UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE

Plaintiff,

vs.

Index No. 08-cv-00347-JTC

FREDERICK DIMOND, ROBERT DIMOND, and MOST HOLY FAMILY MONASTERY, a New York Not-for-Profit Corporation

Defendants

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is an action to recover damages and restitution from defendants, Frederick Dimond, Robert Dimond, and Most Holy Family Monastery. The plaintiff's claims are based on the defendants' operation of Most Holy Family Monastery and sound in fraud, constructive fraud, unjust enrichment, monies had and received, violation of the federal civil RICO statute, deceptive trade practice and false advertising.

The defendants have denied each of plaintiff's claims and asserted various counterclaims, including defamation, conversion, unfair competition, breach of fiduciary duty, etc. Each of the counterclaims has been denied by the plaintiff.

Before the Court at this juncture is the defendants' motion for summary judgment dismissing each of the plaintiff's' causes of action and granting judgment to the defendants on each of their counterclaims.

FACTS

The Dimond Brothers

On or before April 1, 2002, the Dimond defendants established a web site for MHFM with the internet address of "www.mostholyfamilymonastery.com" (hereinafter "the MHFM website"). They also established an e-mail address: mhfm1@aol.com. From that time forward, defendant Frederick Dimond has continuously identified himself on the MHFM website as "Brother Michael Dimond, O.S.B." Since on or about June 1, 2002, defendant Robert Dimond has continuously identified himself on the MHFM website as "Brother Peter Dimond, O.S.B."

Since on or about September 29, 2002, the Dimond defendants have continuously offered for sale various video recordings and publications to the general public. Since May 30, 2003, the Dimond defendants have continuously displayed a

hyperlink on the MHFM website to a document entitled "Our Benedictine Community." This document purports to describe the history of MHFM as a Benedictine community and to further identify defendant Frederick Dimond as Brother Michael Dimond, O.S.B., a Benedictine monk. Since on or about May 26, 2004, the Dimond defendants have continuously displayed on the MHFM website a solicitation for financial support.

Between the summer of 2004 and the date this action was commenced, hundreds of thousands of individuals from various locations in the United States and around the world have viewed the MHFM website. Thousands have either made financial contributions to MHFM in response to the solicitation contained there and/or purchased items advertised for sale on the MHFM website.

The Order of St. Benedict

The Order of St. Benedict is widely recognized as a Roman Catholic religious order of monastic communities that observe the Rule of St. Benedict. Within the order, each individual community (which may be a monastery, abbey, or priory) maintains its own autonomy, while the organization as a whole exists to represent their mutual interests. The terms "Order of St. Benedict" and "Benedictine Order" are also used frequently to refer to the total of the independent Roman Catholic Benedictine abbeys.

The Benedictine Confederation, which was established in 1883 by Pope Leo XIII, is the international governing body of the order. Members of the Order of St. Benedict are permitted to use the suffix "O.S.B." after their names. New Benedictine monks and monasteries come into being by permission of and association with existing Benedictine monks and monasteries.

Eric Hoyle Learns of MHFM

In the fall of 2003, Eric E. Hoyle was 22 years old and was teaching chemistry at a public high school in Edgewater, Maryland. A primary focus of his private activities at that time was the search for religious doctrines that were true and good.

In 2004, believing that the Catholic Church held and taught the religious doctrines he was looking for, the plaintiff gave up his teaching position to pursue entrance into a seminary to become a priest. The plaintiff's experiences, research, and conversations with various individuals eventually led him to set aside his pursuit of priestly training and to study the Catholic religion on his own for a time.

In early 2005, while living a solitary life of prayer and study, the plaintiff learned of the existence of a Benedictine monastery in upstate New York going by the name Most Holy Family Monastery. The plaintiff sought information from the MHFM website, www.mostholyfamilymonastery.com, which stated that MHFM was a Benedictine monastery supervised by Brother Michael Dimond, O.S.B., a Benedictine monk.

