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Fiber Materials, Inc.,

Plaintiff

v.

**DECISION AND JUDGMENT**

Willie Taylor,

Defendant

This matter was heard on Plaintiff's Amended Complaint on January 13 & 14, 2009. Attorney Michael Nelson and Joseph Groff represented the Plaintiff. Attorney Stephen Beale represented the Defendant.

In this action, Plaintiff seeks to recover damages from Defendant, a former employee of Plaintiff, for breach of contract, fraud, and conversion. Plaintiff also seeks to recover punitive damages.

After consideration of the evidence, the Court makes the following findings, and orders as follows:

Findings of Fact

1. Plaintiff is a corporation with a principal place of business located in Biddeford, Maine.
2. In July 2001, Plaintiff hired Defendant as an Industrial Sales Representative with an annual salary of \$36,000. Defendant began working for Plaintiff on August 13, 2001. In February 2004, Plaintiff increased Defendant's annual compensation to \$37,800.
3. Defendant signed an employment contract on August 20, 2001. The contract did not prohibit Defendant from working for any other employer while employed by Plaintiff. The contract

provides in pertinent part, “[s]o long as you are employed by [Plaintiff], you (Defendant) agree to devote your full time, skill and energy, diligently, loyally, effectively and to the best of your ability, to the performance of your duties as such employee to the reasonable satisfaction of [Plaintiff].

4. During Defendant’s tenure with Plaintiff, Defendant reported directly to Maurice Subilia, who was responsible for Plaintiff’s overall operation.

5. Although Defendant received a salary, Defendant was required to complete a “time card” on which Defendant represented that he worked 8 hours each day. On occasion, another person in the office would complete the “time card”, and Defendant signed the card.

6. Defendant represented that he worked 8 hours each day regardless of the number of hours that he worked. On some occasions, Defendant worked more than 40 hours in a week.

7. Beginning in the fall of 2003, Defendant worked as an assistant basketball coach at the University of Southern Maine. He continued to work in this capacity for the remaining tenure of his employment with Plaintiff. Defendant voluntarily left Plaintiff’s employ on January 19, 2005. Defendant obtained permission from Mr. Subilia to work as a basketball coach provided that Defendant was able to fulfill his responsibilities to Plaintiff.

8. On some limited occasions, in order to devote time to his coaching responsibilities, Defendant used some of the vacation time to which he was entitled as part of his employment with Plaintiff. More often, Defendant did not take vacation time in order to coach.

9. In October 2004, Defendant started working with Vicus Technologies, LLC, as a consultant. Paul Hurlburt, Mr. Subilia’s son-in-law, was the principal of Vicus Technologies. Mr. Subilia was aware of and approved of Defendant’s work for Vicus Technologies.

10. As part of his consultant work for Vicus Technologies, Defendant evaluated the products of and operation of a business or businesses that Mr. Hurlburt was considering purchasing.

11. In the course of Defendant’s work for Vicus Technologies, Defendant was required to travel within and without the state of Maine. Defendant incurred expenses related to this work. Defendant submitted vouchers to Plaintiff seeking reimbursement for expenses incurred in

connection with his work for Vicus Technologies. Plaintiff reimbursed Defendant for some of those expenses in the amount of \$2,492.77.

12. During the time for which Defendant was working for Vicus Technologies, Defendant was not on site at Plaintiff's office as often as he had been before he started working for Vicus Technologies. Defendant charged \$25 per hour for his work as a consultant. Vicus Technologies paid Defendant \$4,000 for his services in 2004.

13. Defendant is currently employed as a general manager at Elscott Manufacturing.

14. While employed by Plaintiff, Defendant also performed some consultant duties for Mr. Subilia and his daughter. Defendant was not compensated directly for this work.

