

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE**

JACK PELHAM and KAY PELHAM,)

Plaintiffs,)

v.)

Case No. 05-2259-III

THE NASHVILLE CHURCH, INC.,)

INTERNATIONAL CHURCHES OF)

CHRIST, INC., HOPE WORLDWIDE,)

LTD., and CENTRAL AND SOUTH)

AMERICA WORLD SECTOR, INC.,)

Defendants.)

MEMORANDAM OF LAW AND FACTS
IN SUPPORT OF MOTION OF
DEFENDANT, THE NASHVILLE CHURCH, INC.
TO DISMISS FOR FAILURE TO STATE A CLAIM

COMES NOW the Defendant The Nashville Church, Inc. (TNC), in accordance with Rule 26.04(b) of the Davidson County Tennessee Local Rules of Practice, by counsel, and respectfully files this Memorandum of Law and Facts in support of its Motion to Dismiss for Failure to State a Claim, contemporaneously filed with the Court. In their Amended Complaint the Plaintiffs failed to plead with particularity, as required by rule 9.02 of the Tennessee Rules of Civil Procedure, the allegations of Fraudulent Misrepresentation (Count I), and Civil Conspiracy (Count II). Also the Plaintiffs fail to state a claim for Civil Conspiracy (Count II) due to the failure of an underlying claim. The Plaintiffs fail to state a claim for Conversion (Count III) due to failing to plead any facts that establish the elements of Conversion. Lastly, Plaintiffs' allegations regarding Constructive Trust (Count IV) fail to state a claim due to the Plaintiffs' lack of standing.

TNC would further show that on the face of the Amended Complaint, all causes of action are barred by the applicable statute of limitations, being the three year statute of limitations found in TENN. CODE ANN. § 28-3-105(1). In support thereof, TNC states as follows:

INTRODUCTION

PARTIES

The Defendant, The Nashville Church Inc. (TNC) is a Tennessee religious not-for-profit corporation. It is a church that holds worship services in Davidson County, Tennessee.

The Defendant, International Churches of Christ Inc. (ICOC), is a California religious not-for-profit corporation which was during the relevant times to the lawsuit, an association or convention of church associations. Eight association or convention of churches were associated with ICOC. The Defendant Central and South America World Sector, Inc. (CSA) is one of the eight associations or convention of churches that are associated with ICOC.

CSA is a Florida religious not-for-profit corporation, which was during the relevant times to the lawsuit an association or convention of churches. CSA planted new churches in the United States and abroad, provided ecclesiastical oversight over existing churches, and provided other forms of missions support in its geographic region.

The Defendant, TNC, was one of the numerous churches that comprised CSA, and CSA provided it with ecclesiastical oversight.

The Defendant, Hope Worldwide Ltd. (HOPE), is a not-for-profit corporation that provides world aide and relief services.

The Plaintiffs, Jack and Kay Pelham, husband and wife, attended and were members of TNC during the period of October 1998 through August 2001. At that time, they were not married, and her name was Kay Davis. (*Aff. Rowe* ¶¶ 3, 4). They apparently now want a return of some money that they voluntarily donated through TNC, and profess dissatisfaction with how they believe their donations were spent.

COMPLAINT ALLEGATIONS

Through their attorney, the Plaintiffs filed a Complaint against TNC and the other three Defendants on June 17, 2005. The Plaintiffs filed an Amended Complaint against all four original Defendants on November 18, 2005. Count I is entitled "Fraudulent Misrepresentation": Count II is entitled "Civil Conspiracy": Count III is entitled "Conversion": and Count IV is entitled "Constructive Trust".