The plaintiff contacted Frederick Dimond to learn more about MHFM and the procedures required for the plaintiff to become a Benedictine monk through MHFM. Frederick Dimond told the plaintiff that MHFM's history dated to the 1960's when a Benedictine monk named Brother Joseph Natale ("Natale") was given permission by Archabbot Dennis Strittmatter of St. Vincent's Archabbey in Latrobe, Pennsylvania, to establish a Benedictine community and that such a community had been established by Natale in southern New Jersey.

Frederick Dimond further stated that someone had given land in upstate New York to Natale's Benedictine community in the early 1990's for the purpose of

establishing a Benedictine monastery there. Frederick Dimond told the plaintiff that when Joseph Natale died in November 1995, he had been elected Superior of MHFM and had supervised the move to its present location in 1997.

In reliance on information provided by Frederick Dimond, the plaintiff made a cash contribution of Seven Hundred ($700.00) Dollars to MHFM on or about April 1, 2005. The transfer was made by delivery of check number 1014 from checking account number 218-2871-7 at USAA Federal Savings Bank.

The plaintiff made a further cash contribution to MHFM on May 2, 2005 in the amount of Sixty-Five Thousand ($65,000.00) Dollars. The transfer was made by delivery of check number 1179 from checking account number 1087375695120 at Wachovia Bank, N.A.

The plaintiff made visits to MHFM in late June and again for several weeks beginning in mid-July 2005. In reliance on his discussions with Frederick Dimond and his visits to MHFM, the plaintiff decided in September 2005 that he would seek to become a Benedictine monk under the auspices of Frederick Dimond and MHFM.

Frederick Dimond agreed to receive the plaintiff as a postulant and to undertake his training to become a Benedictine monk, conditioned upon the plaintiff's agreement to turn over most of his worldly possessions to MHFM. Frederick Dimond conveyed to the plaintiff that the shedding of material possessions was a requirement of the Order of St. Benedict and MHFM. Frederick Dimond also told the plaintiff that the plaintiff must specify in writing what portion, if any, of money he would be transferring to MHFM must be returned to him should he leave MHFM.

Based on representations made by Frederick Dimond, the plaintiff took up residence at MHFM on September 27, 2005. At that time, the plaintiff was the owner of

approximately 1,350,000 shares of Guinor Gold Corporation. On or about November 4, 2005, the plaintiff transferred 1,045,000 shares of Guinor Gold Corporation, valued at $1,233,100.00 to MHFM. This transfer was made by wire from the plaintiff's account number 506-66358-1-3 at TD Waterhouse, Inc. The plaintiff retained sufficient assets to pay his capital gains taxes for 2005.

In the late-spring/summer of 2006, Frederick Dimond renewed his request that the plaintiff specify in writing the amount of the plaintiff's transfers that must be returned to him if and when he left MHFM. The plaintiff did so, choosing the amount of $750,000.00, and prepared a handwritten document stating this amount.

On or about September 12, 2006, the plaintiff made an additional transfer to MHFM of 37,400 shares of Central Fund of Canada from his USAA Investment Management Company brokerage account number 11590502. These shares had an approximate value of $307,989.00 on the date of transfer.

On December 31, 2007, the plaintiff left MHFM. Subsequent to his departure from MHFM, the plaintiff learned that, contrary to Frederick Dimond's representations, he was not a member of the Order of St. Benedict and that MHFM was neither founded nor operated in accordance with the requirements of the Order of St. Benedict.

Subsequently, representatives of the plaintiff demanded the return of all property turned over to MHFM, including the $1,606,789.00 previously "donated" to MHFM. The defendants refused to comply with the demand that all funds and personal property, or their monetary equivalent, previously transferred to the defendants be returned to the plaintiff.

Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure clearly establishes the standard for granting a summary judgment motion. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. See *Adickes v. S.H.Kress & Co.*, 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied." 11 MOORE'S FEDERAL PRACTICE, §56.11[1] [a] (Matthew Bender 3d ed.). Therefore, the burden is on the moving party to demonstrate that the evidence presented in the case creates no genuine issue of material fact. *Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir.2001).

Once that burden has been met by the moving party, it then shifts to the non-moving party to demonstrate that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e); *Anderson v. Liberal Lobby, Inc.*, 477 U.S. 242, 250 (1986).

A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. at 248. A fact is considered to be "material" if it has some affect on the outcome of the suit under the applicable rule of law. Ibid.

In determining whether a genuine issue of a material fact exists, the Court must view underlying facts and circumstances of the case contained in affidavits, attached exhibits, and depositions in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Moreover, the Court must draw all reasonable

inferences and resolve all ambiguities in favor of the non-moving party. *Anderson*, 477 U.S. at 248-49.

Summary judgment is only appropriate when the moving party has met its burden of production under F. R. Civ. P.56(c), and has demonstrated the absence of a genuine issue of concerning any material fact. *Adickes v. S. H.Kress & Co., supra* at 159. The burden of production is a high standard to meet. As the Court noted in *Adickes*, summary judgment should be denied when a party failed to demonstrate that no genuine issues of material fact remain for trial even if no opposing evidentiary matter is presented. Id. at 160.

Parties seeking summary judgment on fraud claims have a particularly heavy burden. This fact has long been acknowledged by New York courts and federal courts applying New York law.

> The other claims and defenses in the present suit bristle with genuine issues as to the material facts. For instance, issues are raised as to the state of mind, intent and knowledge of the parties. We have repeatedly stated that summary judgment is particularly inappropriate where, as here, it is sought on the basis of "the inferences which the parties seek to have drawn [as to] questions of motive, intent, and subjective feelings and reactions" [cases cited].

Friedman v. Meyers, 482 F.2d 435, 439 (C.A.1973). See, also, *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A., 2008* WL 5460096, *2 (Sup. Ct. N.Y. County, Sept 23, 2008) ("Fraud claims are often not appropriate for summary decision, because motive, intent and subjective feelings are at issue.")

Whether a misrepresentation of fact was "material" depends, of course, on the importance of the information to the victim. For example, if the customer of an automobile dealer is a determined "Buy America" stalwart, a false statement that a particular automobile was made in America would undoubtedly be material. The same

misrepresentation made to a customer who had no concern as to the country of origin would, in all likelihood, not be material.

ARGUMENT

POINT I

DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE REMAIN GENUINE DISPUTES CONCERNING MATERIAL FACTS

Defendants' assertion that no genuine issues of material fact remain in this case is based on the fact that the plaintiff is in near total agreement with the defendants' religious views. This attempt to divert the Court's attention from the actual issues in this case is consistent with the defendants' continued efforts to characterize this case as primarily about alleged differences between the plaintiff and defendants concerning religious doctrine. In fact, neither plaintiff's' concurrence in the majority of defendants' religious views nor the parties' disagreement concerning mass attendance is at issue in this case.[1]

A. Defendant's Misrepresentations.

The misrepresentation which forms the basis of several of the plaintiff's claims relates to the historical relationship between MHFM and the ancient Order of St. Benedict. Long before plaintiff became aware of the existence of MHFM, the defendants had publicly asserted a direct link to the centuries-old Order of St. Benedict. As of June 1, 2002, the MHFM website contained the following entry regarding its lineage:

[1] This Court has previously ruled that the claims raised by the plaintiff do not involve issues of religious doctrine and that it's entertainment of these claims is not prohibited by the First Amendment.

WHO MADE US BENEDICTINES?

> The founder of our monastery, Brother Joseph Natale, was made a Bendictine Monk at St. Vincent's Archabbey in Latrobe, Pennsylvania. In 1966, Brother Joseph received permission from the Archabbot Dennis Strickmatter to start his own community. Hence came Most Holy Family Monastery. With the passing of Brother Joseph, Brother Michael became superior.