## Discussion

### **A. Breach of Contract**

Plaintiff contends that Defendant breached his employment agreement with Plaintiff by failing "to devote [his] full time, skill and energy, diligently, loyally, effectively and to the best of [his] ability, to the performance of [his] duties ... to the reasonable satisfaction of [Plaintiff]." (Employment Agreement, ¶ (b)). In support of its contention, Plaintiff cites Defendant's work as a basketball coach and his consultant work for Vicus Technologies. That is, Plaintiff argues that because he had other employment responsibilities, Defendant did not devote his full time skill and energy to his work for Plaintiff.

Significantly, the Employment Agreement does not contain an exclusivity provision. Defendant was not, therefore, prohibited from working for other employers during the term of his employment with Plaintiff.<sup>1</sup> At times, Defendant worked an atypical schedule for Plaintiff when he was coaching basketball and/or working for Vicus Technologies. In other words, Defendant occasionally worked longer on certain days or worked weekends for Plaintiff during basketball season, or when working for Vicus Technologies. The Court is convinced that Defendant was capable of fulfilling his responsibilities to Plaintiff while coaching basketball. However, that was

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<sup>1</sup> Under the terms of the Employment Agreement, Defendant is prohibited from working for a company that is "in direct or indirect competition" with Plaintiff. (Employment Agreement, ¶ (c)).

not the case when Defendant performed work for Vicus Technologies at the end of 2004. During the last three months of 2004, Defendant worked 160 hours for Vicus Technologies.<sup>2</sup> The Court concludes that for a period of 4 weeks, based on a 40-hour work week, Defendant could not have and did not devote his “full time, skill and energy” to Plaintiff in accordance with his contractual obligation. Indeed, for this three-month period, Defendant was frequently not in his regular office, and was often traveling on business related to Vicus Technologies. Based on his salary at the time, Defendant was earning at a weekly rate of \$726.92.<sup>3</sup> His compensation for a 4-week period would have been \$2,907.68, which amount he received without devoting the requisite time, skill and energy to Plaintiff.

### **B. Fraud**

Plaintiff argues that Defendant committed fraud by submitting inaccurate “time cards”, and by submitting for reimbursement vouchers for expenses that he occurred while conducting business for Vicus Technologies. In order to prevail on its fraud claim, Plaintiff must demonstrate by clear and convincing evidence that Defendant (1) made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing [Plaintiff] to act or refrain from acting in reliance on it, and (5) [Plaintiff] justifiably relie[d] on the representation as true and acted upon it to the damage of the [Plaintiff]. *Rand v. Bath Iron Works Corporation*, 2003 ME 112, ¶ 9, (citing, *Mariello v. Giguere*, 667 A.2d 588, 590 (Me. 1995) (quoting *Guiggey v. Bombardier*, 615 A.2d 1169, 1173 (Me. 1992)).

During the course of his employment with Plaintiff, Defendant regularly submitted “time cards” reflecting that he worked eight hours each day. The evidence established that on some days Defendant worked more or less than eight hours. Additionally, there were occasions when Defendant worked on days for which he did not record any time (e.g., some weekend days). The information on the “time cards” was, therefore, frequently false. It was not, however, necessarily false to Plaintiff. The evidence established that the “time cards” were routinely completed in this fashion with the acquiescence of Plaintiff in order to satisfy certain accounting requirements.

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<sup>2</sup> Defendant testified that he charged \$25 per hour for his consultation services. Insofar as Defendant earned \$4,000 from Vicus Technologies in 2004, Defendant evidently worked 160 hours for Vicus Technologies (160 x \$25 = \$4,000).

<sup>3</sup> Defendant’s annual compensation was \$37,800.

Nevertheless, assuming, *arguendo*, that Plaintiff has satisfied the first element for a fraud claim as to the “time cards”, Plaintiff cannot prevail on its claim. Plaintiff paid Defendant an annual salary. He was not, therefore, an hourly wage earner. He received the same weekly compensation regardless of the number of hours that he worked in a particular week. The Court is thus unconvinced that Defendant submitted false information on the “time cards” for the purpose of inducing Plaintiff to act in a certain way.

