Brother Michael)) (emphasis added). Plaintiff's admissions establish that there is nothing materially false about this statement, see infra.

Equally important, plaintiff has offered no competent proof to support his allegations in opposition to summary judgment that the foregoing statement was materially false. On a motion for summary judgment, the Court may consider affidavits submitted by the opposing party in determining whether a genuine issue exists. Fed.R.Civ.Pro. 56(e). However, any opposing affidavit (i) must be based on personal knowledge of the affiant, and (ii) must not contradict the affiant's prior deposition testimony. Here, Hoyle's declaration in opposition satisfies neither of these requirements.

A. Hearsay Evidence is Insufficient to Create Question of Material Fact to Warrant Denial of Summary Judgment

Plaintiff has disregarded the fundamental requirement of Rule 56(c) that opposition to summary judgment must be based on evidence that would be admissible at trial, meaning that opposing affidavits must be made on personal knowledge of the affiant, and where they are not such opposition will be insufficient to create issues of fact. Fed. R. Civ. P. 56(c); see, e.g., Woods v. Newburgh Enlarged City School Dist., 288 Fed.Appx. 757 (2d Cir. 2008) (holding that allegations that relied on hearsay could not be considered on summary judgment); Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2d Cir. 1999) (same). Where a party fails to present evidence in admissible form in opposing a motion for summary judgment, the other party "may object that the material cited to support a dispute of fact cannot be presented in a form that would be admissible evidence." Fed. R. Civ. Pro. 56(c)(2).

Here, plaintiff offers as an exhibit to his declaration an email he received in January 2008, purportedly from Douglas R. Nowicki who signed the email as the Archabbot at St. Vincent's Archabbey. (Hoyle Dec. Item 97-1). Plaintiff states in his opposing affidavit that:

> I have alleged that the defendants' historical claims are false, **based on information received from St. Vincent's Archabbey**. **The records at that Archabbey reportedly indicate** that Joseph Natale lived there for a few months as a postulant for the lay brotherhood but never became a Benedictine monk and never received permission from St. Vincent Archabbey to found a monastery. See Exhibit A, attached hereto.

(Hoyle Dec. ¶ 11 and Exh. A) (emphasis added). Plaintiff offers no evidence in admissible form from St. Vincent's Archabbey, and even in the hearsay document there is no reference to whether or not Joseph Natale received "permission." In any event, the statement in plaintiff's declaration and the exhibit are inadmissible hearsay.

Plaintiff also offers as an exhibit to his opposing declaration an article authored by Richard Ibranyi which alleges that Joseph Natale did not receive permission to found MHFM. Plaintiff states in his opposing affidavit that:

> I have testified that I decided to depart MHFM after reading articles by Richard Ibranyi (Hoyle T. 59-61). Among these articles was one titled "Against the Dimonds," **in which Mr. Ibranyi asserts that Joseph Natale did not receive permission from St. Vincent Archabbey to found a monastery and that Natale's final vows are doubtful** (Against the Dimonds., pp. 59-60). See Exhibit B, attached hereto.
>
> Mr. Ibranyi had been a member of MHFM under Frederick Dimond, and while I could not confirm his claims about Joseph Natale before departing MHFM, I considered it likely that they were true, and thus, that the defendants had deceived me in regard to their Benedictine status.

(Hoyle Dec. ¶¶ 20-21) (emphasis added). Again, plaintiff fails to tender in admissible form any evidence from Mr. Ibranyi. The statement in plaintiff's declaration and the exhibit are inadmissible hearsay.

Even if plaintiff's "proof" as to Joseph Natale's time at St. Vincent's Archabbey were admissible, it still fails to create a material question of fact. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (a fact is "material" if it might affect the outcome of the case). In this case, the only "representations" alleged by plaintiff to have been made by defendants that he claims were fraudulent and/or negligent are that defendants represented themselves to be Benedictine. (See First Amended Complt., Item 42-1 ¶¶ 13, 14, 16, 29, 31). Plaintiff entirely glosses over his admissions that MHFM made no misrepresentations of its Benedictine status and his awareness it was an independent Benedictine community (D.Statement of Undisputed Facts ¶¶ 33-34, 37-38, 63-64). And, the question of MHFM's Benedictine status was not material to any decisions Hoyle made. (D.Statement of Undisputed Facts ¶¶ 13, 22, 33-34). Instead, plaintiff attempts to misdirect the Court's attention on hearsay evidence purporting to support theories of others that MHFM is not "legitimately" Benedictine – an issue which this Court is prohibited from determining under the First Amendment, see infra.