The Amended Complaint alleges in sweeping terms that all of the Defendants "collected from their parishioners and members, including the Plaintiffs, funds which they falsely represented would be allocated to international missionary endeavors, and to benevolence to the needy." (*Compl.* ¶ 1)

The Plaintiffs further allege that these contributions were solicited under the guises of "special missions contributions" and "contributions for the poor". (*Compl.* ¶ 1) Financial records maintained by TNC reflect that Plaintiff, Jack Pelham, gave \$3,260.00 in "special missions contributions" and \$221.00 in benevolence or "contributions for the poor" while he was a member of TNC. Plaintiff, Kay Davis Pelham, gave \$2,750.00 in

“special missions contributions” and \$30.00 in benevolence or “contributions for the poor” while she attended TNC. (*Aff. Rowe* ¶¶6, 7)

The Plaintiffs allege that these funds were treated by “the Defendants” as “unrestricted funds” and diverted by them for the personal inurement and benefit of “several high-ranking employees and officers of the Defendant corporations.” (*Compl.* ¶ 1)

CAUSES OF ACTION

Plaintiffs allege four causes of action against all Defendants:

I. Fraudulent Misrepresentation, the elements of which are (1) the Defendant made a representation of fact; (2) the representation was false; (3) the representation related to a material fact; (4) the representation was made knowingly, recklessly, or without a belief in its truth; (5) the plaintiff acted reasonably in relying on the representation; and (6) the plaintiff suffered damages as a result. *Metropolitan Government of Nashville & Davidson County v. McKinney*, 852 S.W.2d 233, 237 (Tenn. Ct. App. 1992).

II. Civil Conspiracy, which is a combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful but by unlawful means. *Baker v. Hooper*, 50 S.W.3d 463 (Tenn. Ct. App. 2001).

III. Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his or her rights therein, such as the tortious taking of another's chattels, or any wrongful exercise or assumption of

authority, personally or by procurement, over another's goods, depriving him or her of possession, permanently or for an indefinite time. *Mammoth Cave Production Credit Ass'n v. Oldham*, 569 S.W.2d 833, 25 U.C.C. Rep. Serv. 603 (Tenn. Ct. App. 1977); *Judds v. Pritchard*, 1997 WL 589070 (Tenn. Ct. App. 1997).

IV. Constructive Trust is a remedy that may be imposed where one procures the legal title in property in violation of a duty to the actual owner; the title to property is obtained by some inequitable means; a person makes use of some influence to in order to obtain title on better terms than it otherwise would have obtained; and a person acquires property with notice that someone else is entitled to its benefits. *Stewart v. Sewell*, 2005 WL 873304 (Tenn. Ct. App.)

STANDARD FOR MOTION TO DISMISS

A motion to dismiss for failure to state a claim upon which relief can be granted under Tennessee Rules of Civil Procedure 12.02(6) “admits the truth of all relevant and material averments contained in the complaint but asserts that such facts do not constitute a cause of action.” *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997) “The failure to state a claim upon which relief can be granted is determined by an examination of the complaint alone.” *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 639 (Tenn.2003). For purposes of the motion, “all relevant and material averments contained in the complaint” are deemed admitted, but factual and legal conclusions need not be taken as true. *Riggs v. Burson*, 941 S.W.2d 44, 47-48 (Tenn. 1997). Construing the complaint liberally in favor of the plaintiff, the reviewing court must determine whether its well-pleaded material factual allegations constitute a cause of action. *Jo Ann Forman, Inc. v.*

Nat'l Council on Compensation, Inc., 13 S.W.3d 365, 366 (Tenn. Ct. App. 1999). The complaint should be dismissed when it alleges no set of facts that would entitle the plaintiff to relief, *Forman*, 13 S.W. 3d at 366, or when it completely lacks clarity or specificity. Mere "conclusions and generalities" are insufficient to state a claim. *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn. 1986).

COUNT I: FRAUDULENT MISREPRESENTATION

COUNT II: CIVIL CONSPIRACY

Count I, Fraudulent Misrepresentation, and Count II, Civil Conspiracy, (alleged as a conspiracy to defraud the Plaintiffs), are actions based upon fraud. Each Count fails because the circumstances constituting fraud are not pled with particularity.

