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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2018 SEP 26 PH 1:04

CITY NATIONAL BANK OF WEST VIRGINIA,  
a National Banking Association,

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

**Plaintiff,**

v.

Civil Action No. 18-C-17  
Honorable Charles E. King

MOUNTAINEER FIRE & RESCUE EQUIPMENT, LLC,  
a West Virginia limited liability company;  
BRIAN CAVENDER, a Member;  
WALTER CAVENDER, a Member; and,  
JOE BEAM, a Member.

**Defendants,**

MOUNTAINEER FIRE & RESCUE EQUIPMENT, LLC,  
a West Virginia limited liability company;  
BRIAN CAVENDER, a Member;  
WALTER CAVENDER, a Member; and,  
JOE BEAM, a Member,

**Cross-Plaintiffs and Counter-Plaintiffs,**

v.

JOE BEAM,

**Cross-Defendant, and**

CITY NATIONAL BANK OF WEST VIRGINIA,  
a National Banking Association,

**Counter-Defendant.**

**ORDER GRANTING DEFENDANT and CROSS-DEFENDANT JOE BEAM'S MOTION  
TO DISMISS THE CROSS-CLAIMS ASSERTED AGAINST HIM**

On the 22<sup>nd</sup> day of May, 2018, came the parties for the purposes of a Hearing upon Plaintiff and Counter-Defendant City National Bank of West Virginia's *Motion to Dismiss Counter-Claims* as well as for a Hearing upon Defendant and Cross-Defendant Joe Beam's

***Defendant Joe Beam's Motion to Dismiss Cross-Claims of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender.*** No response was filed to either aforementioned Motion to Dismiss. Upon consideration of the filed pleadings and the asserted arguments of counsel, the Court does **FIND** as follows:

1. Count II of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender's Cross-Claim, constituted in Paragraphs 109-112 of said Cross-Claim, asserts a "breach of fiduciary duty" count against Joe Beam.
2. Count II, specifically Paragraph 110 of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender's Cross-Claim, alleges that Joe Beam owed certain duties to the aforesaid parties "under West Virginia Code 31B-4-409(a)(1) and (2)(a)(b) and (c)."
3. "West Virginia Code 31B-4-409(a)(1) and (2)(a)(b) and (c)" do not exist; accordingly, Joe Beam, nor any other person or entity, could be assigned any certain or specific duties thereunder.
4. Since West Virginia Code 31B-4-409(a)(1) and (2)(a)(b) and (c) do not exist, and thus are not valid law under which relief could be granted or under which duties could be assigned, Defendants Mountaineer Fire, Brian Cavender and Walter Cavender have failed in Count II (Breach of Fiduciary Duty) to state a cause of action upon which relief could be granted and thus Count II of the asserted Cross-Claim against Joe Beam must be dismissed.
5. Count III of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender's Cross-Claim, constituted in Paragraphs 113-116 of said Cross-Claim, asserts a count of "unlawful conversion of funds on deposit with City National" against Joe

Beam.

6. Count III, specifically Paragraph 114 of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender's Cross-Claim, alleges that Joe Beam owed certain duties to the aforesaid parties "under West Virginia Code 31B-4-409(a)(1) and (2)(a)(b) and (c)."
7. "West Virginia Code 31B-4-409(a)(1) and (2)(a)(b) and (c)" do not exist; accordingly, Joe Beam, nor any other person or entity, could be assigned any certain or specific duties thereunder.
8. Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender also fail, in Count III, to list or describe any specific acts of "conversion" upon which relief could be granted.
9. Since West Virginia Code 31B-4-409(a)(1) and (2)(a)(b) and (c) do not exist, and thus are not valid law under which relief could be granted or under which duties could be assigned, and since Count III fails to specifically allege, with any particularity whatsoever, any specific acts of "conversion," Defendants Mountaineer Fire, Brian Cavender and Walter Cavender have failed in Count III (Unlawful Conversion of Funds on Deposit with City National) to state a cause of action upon which relief could be granted and thus Count III of the asserted Cross-Claim against Joe Beam must be dismissed.
10. Count IV of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender's Cross-Claim, constituted in Paragraphs 117-119 of said Cross-Claim, asserts a count of "conversion – equipment owned by Mountaineer Fire" against Joe Beam.
11. Count IV fails to list or describe any specific acts of "conversion" upon which relief

could be granted.