Plaintiff has no personal knowledge of the records of St. Vincent's Archabbey, no personal knowledge of an evidentiary basis for Mr. Ibranyi's hearsay statements, and no personal knowledge of what may or may not have transpired at St. Vincent's in the 1960s. Accordingly, the statements made by plaintiff as to representations of St. Vincent's Archabbey and Mr. Ibranyi, together with Exhibits A and B to plaintiff's opposing affidavit regarding such representations, are inadmissible hearsay that do not fit into any of the exceptions to the hearsay rule, see Fed. R. Evid. 801-803, and should be disregarded on this motion.

B. Plaintiff's Opposing Affidavit is Barred by Contrary Deposition Testimony

It is well-established that factual allegations in a party's affidavit that might otherwise defeat a motion for summary judgment will not be permitted to do so when that affidavit contradicts the plaintiff's own prior deposition testimony. Fed. R. Civ. Pro. 56(c); Brown v. Henderson, 257 F.3d 246 (2d Cir. 2001); Palazzo ex rel. Delmage v. Corio, 232 F.3d 38 (2d Cir. 2000) (in opposing summary judgment, a party who has testified to a given fact in his deposition cannot create a triable issue merely by submitting his affidavit denying the fact). Where the opposing party attempts to create a triable issue of fact merely by submitting an affidavit that disputes his own prior sworn testimony the Court should disregard it. Rojas v. Roman Catholic Diocese of Rochester, 783 F. Supp.2d 381 (WDNY 2010), aff'd, 660 F.3d 98 (2d Cir. 2011). Grace v. U.S., 754 F. Supp. 2d 585 (WDNY 2010). As Judge Siragusa recently held in Rojas v. Roman Catholic Diocese of Rochester:

> It is well settled that the party opposing summary judgment may not create a triable issue of fact "merely by submitting an affidavit that disputes his own prior sworn testimony." Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir.1996) (citations omitted). Rather, such affidavits are to be disregarded. Mack v. United States, 814 F.2d 120, 124 (2d Cir.1987) (citations omitted).
>
> Similarly, a party cannot attempt to defeat a summary judgment motion by contradicting factual allegations in his complaint. See, Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 757 F.2d 523, 528–529 (2d Cir.1985) ("A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding. Accordingly, the district court properly disregarded Universal's affidavits seeking to controvert its own pleading.")…

Id., 783 F.Supp.2d at 406. Here, consistent with plaintiff's desire to "take down" defendants and avoid dismissal of his lawsuit at all costs, plaintiff now blatantly contradicts his deposition testimony and prior pleadings. In opposition to summary judgment, plaintiff claims in his declaration that he was unaware the defendants were not affiliated with the publicly recognized Order of St. Benedict:

> The defendants' argument for dismissal of plaintiff's claims is based on two assertions: (1) there was no misrepresentation by defendants regarding their Benedictine status; and (2) I understood defendants' religious positions and was at all times aware they were not affiliated with 'the universally recognized and sanctioned Order of St. Benedict.' (Memo. Of Law, Dkt. 89-26, p. 2). **Both claims are false, and both have been contested by me**.

(Hoyle Dec. ¶ 3) (emphasis added). This is the sum total of Hoyle's argument in opposition to summary judgment. Yet, this argument directly contradicts Hoyle's sworn deposition testimony where he repeatedly admitted that he understood and agreed with defendants' religious views and beliefs, including that defendants were an independent Benedictine community not affiliated with the publicly recognized Order of St. Benedict:

- In 2005, plaintiff knew that MHFM condemned as false all the monasteries of the "publicly recognized Order of St. Benedict" (Hoyle T. 257: 20 – 258: 2, 258: 13-21);
- Plaintiff understood and agreed with MHFM's theological position on the issue of the Order of St. Benedict (Hoyle T. 262: 3-11);
- Plaintiff counseled others over the telephone that the monasteries of the publicly recognized Order of St. Benedict are not truly Benedictine or Catholic (Hoyle T. 263: 6-20);
- Prior to entering MHFM, plaintiff thoroughly reviewed MHFM's website and was aware of the position that was posted on MHFM's website before he entered and while he was there: that MHFM is not part of the Benedictine Order under John Paul II, i.e., what is called the "publicly recognized Order of St. Benedict" (Hoyle T. 256: 12 – 257:19);
- Plaintiff never would have entered any monastery of the "publicly recognized Order of St. Benedict," since they recognized John Paul II as pope. (Hoyle T. 258: 3-7, see also, 258: 8-12, 13-21, 259: 21 – 260:14).