Under Tennessee Rules of Civil Procedure 9.02, malice, intent, knowledge, and other conditions of the mind may be averred generally, but in any averment of fraud, the circumstances constituting fraud must be stated with particularity. The particularity requirement is satisfied if the pleading states the time, place, substance of the fraudulent representations, facts misrepresented, fraudulent intent, reliance, and the gain obtained as a result of the fraud. *See City State Bank v. Dean Witter Reynolds*, 948 S.W.2d 729, 738 (Tenn.Ct.App.1996) *Haynes v. Cumberland Builders, Inc.*, 546 S. W. 2d 228 (Tenn. App. 1976) The facts thus pled give the Defendant adequate information to frame a response, and the court adequate information to distinguish valid from invalid claims and to terminate needless litigation. (*Blount Fin. Servs., Inc. v. Walter E. Heller and Co.*, 819 F. 2d 151 (6th Cir. Tenn. 1987)

The Plaintiffs failed to comply with Rule 9.02 of the Tennessee Rules of Civil Procedure because the Complaint fails to specifically identify the time and place of each alleged false representation, and fails to identify the manner in which each representation was deemed to be fraudulent. *See City State Bank v. Dean Witter Reynolds*, 948 S.W.2d 729, 738 (Tenn.Ct.App.1996)

The Plaintiffs assert a cause of action titled "Civil Conspiracy", Count II, in which they allege that the Defendants conspired to defraud them. Plaintiffs' allegations group all Defendants together, alleging a conspiracy and/or a scheme to defraud Plaintiffs and to induce them into making donations. (*Compl.* ¶¶ 1, 10, 11). Elsewhere in the Complaint, Plaintiffs allege that they were "misled" by Doug Lambert into believing no contributions would inure to the personal benefit of those in leadership positions (*Complaint* ¶ 16). Plaintiffs fail to allege when, where, or how Mr. Lambert "misled" them.

When an alleged civil conspiracy is one to defraud the plaintiff, allegations are subject to the pleading requirement of Rule 9.02 of the Tennessee Rules of Civil Procedure. *See, e.g., Clayton v. Union Savings Bank*, 1997 WL 781895 (Tenn. Ct. App. Dec. 22, 1997). Under this Rule, the circumstances constituting the fraud must be pled with particularity, and "general allegations of fraud and mistake are insufficient." Tennessee Rules of Civil Procedure 9.02, and Advisory Committee Comment.

In this case, the Plaintiffs generally allege that "the Defendants" through fraudulent misrepresentations engaged in a civil conspiracy to take their money under false pretenses. In order to prove that TNC is subject to liability for fraudulent misrepresentations, and thus for a civil conspiracy, the Plaintiffs must set forth facts

showing (1) TNC made a representation of fact, (2) the representation was false, (3) the representation related to a material fact, (4) the representation was made either knowingly, recklessly, or without a belief in its truth, (5) the Plaintiffs acted reasonably in relying on the representation, and (6) the Plaintiffs were injured. *City State Bank v. Dean Witter Reynolds, Inc.*, 948 S.W.2d 729, 738 (Tenn. Ct. App. 1996). In order to prove these elements with the particularity required by Rule 9.02, the Plaintiffs must identify the time and place of each alleged false representation and the manner in which each representation was deemed to have been fraudulent. *Id.*

The Plaintiffs in this case, however, did not allege with the requisite particularity the fraudulent activity that allegedly was the basis of a civil conspiracy. With regard to the Plaintiffs' claim that TNC conspired with the other Defendants to commit fraud on the Plaintiffs (Count II), the Plaintiffs merely make conclusory allegations. Many times, the Plaintiffs generally state that the Defendants "participated together in a scheme and artifice to defraud." (*See, e.g., Compl.*, ¶¶ 10, 11, 67). The Plaintiffs do not describe this "scheme and artifice" other than to allege that the Defendants represented that the Plaintiffs' contributory funds would go toward certain missions but, in actuality, portions of the funds went to the Defendants. With respect to TNC, the Plaintiffs allege that they were "misled" but failed to provide affirmative allegations as to what was actually said so that they were "misled". They do not allege when these statements were made or what the representations were with specificity. The Complaint further alleges that the Plaintiffs "relied upon the false representations of TNC regarding the Contribution for the Poor to be true and accurate" (*Compl.* ¶19).