Can be viewed at:

http://web.archive.org/web/20020601182236/http://www.mostholyfamilymonastery.com/Response_to_the_Schismatic_False_Prophet_Richard_I.html.

By the time the plaintiff became aware of the existence of MHFM, its claim of descent from Vincent's Arch abbey was somewhat diluted, asserting only that Joseph Natale "was trained at St. Vincent's." Their website continued, however, to refer to Natale as "Brother Joseph Natale, O. S. B." and to claim that he had been authorized to establish a Benedictine monastery. It also detailed a series of events which purported to link MHFM directly to St. Vincent's, which it referred to as "the largest Benedictine monastery in the United States." *Ibid.* The MHFM website also stated that it operated in accordance with the Rule of St. Benedict.

St. Vincent's had, of course, been founded long before the Second Vatican Council and was part of the "universally recognized" Order of St. Benedict. Although the defendants made clear that they were not in agreement with the current leadership of the Order regarding the actions taken at Vatican II, they continued to maintain that their “Benedictine community” had roots in the ancient Order and were governed by the Rule of Saint Benedict.

On December 30, 2007, the day before he departed from MHFM, plaintiff studied an article written by a former member of MHFM, Richard Ibranyi, entitled "Against the Dimonds XXX." although the article focused primarily on the question of attending mass in the presence of heretics, it ends with a challenge to the legitimacy of MHFM as a Benedictine community. See Exhibit B to the Hoyle declaration.

After leaving MHFM, the plaintiff began to inquire, for the first time, into the truth of the defendants' assertions regarding the connection with St. Vincent. He contacted the Archabbot of St. Vincent by e-mail and asked what was known regarding Joseph Natale's attendance and subsequent activities. He received an email response from Douglas R. Nowicki, O.S.B. on January 24, 2008, which stated, in part, as follows:

> Joseph A. Natale came to Saint Vincent as a candidate for the lay brotherhood on July 5, 1960. He remained here for several months as a postulant but he did not receive vows as a Benedictine monk. * * * I would also note that this group [MHFM] is not listed in The Official Catholic Directory which is another source for approved Catholic organizations.

See Exhibit A to the Hoyle Declaration.

B. The Plaintiff's Justifiable Reliance

The plaintiff had reasonably relied on the defendants' statements regarding the monastery's lineage and its centuries of association with what he viewed as the "true" Catholic Church. The history of the Order, its endurance and the teachings of its hundreds of members over the years appealed to the plaintiff. The imprimatur "O.S.B." carried with it an assurance of historical legitimacy and spiritual authenticity which the plaintiff had long sought. He had searched for the "true" faith, one which had stood the test of time and, based on the defendants' misrepresentations concerning MHFM, he thought he had found it.

After leaving MHFM plaintiff learned that the defendants' claim to legitimacy, based on its connection to a universally recognized Benedictine monastery, was demonstrably false. To the extent that the defendants continued to assert this historical relationship with St. Vincent, a material fact about which the plaintiff relied, the issue must be addressed to a finder of fact. Although the scope of the inquiry with regard to plaintiff's constructive fraud claim will be different, it too requires factual findings based on a full hearing in which the credibility of various witnesses can be assessed.[2]

C. Plaintiff's Equitable Claims

The plaintiff's equitable claims, sounding in unjust enrichment and money had and received, are to be distinguished from the fraud and constructive fraud claims. If those causes of action are found to have merit, plaintiff will be entitled to damages and equitable considerations will not be involved. The equitable claims arise the fact that, when plaintiff made his contributions to MHFM, he was advised that he would be entitled to receive the return was certain portion of the assets which he had transferred to MHFM; the amount to be determined by the plaintiff in an informal written instrument.