12. Even viewing the "conversion" allegations in Paragraphs 118 and 119 of the Mountaineer Fire Defendants' Cross Claims in the light most favorable to the claimant, as must be done at this stage in the proceedings, there is no set of facts which could demonstrate conversion under West Virginia law, due to the fact that Count IV wholly fails to allege any acts of conversion, whether specific or general, and due also importantly to the fact that Paragraph 118 is unintelligible, legally incomprehensible, and completely fails to allege any relevant facts or law necessary to support a claim for conversion.
13. Count V of of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender's Cross-Claim, constituted in Paragraphs 120-122 of said Cross-Claim, asserts a count of "fraud" against Joe Beam.
14. *West Virginia Rule of Civil Procedure 9(b)* mandates that when fraud is asserted, the "circumstances constituting fraud" must be stated "with particularity."
15. *West Virginia Rule of Civil Procedure 9(b)* is supported by relevant and controlling case law, such as Kessel v. Leavitt, 204 W.Va. 95, 511 S.E.2d 720 (1998).
16. Count V completely fails to describe the circumstances constituting fraud with any particularity whatsoever, as is required under West Virginia law; accordingly, the count of fraud, Count V, must be dismissed against Joe Beam.
17. Count VI of of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender's Cross-Claim, constituted in Paragraphs 123-126 of said Cross-Claim, asserts a count of "tortious interference" against Joe Beam.
18. In Syllabus Point 2 of Torbett v. Wheeling Dollar Sav. & Trust Co., 173 W.Va. 210, 314 S.E.2d 166 (1983), the Supreme Court of Appeals of West Virginia wrote that "to

establish prima facie proof of tortious interference, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and, (4) damages.”

19. Count VI, particularly Paragraph 124 thereof, of Mountaineer Fire Defendants’ Cross Claims states, in its entirety, as follows: “Following his agreed withdrawal as a Member of Mountaineer Fire Tortious, Joe Beam owed a duty to Mountaineer Fire and the Majority Members to not interfere with Mountaineer Fire’s business operations.”

20. Count VI fails to allege the necessary elements-so as to show a *prima facie* case of tortious interference, as it identifies no valid contractual or business relationship, it does not include the allegation that “a party outside that business relationship” has done anything to “interfere” and because no proof whatsoever is proffered in support of the Defendants’ assertion.

21. The Supreme Court of Appeals of West Virginia has made it clear that “...while bald statements or a carelessly drafted pleading will not survive a Rule 12(b)(6) motion to dismiss [internal citation omitted], a circuit court should not dismiss a claim ‘merely because it doubts that the plaintiff will prevail in the action.’” Highmark West Virginia, Inc. v. Jamie, 221 W.Va. 487, 491, 655 S.E.2d 509, 513 (2007).

22. None of the claims put forth in the asserted Cross-Claims state any cause of action upon which relief could be granted under West Virginia law.

Accordingly, for the reasons aforesaid, as listed above herein Paragraphs 1 through 22 of this *Order Granting Defendant and Cross-Defendant Joe Beam’s Motion to Dismiss the Cross-Claims Asserted Against Him*, this Court does GRANT Defendant and Cross-Defendant

Joe Beam's *Defendant Joe Beam's Motion to Dismiss Cross-Claims of Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender* and accordingly does hereby **DISMISS** Mountaineer Fire & Rescue Equipment, LLC, Brian Cavender and Walter Cavender's Cross-Claims against Joe Beam. Said Cross-Claims are being **DISMISSED**.

*CEP*

*JCF*

Mountaineer Fire, Brian Cavender and Walter Cavender have failed to carefully draft a pleading which would be able to survive a Motion to Dismiss under West Virginia law, even when viewed in the light most favorable to them. Said parties have failed to state a claim upon which relief may be granted and thus their cross-claims against Joe Beam must be dismissed, per operation of West Virginia law, including, but not limited to, West Virginia Rule of Civil Procedure 12(b)(6).

The Clerk is **ORDERED** to **DISMISS** the Cross-Claims asserted by Mountaineer Fire LLC, Brian Cavender and Walter Cavender and strike the same from the active docket of the Court.

The Clerk is further **ORDERED** to forward a certified copy of this *Order Granting Defendant and Cross-Defendant Joe Beam's Motion to Dismiss the Cross-Claims Asserted Against Him* to all parties and/or Counsel of record, as herein indicated below.

Date: 9-27-18  
Certified copies sent to:  
 Counsel of record  
 parties  
 other M. Weikle  
(please indicate)  
By: A. Roney  
M. Berger  
S. Romano  
Deputy Circuit Clerk

Entered this 22<sup>nd</sup> day of May, 2018.

*26th of May*

*Charles E. King*  
Honorable Charles E. King  
Circuit Court of Kanawha County, West Virginia

**Prepared and Submitted for Entry by:**

Shawn R. Romano, Esq. (WVSB No. 7577)  
Miles B. Berger, Esq. (WVSB No. 12147)

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY,  
AND BY SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
DATE: Sept 2018  
BY: Cathy S. Gatson  
CLERK OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 116

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**Copy of this Order to:**

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