The court's decision in *Strategic Capital Resources, Inc. v. Dylan Tire Industries, LLC*, 102 S.W.3d 603 (Tenn. Ct. App. 2002), is on point. In that case, which was decided by this court, the Plaintiffs sued Pirelli Tire, LLC, and Dylan Tire Industries, LLC, for breach of a contract arising from the sale of the local Pirelli Tire plant. *Id.* at 605. In addition to the breach of contract claim, the Plaintiffs sued these contracting parties and others for fraud, conspiracy, and inducement to breach contract. *Id.* With respect to the fraud claims, the Plaintiffs alleged that the "Defendants" intentionally misled them about their involvement in the closing of this transaction and did so through "representations, statements, and omissions." *Id.* at 610-611. This court dismissed the fraud claim on the grounds that this claim was not pled with the particularity required by Rule 9.02. *Id.* at 611.

The Court of Appeals affirmed this court's decision. In doing so, the appellate court stated that a plaintiff complies with Rule 9.02 "where it 'specifically identifies the time and place of each alleged false representation, and identifies the manner in which each representation was deemed to have been fraudulent.'" *Id.* (quoting *City State Bank*, 948 S.W.2d at 738). Applying this standard, the court of appeals stated that "[a]n inspection of the complaint shows that the allegations are only general and that no particular Defendant is identified as the one making the false and misleading statements. At a minimum the actors should be identified and the substance of each statement should be pled." *Id.* The court of appeals affirmed this court's dismissal when finding that these particularity standards were not met. *Id.*

The identical standard and reasoning apply in the instant case. The Plaintiffs' civil conspiracy allegations, which are based upon fraudulent misrepresentations, are not

pled with the requisite particularity. At no point did the Plaintiffs allege an affirmative misrepresentation made by a TNC representative, but declared they were “misled”. The Plaintiffs did not allege when any false statements were made or what the statements were that caused the Plaintiffs to be “misled”. Without these essential allegations, the fraudulent misrepresentation claim, and thus the civil conspiracy claim, are not pled with any of the required specificity, and must fail.

COUNT II - CONSPIRACY

A conspiracy claim is not actionable unless there is a viable underlying cause of action. *Pusser v. Gordon*, 684 S.W.2d 639, 642 (Tenn. Ct. App. 1984) (“plaintiff may not recover for conspiracy to defraud when fraud cannot be established”). Because Plaintiffs have failed to adequately plead a cause of action against TNC for fraudulent misrepresentation, they have no cause of action for conspiracy to commit that tort, and thus Count II of the Complaint should be dismissed as to TNC.

Plaintiffs fail to meet this standard, instead making only the conclusory and general allegation that the Defendants “participated together in a scheme and artifice to defraud.” (*Compl.* ¶¶ 10, 11, 67) Plaintiffs conspiracy allegations should therefore be dismissed.

COUNT III – CONVERSION

The Plaintiffs’ claim for conversion should be dismissed because it fails to allege that the Plaintiffs had any right to immediate possession of the item converted at the time of the alleged conversion. Conversion is any distinct act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his or her rights therein,

such as the tortious taking of another's chattels, or any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him or her of possession, permanently or for an indefinite time. *Mammoth Cave Production Credit Ass'n v. Oldham*, 569 S.W.2d 833, 25 U.C.C. Rep. Serv. 603 (Tenn. Ct. App. 1977); *Judds v. Pritchard*, 1997 WL 589070 (Tenn. Ct. App. 1997).

In any action for conversion, the plaintiff must allege and show ownership of the property described in the complaint or that the plaintiff is entitled to immediate possession of it. *Pero's Steak and Spaghetti House v. Lee*, 90 S. W. 3d. 614 (Tenn. 2002).