Time and again, Hoyle has admitted, contrary to his arguments to the Court, that before he entered MHFM he was aware of and agreed with defendants' position that St. Vincent's and the other monasteries of the "publicly recognized Order of St. Benedict" are not legitimately Benedictine:

> Q. And while you were at Most Holy Family Monastery -- actually, before you joined Most Holy Family, did you share the Dimond brothers' belief that St. Vincent Archabbey was a heretical monastery?
>
> A. Yes.
>
> Q. **And while you were at Most Holy Family Monastery, did you share the Dimond brothers' belief that St. Vincent Archabbey was not truly Benedictine?**
>
> **A. Yes.**
>
> Q. Do you still believe that today?
>
> A. Well, as I said, I believe that the religious beliefs that are held at St. Vincent's are not truly Catholic, and therefore at variance with the Order of St. Benedict as it has stood throughout the centuries.

(Hoyle T. 298: 20 – 299:15) (emphasis added). Plaintiff's condemnation of the monasteries affiliated with the publicly recognized Order of St. Benedict is the same today as it was before he entered MHFM:

> Q. Is there any monastery in the world that you believe sitting here today is legitimately Benedictine?
>
> A. I believe that that requires clarification to be able to say yes or no.
>
> **Q. Is there any monastery in the world you're aware of that is a legitimate Catholic Benedictine monastery?**
>
> **A. I'm not aware of any monastery that fulfills all the requirements I believe are necessary to be called that**.

(Hoyle T. 260: 20 – 261:2)(emphasis added).

The allegations in plaintiff's opposing affidavit claiming that he did not understand defendants' religious positions and non-affiliation with the publicly recognized Order of St. Benedict must therefore be disregarded by the Court.

C. All Claims "Hinge" on the Benedictine Issue and Summary Judgment is Proper

Plaintiff has testified that defendants' representation that MHFM was a Benedictine community is the sole factual basis for all of his causes of action to recover money from defendants:

> Q. What would be your basis for claiming that you want that money back?
>
> A. Am I supposed to answer all this?
>
> **Q. Factually, why do you think you're entitled to that back?**
>
> **A. Because the organization presented itself fraudulently.**
>
> **Q. In what respect?**
>
> **A. About it being a Benedictine monastery.**
>
> Q. Any other respect?
>
> A. You said any other respect?
>
> Q. You said it presented itself fraudulently about being a Benedictine monastery, that was your statement. Is there anything else that the monastery did that you think warrants you getting this gift back?
>
> A. I don't know.
>
> Q. Not that you're aware of?
>
> A. I wouldn't say that I can think of something right now.

(Hoyle T. 215:9 – 216:5 (emphasis added).

As noted above, plaintiff's allegations of fraud and misrepresentation on the Benedictine issue are proven false by his own admissions – he knew and agreed with MHFM's position against the "publicly recognized Order of St. Benedict." (See supra; D.Statement of Facts ¶¶ 33-34, 37-38, 63-64). Accordingly, plaintiff's admissions establish that summary judgment should be granted dismissing all of plaintiff's claims to reverse his donations and recover the funds he gifted to MHFM.

II. The Court Cannot Judge or Determine the Validity of Defendants' Religious Beliefs

Early in this litigation, this Court denied defendants' motion to dismiss premised on First Amendment grounds, but made clear that "if, after discovery and a narrowing of the issues, the case later requires an interpretation of religious doctrine, the jurisdictional issue could be decided on a motion for summary judgment." (Docket Item 41).

Now, over three years later and with discovery complete, it is clear that defendants have made no misrepresentations about their Benedictine status, and plaintiff admits having had full knowledge of defendants' non-affiliation with the publicly recognized Order of St. Benedict. The First Amendment protects MHFM's right to decide matters of faith and to declare its doctrine free from state interference. See, Petruska v. Gannon Univ., 462 F.3d 294, 312 (3d Cir. 2006). "Although religious bodies are not completely exempt from civil and criminal liability, the First Amendment protects them when the adjudication of a claim would require a judicial determination of the validity of a religious belief." Davis Lee Pharmacy, Inc. v. Manhattan Central Capital Corp., 327 F.Supp.2d 159, 164 (EDNY 2004). Here, plaintiff asks the Court to adjudicate correctness of defendants' belief and representation of themselves as Benedictine community and whether the rules of MHFM required any of plaintiff's donations be returned. Such inquiries would require the Court to "venture into forbidden ecclesiastical terrain." Langford v. Roman Catholic Diocese of Brooklyn, 705 NYS2d 661, 662 (2nd Dep't 2000).