Although the figure of $30,000 was mentioned at one point, defendants have agreed that the amount to be returned by plaintiff's departure was never resolved. Following his departure from MHFM, plaintiff requested that the amount of $483,000 be returned. Defendants refused to return that amount.

The facts related to this issue remain in dispute. First, defendants take a position that, although they advised the plaintiff that he must place all of his worldly assets in their control, the blast decision to take a tax deduction for portion of the mount

[2] The same is true with regard to the plaintiffs RICO claim.

transferred converted the transfer to a "gift", depriving the plaintiff of the right to receive any return of his assets in the future. In fact, the denomination of this transfer as a gift was based on plaintiff's accountant's suggestion and was undertaken solely for tax purposes. Under the situation presented, the question of whether the plaintiff intended to waive his right to a "refund" and make the transfer unconditional is central to plaintiff's equitable claims and must be addressed to a fact finder.

POINT II

THE DEFENDANTS ARE NOT ENTITLED TO
SUJMARY JUDGMENT ON THEIR DEFAMATION CLAIM

It is black letter law that truth is a defense to a claim of defamation. The cause of action only exists where statements concerning the plaintiff are false. The plaintiff reported to Trooper LaRose that the Dimonds had refused to return his money when he left MHFM. He later referred to this fact in terms of his money having been "stolen."

McKinney's Penal Law § 155.05 provides as follows: "A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof" or by obtaining another's money by "false pretenses."

To the extent that the plaintiff can persuade the Court that the defendants encouraged him to transfer assets my making false representations of material fact, they are guilty of stealing those assets. To the extent that the plaintiff can persuade the Court that the defendants refused to return those assets to plaintiff when he left MHFM, they are guilty of stealing those assets.

The resolution of these factual issues will determine the outcome of both the plaintiff's fraud, constructive fraud and RICO claims, but also whether the defendants'

defamation claims will lie. In any case, summary judgment on these issues in wholly inappropriate.

POINT III

THE PLANITIFF IS ENTITLED TO SUJMARY JUDGMENT DISMISSING THE DEFENDANTS' CONVERSION COUNTER-CLAIM

The defendants assert a counterclaim sounding in conversion:

> On or about that date, plaintiff took certain property that rightfully belonged to defendant or defendants. In taking that property, plaintiff interfered with defendants' rights to it.

Defendants' Answer and Counterclaims to Plaintiff's Amended Complaint, ¶217.

It is black letter law that a cause of action for conversion requires "the unauthorized assumption of ownership of and exercise of right over property belonging to another, **to the exclusion of the owner's rights therein**." *Vigilant Insurance Company of America v. Housing Authority of the City of El Paso,* 87 N.Y.2d 36, 45 (1995) (emphasis added). See, also, *Trustforte Corporation v. Eisen,* 10 Misc.3d 1064(a), 2005 WL 3501957 (Sup.Ct. New York Co., November 15, 2005) (plaintiff had no cause of action for conversion where the defendant made copies of plaintiff's customer list but the original documents remained in plaintiff's possession).

The defendants have not alleged that the plaintiff's actions excluded them from access to the information which he allegedly converted, i.e., defendants' customer lists. Since this is an essential element of this cause action, the Court must grant summary judgment to the plaintiff dismissing the defendants' conversion claim.

POINT IV

THE PLANITIFF IS ENTITLED TO
SUJMARY JUDGMENT DISMISSING THE
DEFENDANTS' TORTIOUS INTERFERENCE/
UNFAIR COMPETITION COUNTER-CLAIM

The defendants claim that the plaintiff engaged in tortuous interference with business prospects and unfair competition by using defendants' confidential information to solicit its customers.