The Plaintiffs allege that they made various financial gifts while they were members of TNC. The gifts were complete upon donation. There are no allegations made of contingencies. Once the Plaintiffs made their gifts, they had no right of ownership of the property given. They cannot claim conversion because they have no right to immediate possession of money they have donated.

COUNT IV - CONSTRUCTIVE TRUST

A constructive trust is a remedy, not a cause of action. Plaintiffs have no standing to seek that remedy. They allege that the money they contributed to "special missions" and "contributions for the poor" were improperly spent.

Even if Plaintiffs had alleged some wrongful conduct that would justify imposition of a constructive trust, they have no standing to seek that remedy. Their allegations are that all of the "special missions" and "contributions for the poor" money they contributed to TNC should have been spent on missionary work and to help the needy. (*Complaint* ¶¶ 1, 12, 16). The allegation is that the beneficiaries of the funds were the poor and needy, not the Plaintiffs. Plaintiffs therefore have no standing to

impose a constructive trust on the funds. *See, e.g., Boynton v. Headwaters, Inc.*, 2005 WL 1959195 (W.D. Tenn. 2005). Count IV, Constructive Trust should be dismissed because Plaintiffs lack the standing to bring this claim.

ALL CAUSES OF ACTION ARE TIME-BARRED

All causes of action set forth in the Amended Complaint are time-barred by the applicable statute of limitations being found at TENN. CODE ANN. section 28-3-105(1). Actions for injuries to personal or real property and actions for detention or conversion of personal property must be brought within three years of accrual of the cause of action. Civil Conspiracy does not exist as a cause of action in and of itself but depends upon the gravaman of the allegations. The Plaintiffs have pled Civil Conspiracy on the basis of fraud.

The Plaintiffs allege that they were members of TNC from October of 1998 to August of 2001 (*Compl.* ¶8). The Plaintiffs did not file the Original Complaint until June 2005, almost four years after the Plaintiffs left TNC, according to their own allegations. The Plaintiffs allege that “on one occasion during the period of the Plaintiffs’ membership of TNC, Jim Taylor, a former member and former director of Hope Worldwide-TN informed the Plaintiff, Jack Pelham, that his own salary was funded in part from the receipt of the “contribution for the poor” received from TNC (*Compl.* ¶35). In spite of this alleged personal knowledge which would have been gained according to the Plaintiff’s own allegations in the time frame of October 0f 1998 to August of 2001, Plaintiff, Jack Pelham, waited until January of 2003 to begin to conduct an investigation into the Defendants’ corporate activities (*Compl.* ¶33). Suits for fraud, deceit, or

conspiracy are actions in tort and are governed by the three year statute of limitations.

Harvest Corp. v. Ernst and Whinney, 610 S. W. 2nd 727 (Tenn. CT. App. 1980)

Seeking application of constructive trust is a remedy and not a cause of action. If the court determines, however, that a cause of action exists for the Plaintiffs for a constructive trust, the injury alleged is to property. Hence, the statute of limitations should be the three year statute of limitations.

The Plaintiffs simply waited too long to file their Original Complaint. The Amended Complaint should now be dismissed in its entirety as to TNC.

CONCLUSION

For the foregoing reasons, TNC requests that its Motion be granted and the Plaintiffs' claims against it be dismissed in their entirety. TNC further requests that this Court's order be entered as a Final Judgment under Rule 54.02 of the Tennessee Rules of Civil Procedure as there is no just reason for delaying the resolution of this case in its favor.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

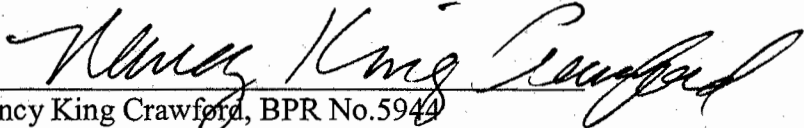
The undersigned hereby certifies that a true and correct copy of the foregoing has been transmitted via United States mail, postage prepaid on this the 28th day of December, 2005, to the following:

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