In Smith v. Clark, 185 Misc. 2d 1 (Sup. Ct. 2000), aff'd, 286 A.D.2d 880 (4th Dep't 2001), the court was faced with a breach of contract action that involved an issue of the authority of an alleged pastor as administrator of the church, to enter into employment agreements. The court held that whether the pastor had such authority required the Court to delve into the religious Canon Code of Law and the rights of an administrator versus a pastor. Plaintiff's claims therefore required "an assessment by [the] Court of the inter-relationship between the Diocese and the Corpus Christi Church, and the authority of

each over employees of the Diocese and employees of individual churches." In finding such inquiry is prohibited by the First Amendment, the court stated:

> This Court will not interject itself into resolving religious disputes as to the rights and authority of an Administrator of the Church to enter into employment contracts, the rights and authority of a Pastor to terminate employees performing ministry duties of a church, and the enforcement of contract terms directly addressing religious beliefs. To decide otherwise would require this Court to resolve underlying controversies over religious doctrine. Park Slope Jewish Center v. Congregation B'nai Jacob, 90 N.Y.2d 517, 664 N.Y.S.2d 236, 686 N.E.2d 1330 (1997). This the Court cannot do. The Court is barred by the Constitution from interfering in religious disputes. The Constitution directs that religious bodies are to be left free to decide church matters for themselves, uninhibited by State interference. U.S. Constitution, 1st Amendment and 14th Amendment. (emphasis added).

Smith v. Clark, 185 Misc. 2d at 8-9 (Sup. Ct. 2000)(emphasis added).

The instant lawsuit, like Smith, requires this Court to interpret defendants' religious beliefs and make a determination of whether defendants are "Benedictine" as they believe themselves to be. In accordance with the Rule of St. Benedict as represented on the MHFM website, Joseph Natale started "his own Benedictine community." Defendants' religious faith is defined by their belief that they are traditional Catholics who follow the rule of St. Benedict and not by any affiliation with other organizations. As plaintiff admits, defendants have represented themselves to be an independent Benedictine community. Whether the now deceased Archabbot of St. Vincent's gave Natale "permission" to leave St. Vincent's and "start his own community" would require this Court to delve into an examination of the Archabbot's authority and Natale's religious beliefs in founding MHFM. And, even the hearsay letter from St. Vincent's relied on by plaintiff, does not address whether Natale had such "permission." The Court cannot and should not attempt to judge or rule whether defendants' belief that they are Benedictine and Catholic is in accordance with the Rule of St. Benedict, the Bible, and/or other Catholic doctrine.

In addition, the prohibition of judicial determination of religious matters precludes plaintiff's claim that he is entitled to a return of the funds he donated to MHFM. To make such a determination

would require the Court delve into the Rule of St. Benedict as well as the rules of MHFM concerning any requirement that a person entering the monastery surrender his worldly possessions and write down what, if anything, he desired to be returned on his departure. It is undisputed that plaintiff entered MHFM, lived there for over two years and abided by the daily religious routine, and took "formal, monastic vows." (D.Statement of Fact ¶¶ 52-53, 55-56). Although plaintiff made outright donations/gifts (after consultation with a tax advisor) (D.Statement of Facts ¶¶ 17-18, 57, 60-61), he now claims that the money he provided was not meant as a gift and was to be returned if he departed in accordance with the rules of MHFM. However, consideration of this claim would necessitate that the court review and determine the rules of the monastery, an inquiry forbidden by the First Amendment.

III. Doctrine of *In Pari Delicto* Bars Plaintiff's Claims

Plaintiff alleges defendants were engaged in an ongoing scheme of fraud and racketeering by seeking to raise money based on misrepresentations that they were affiliated with the publicly recognized Order of St. Benedict. Plaintiff has also claimed that defendants engaged in fraud by "rounding down" when they determined the proper UPS charge applicable to packages they were shipping. (Hoyle T. 282-83).

With knowledge of its background and autonomous status, Hoyle promoted MHFM as a Benedictine community to the public through emails, publications, and verbal discussions. (D.Statement of Undisputed Facts ¶¶ 37-38, 56, 63-64, 67). Hoyle even helped defendants write a book on the subject, and created an on-line store for sales and distribution of their promotional materials. (Id., ¶¶ 63-64, 67). He personally engaged in the practice of "rounding down" when determining the proper UPS charge for a shipment. Moreover, plaintiff admits that he was a wrongdoer in his dealings with MHFM when, upon concluding defendants were heretics, he stole records, computer files, and attempted to transfer all of the monastery's assets to his personal name. (Id., ¶¶ 26, 41, 75, 77-80).