To prevail on this claim, the defendants must prove that it would have obtained specific revenue (sales or contributions) for which it seeks damages, but for the plaintiff's unlawful acts directed at a particular customer. Defendants' damages "are limited to lost profits resulting from the [plaintiff's] actual diverting [of customers]." *Allan Dempf, P.C. v. Bloom,* 127 A.D.2d 719 (2nd Dept. 1987). *See, also, Town & Country House & Home Serv. v. Newberry,* 3 N.Y.2d 554 (1958).

The burden on the defendants here is to allege and prove detailed facts regarding the plaintiff's actual conduct, the third-party's reasons for terminating financial support or business activity with the defendants and the damages resulting from each instance of alleged misconduct. The defendants' motion for summary judgment on this cause of action is wholly unsupported by evidence of the plaintiff's particular conduct, which if any of its customers/benefactors were dissuaded from supporting MHFM because of the plaintiffs' allegbed conduct or any proof of actual monetary damages in the nature of lost revenue resulting from the plaintiff's alleged conduct.

More importantly, the competition of which the defendants' complaint is clearly not commercial in nature, but is a competition between the plaintiff and defendants' view of various elements of religious doctrine. The First Amendment prohibits civil courts from exercising jurisdiction over disputes involving religious doctrine.

> The First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs [citations omitted]. Civil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis for their resolution [citations omitted].The "neutral principles of law" approach requires the court to apply objective, well-established principles of secular law to the issues.

Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 9 N.Y.3d 282, 287 (2007).

In this case, there are no neutral principals of secular law to resolve the question of whether attending mass with non-believers is a mortal sin. Defendants' complaint that the plaintiff was unfairly competing in a contest of ideas and religious beliefs must find another venue.[3]

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[3] Even if the defendants' unfair competition claim stated a theoretical cause of action, Frederick Dimond's testimony regarding the unfair nature of the plaintiff's conduct shows the weakness of the claim:

Q: So your position is that because he's charging for something that you do for free, he's competing against you?

A: ln that sense.

Dimond deposition transcript, p. 92, ll. 5-8.

POINT V

THE PLANITIFF IS ENTITLED TO SUJMARY JUDGMENT DISMISSING THE DEFENDANTS' CLAIM UNDER THE ELECTRONIC COMMUNICATIONS PRIVACY ACT

The defendants charged that the plaintiff is violated the uppercase electronic communications privacy act ("ECPA") which prohibits the "unauthorized interception of electronic communications". 18 U at U.S.C. §§ 2510 – 2522. Section 2520 creates a civil and cause of action on behalf of "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter."

The defendants failed to allege any occasion on which they wire, oral, or electronic communication intended for them was exact "agents intercepted" actions by the plaintiff. It simply complained, without proof, some individuals may have responded to certain of plaintiff's e-mails which emanated from the MHFM e-mail address. Since any of these responsive e-mails were intended to be received by plaintiff, the defendants were not persons contemplated by statute.

In any case, the ECPA does not apply to email communications, because they are "stored" electronic communications and cannot be "intercepted" at the time of transmission. See Pure Power Boot Camp Inc. v. Warrior Fitness Boot Camps LLC, 759 F. Supp. 2d 417, 430 (S.D.N.Y. 2010). See, also, *Garback v. Lossing*, 2010 WL 3733971 (E.D.Mich., Sept. 20, 2010).

> [T]here is only a narrow window during which an E-mail interception may occur-the seconds or mili-seconds before which a newly composed message is saved to any temporary location following a send command. Therefore, unless some type of automatic routing software is used (for example, a duplicate of all of an employee's messages are

> automatically sent to the employee's boss), interception of E-mail within the prohibition of [the Wiretap Act] is virtually impossible.

2010 WL 3733971 *3.

The defendants claim under the ECPA fails to meet even minimum standards of pleading in their motion for summary judgment should be denied.

CONCLUSION

Based on the foregoing, the plaintiff asks the Court to deny the defendants' motion for summary judgment and to grant summary judgment to plaintiff dismissing the defendants" counterclaims.

Dated: February 24, 2012

/s/ K. Wade Eaton

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