Plaintiff has, however, established that Defendant fraudulently obtained reimbursement for expenses that he incurred while performing work for Vicus Technologies. The evidence plainly demonstrated that Defendant submitted to Plaintiff vouchers seeking payment for expenses that were not related to his work for Plaintiff. The fact that Defendant’s superior, Mr. Subilia, was aware of or condoned Defendant’s actions does not exonerate Defendant.

The Court specifically finds that on five occasions, Defendant filed false expense vouchers for the express purpose of inducing Plaintiff to reimburse Defendant. Plaintiff relied upon Defendant’s representation, and made payment to Defendant in the amounts requested. The false expense vouchers include an October 18, 2004, voucher for \$289.36 (Exhibit 6); an October 10, 2004, voucher for \$407.36 (Exhibit 19); a November 21, 2004, voucher for \$613.25 (Exhibit 21); a November 15, 2004, voucher for \$823 (Exhibit 22); and a November 27, 2004, voucher for \$359.80 (Exhibit 23) for a total of \$2,492.77.

### **C. Conversion**

Plaintiff contends that Defendant’s request for and acceptance of payment for compensation and reimbursement of expenses incurred in connection with Defendant’s work for Vicus Technologies constitute conversion. Under Maine law, “[t]he necessary elements to make out a claim for conversion are: (1) a showing that the person claiming that his property was converted has a property interest in the property; (2) that he had the right to possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for its return that was denied by the holder.” *Withers v. Hackett*, 1998 ME 164, ¶ 7, 174 A.2d 798, 799 (citing, *Leighton v. Fleet Bank of Me.*, 634 A.2d 453, 457 (Me. 1993)).

In this case, at the time the property (i.e., the money) was allegedly converted, Plaintiff did not have a right to the property. Plaintiff tendered to Defendant checks made payable to Defendant in accordance with the Employment Agreement. Although as explained above the expense reimbursement was obtained fraudulently, because the checks were made payable to Defendant, Plaintiff cannot establish that at the time it had a right to possess the money. In short, while Plaintiff is entitled to recover some of the payments made to Defendant on the basis of Defendant's fraud, it cannot do so under a conversion theory.

#### **D. Punitive Damages**

Plaintiff requests an award of punitive damages as the result of Defendant's fraudulent conduct. In Maine, "[a] plaintiff seeking punitive damages must show by clear and convincing evidence that the defendant's conduct was motivated by actual ill will, or that the conduct was so outrageous that malice is implied." *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995) (quoting, *Grover v. Minette-Mills, Inc.*, 638 A.2d 712, 716 (Me. 1994)). Here, although Defendant engaged in fraudulent conduct when he submitted vouchers for expenses that he incurred while performing work for Vicus Technologies, there is no evidence to support Plaintiff's claim for punitive damages. At the time, Defendant's immediate superior, Maurice Subilia, the person responsible for Plaintiff's entire operation, was aware of and supported Defendant's conduct. Under these circumstances, the Court cannot conclude that Defendant was acting out of malice toward Plaintiff.

#### Conclusion

Based on the foregoing analysis, the Court orders as follows:

1. On Count I of the Amended Complaint, the Court enters judgment in the amount of \$2,907.68 in favor of Plaintiff and against Defendant, together with interest and costs.
2. On Count II of the Amended Complaint, the Court enters judgment in the amount of \$2,492.77 in favor of Plaintiff and against Defendant, together with interest and costs.
3. On Count III of the Amended Complaint, the Court enters judgment in favor of Defendant and against Plaintiff.

4. On Plaintiff's claim for punitive damages, the Court enters judgment in favor of Defendant and against Plaintiff.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Judgment into the docket by reference.

Date: 2/9/09

  
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Justice, Maine Business & Consumer Docket

JUDGMENT ENTERED: 2/12/09