Based on plaintiff's allegations in the Amended Complaint and his subsequent admissions, he presents a picture of fraud and deception in which he knowingly participated.

The doctrine of *in pari delicto* prevents a party from advancing a claim based "… on his own inequity, or to acquire any rights by his own crime." In re Parmalat Securities Litigation, 383 F.Supp.2d 587, 596 & n. 49 (S.D.N.Y. 2005), (applying North Carolina law on *in pari delicto*). The law "will not extend its aid to either of the parties or listen to their complaints against each other, but will leave them where their own acts have placed them." Stone v. Freeman, 298 N.Y. 268, 271 (1948).

Here, plaintiff claims that it was fraud, a violation of RICO, false advertising, and a deceptive trade practice for defendants to make representations that MHFM was a Benedictine monastery, that Bros. Michael and Peter were Benedictine monks, and that they are members of the publicly recognized Order of St. Benedict. However, Hoyle now admits that he, at all times, knew defendants were an autonomous religious community that sought to follow the Rule of St. Benedict, and that they were not affiliated with the publicly recognized Order of St. Benedict. Hoyle also admits that for over two years he participated in promoting MHFM as a Benedictine monastery/community, and that he himself engaged in the supposedly fraudulent practice of "rounding down" UPS shipping charges. Hoyle's religious beliefs have changed such that he is now adverse to MHFM on the issue of mass attendance. (D.Statement of Facts ¶ 26). He cannot, however, deny that he was a knowing participant in the promotion of MHFM and its views until December 31, 2007, when his religious beliefs changed. He therefore cannot seek to recover for alleged misrepresentations and wrongful conduct that he participated in.

IV. Plaintiff's Admissions Support Liability on Defendants' Counterclaims

A. Plaintiff admits making the alleged defamatory statements

Plaintiff admits that he made statements identified by defendants as defamatory (D.Statement of Facts ¶¶ 79, 80, 82-85), but attempts to defeat summary judgment by claiming that the statements were true (Item 97 ¶ 37-38). It is preposterous for plaintiff to claim a "truth" defense where he admits making statements to a number of people that defendants "stole" his money, admits having given it to defendants voluntarily, and where he admits that he was fully familiar with MHFM's independent Benedictine status when he made such donations. (D.Statement of Facts ¶¶ 17-18, 33-34, 46, 60-61, 75, 77, 79, 84-85) . Plaintiff even admits he was not sure that he had a legal right to reclaim any of the money that he donated and that he merely "hoped" to get it back. (Hoyle T. 243:23- 245:14). Thus, while truth would be a bar to a defamation claim, Silverman v. Clark, 35 A.D.3d 1 (1st Dep't 2006), the record on this motion establishes plaintiff's statements that defendants "stole" his money are utter falsehoods and defendants are entitled to summary judgment on this counterclaim.

B. Conversion of Confidential and Proprietary Information, Misappropriated Trade Secrets and Breach of Fiduciary Duty

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." Cardiocall, Inc. v. Serling, 492 F.Supp.2d 139, 153 (EDNY 2007). Plaintiff outright admits that he took from MHFM without permission upon his departure certain confidential and proprietary information of MHFM (D.Statement of Facts ¶¶ 41, 77), but attempts to shield himself from liability by contending that because defendants continued to possess other copies of the materials he cannot be liable for conversion. This position is factually false and is not supported by any controlling authority.

First, Hoyle took defendants' financial records when he departed. Defendants did not have any copies of these materials. Contrary to Hoyle's argument, defendants were deprived of possession, access, and use of their property. (See Bro. Michael Reply Decl.).

Second, even to the extent defendants had copies of some of the other (non-financial) records, Hoyle's admitted theft of these documents (D.Statement of Facts ¶ 41, 77), still supports a conversion cause of action for which summary judgment should be granted. Plaintiff cites the case of Trustforte Corporation v. Eisen, 10 Misc.3d 1064(a), 2005 WL 3501957, from Supreme Court New York County for the proposition that defendants cannot maintain a conversion cause of action where original documents subject of the conversion remain in their possession. (Opp.Memo.p. 14, Item 97-7). This is not controlling precedent, and other courts have held to the contrary with much more compelling logic and reason than the Trustforte court.

An Illinois Appellate Court addressed the issue in Conant v. Karris, 165 Ill.App.3d 783, 520 N.E.2d 757 (Ill.App. 1987). In that case the defendant, the plaintiff's broker, received in the course of his employment for the plaintiff, a computer printout of confidential information belonging to the plaintiff. The printout was not the plaintiff's only copy as the plaintiff still had the information in his computer. The defendant disclosed the information from the printout to one of the plaintiff's competitors. The court held that when the defendant disclosed the information, the plaintiff was denied the benefit of the data as it was no longer confidential. Therefore, the court determined the plaintiff could maintain a cause of action for conversion.

A Florida Appellate court also addressed the same issue in Warshall v. Price, 629 So. 2d 903, 905 (Fla. Dist. Ct. App. 1993), commenting that conversion consists of any act of dominion wrongfully asserted over another person's property inconsistent with his or her ownership. There, the defendant downloaded a copy of a proprietary patient list from the plaintiff's computer, leaving the computer copy intact. Nevertheless, the court followed the logic set forth in Conant, and held that the owner was "denied the benefit of his confidential patient list when [the defendant] took the list and used it to [the owner's] disadvantage." This satisfied the elements of the tort of conversion even though the owner at all times had access to the patient list. The reasoning in Conant and Warshall should be applied to the

facts of this case. Like the owners in both those cases, MHFM was denied the benefit of its confidential customer list and proprietary information when Hoyle took the information and used it to MHFM's disadvantage.

Likewise, the factual record requires summary judgment as a matter of law against plaintiff on defendants' cause of action for the misappropriation of a trade secret, because the record demonstrates that (1) MHFM possessed a trade secret and (2) Hoyle used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means. Cardiocall, Inc., 492 F.Supp.2d at 148. (D.Statement of Facts ¶¶ 41, 65-67, 72-75, 77).

The facts before the Court also support, as a matter of law, that plaintiff breached his fiduciary duty to defendants by offering to defendants his expertise in computer and information technology as well as banking and investments. (Dimond Decl. ¶ 48). For more than two years, plaintiff fervently supported MHFM's mission, and lived and worked there although arguably not an "employee" in the traditional sense of the word. During that time plaintiff was given increasing responsibility to handle various computer and technology-related tasks vital to the continued survival of MHFM. (Id.; D.Statement of Facts ¶¶ 56, 65-67, 70, 72-75). Plaintiff not only handled MHFM's online store and telephone, Internet, and mail-generated orders, but as part of that responsibility he managed the confidential and proprietary information that was maintained by MHFM on its customers, clients, supporters and benefactors. (Id. ¶ 49) Plaintiff also was given access to MHFM's Scottrade brokerage account in the early winter of 2007, which contained the majority of MHFM's assets. (Id.). These responsibilities were to be performed solely in keeping with the best interests of MHFM. In the course of plaintiff's abrupt departure from MHFM, without any notice whatsoever, plaintiff took with him most of MHFM's financial and proprietary business information. (D.Statement of Facts ¶¶ 73-75, 77). By pilfering much of the information to which he was given access and subsequently using that information against MHFM, plaintiff breached his fiduciary duties to MHFM and Brother Michael Dimond.

V. Plaintiff's Request for Summary Judgment Dismissing Counterclaims is Improper

Plaintiff, in his Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Item 97-7), requests the court "grant summary judgment for plaintiff dismissing defendants' counterclaims." This request is wholly inappropriate and should be disregarded by the Court in light of the Court's Scheduling Order (Item 87), which required any summary judgment motions to be filed on or before January 6, 2012. Defendants complied with that Order and filed the instant motion. However, plaintiff did not move -- or even attempt to formally cross-move -- against defendants for summary judgment. Based on plaintiff's disregard of this Court's order, and for the other reasons above stated, plaintiff's belated request for summary judgment on defendants' counterclaims must be denied.

CONCLUSION

Based on the foregoing, and for the reasons set forth in defendants' moving papers, it is respectfully requested that the Court grant defendants' motion for summary judgment (a) dismissing plaintiff's Amended Complaint in its entirety; (b) entering judgment in favor of defendants and against plaintiff on the specified counterclaims as to liability; and (c) awarding such other and further relief as the Court deems just and proper.

Dated: March 16, 2012

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP

By: *s/Charles C. Ritter*

Charles C. Ritter, Jr.
Attorneys for Defendants
1800 Main Place Tower
350 Main Street
Buffalo, NY 14202
Telephone: (716) 855-1111
critter@dhpglaw.com