

# New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 235—NO. 80

WEDNESDAY, APRIL 26, 2006

ALM

## OUTSIDE COUNSEL

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### *Can 'Intangible' Electronic 'Property' Be 'Converted' in N.Y.?*

The now-digitized world is leading to more and more claims being litigated over whether someone has wrongfully “converted” another’s electronic “property.”

Under New York law, “[t]he tort of conversion is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner.” *Republic of Haiti v. Duvalier*, 211 AD2d 379, 384, 626 NYS2d 472, 475 (1st Dept. 1995).

The history of the application of this particular cause of action “conversion” has always centered exclusively on the physical theft of specific, identifiable, corporeal, tangible, personal property, in its most rudimentary sense.

*Shmueli v. Corcoran*, 9 Misc3d 589, 591, 802 NYS2d 871, 874 (N.Y. Sup. Ct., N.Y. County 2005).

New York law has long held that claims alleging conversion of intangible or incorporeal property or ideas cannot be sustained as a matter of law. See e.g. *Sporn v. MCA Records, Inc.*, 58 NY2d 482, 489, 462 NY2d 413, 416 (1983); *MBF Clearing v. Shine*, 212 AD2d 478, 479, 623 NYS2d 204, 206 (1st Dept. 1995). See also *Jordan Panel Systems, Corp. v. Turner Constr. Co.*, Index No. 0602359/04, at 9-10 (N.Y. Sup. Ct., N.Y. County July 15, 2005) (misappropriation of ideas contained



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in work-product is “intangible;” motion to dismiss granted); *Woodie v. Azteca*, 9 Misc3d 1104(A), 806 NYS2d 449 (N.Y. Sup. Ct., N.Y. County 2005) (mailing and contact lists are “intangible;” motion to dismiss granted).

#### Court of Appeals

The New York Court of Appeals, however, in applying the tort of conversion to, for instance, the theft of stock, has indicated:

[a]n owner does not forfeit his ownership for failure to take good care of intangible personal property any more than he forfeits it for failure to take good care of his watch.

*Hartford Accident & Indemn. Co. v. Walston & Co.*, 21 NY2d 219, 221, 287 NYS2d 58, 61 (1967) (emphasis added), adhered to on rearg., 22 N.Y.2d 672, 291 N.Y.2d 366 (1968) (citations omitted).

As technologies change and the law evolves, courts in certain instances have found a tangible representation of an idea to be subject to a cause of action alleging the tort of conversion. See *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 FSupp2d 609, 618 (SDNY 2003) (wrongful misappropriation

of an idea for a Web site is “misconduct” that is the “essence of conversion;” idea could not be converted, as a matter of law, but conversion can be “of an idea reduced to practice, i.e., the Web site,” which, in *Astroworks*, was alleged to be both copyrighted and trademarked); *Matzan v. Eastman Kodak Co.*, 134 AD2d 863, 864, 521 NYS2d 917, 918 (4th Dept. 1987) (“There is no protected interest in an idea, but only in the tangible expression or implementation of an idea,” motion to dismiss granted where defendant allegedly “converted three of plaintiff’s ideas.”).

#### The ‘Shmueli’ Holding

Recently, in *Shmueli*, 9 Misc3d at 590, 802 NYS2d at 873, the court noted that whether a “virtual” computerized client/investor list can under New York law be converted “is a new one in our law,” and denied defendants’ motion for summary judgment, indicating:

[w]hile a handwritten list is a “literal” document, the computerized one is to coin relevant jargon “virtual.” Virtual, though it may be, it can undeniably transform to literal form by mere expedient of a printing key function. The question is, does the common-law tort of conversion become an extinct vestige of the past as to documents maintained on a computer, merely because traditional definitions of documents evolve over time to a point where wood pulp is no longer the only required medium upon which to record data? Does the

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concept of conversion, i.e., wrongful exclusionary retention of an owner's physical property, apply to an electronic record created by a plaintiff and maintained electronically as much as it does to a paper record so created? The court today holds that it does.

Id. at 592, 802 NYS2d at 874-75. The court further stated that the Court of Appeals' "practical view" expressed in *Hartford*, as noted above, should "apply equally to the present generation of electronic documents which are just as vulnerable to theft and wrongful transfer as paper documents, if indeed, not even more so." Id. at 593, 802 NYS2d at 875. In addition, the court noted that the "medium of recordation whether ancient or modern should not be deemed germane to a court's substantive application of the salutary principles underlying the tort of conversion. Otherwise, the remedial benefits of this remedy to victims of civil theft would soon become lost, due to what might be perceived as the law's inability to keep up with science." Id. at 593 n.4, 802 NYS2d at 876 n.4.

The court in *Shmueli*, at 594, 802 NYS2d at 876, however, indicated that its conclusion "does not diminish plaintiff's burden to prove the existence of all the elements necessary to sustain a claim for conversion applicable in a case involving non-electronic documents and things" and did not "go so far as to adopt [the court's] application [in *Kremen v. Cohen*, 337 F3d 1024 9th Cir. 2003] of the tort of conversion to such intangibles as domain names."

In *Halcyon Tech., Inc. v. Ciment*, 10 Misc3d 1064(A), 2005 WL 3501587, (N.Y. Sup. Ct., N.Y. County Nov. 15, 2005), plaintiffs moved to renew and reargue the prior dismissal of their conversion claim based on the decisions in *Shmueli* and *Astroworks*. The court adhered to its prior decision because, as noted in *Shmueli*, the traditional elements of conversion still had to be alleged, and plaintiffs had only alleged that the defendant "copied the relevant [electronic] information,

not that he destroyed it or erased it or did anything else that denied plaintiff's access to it"—there was no allegation that plaintiffs were "excluded" from the property. Id. at \*3.

### 'The Knot Inc.' Case

In *The Knot, Inc. v. Ruben Rotteveel and Fairchild Bridal Group, Inc.*, Index No. 602985/05 (N.Y. Sup. Ct., N.Y. County Feb. 2, 2006), the court was presented with the question of whether "documents" maintained in electronic form can be converted. In *The Knot*, plaintiff alleged that a former employee had "deleted and/or destroyed documents and/or trade secrets and confidential

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*The court said Rotteveel exercised unauthorized dominion over the documents by removing or deleting them from the hard drive to the exclusion of The Knot's rights.*

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information" maintained on the company's computers, before he left the company to join a competitor. Id. at 10. When the employee's laptop and desktop computers were searched by plaintiff, it was unable to find important information that should otherwise have been there. The employee claimed that the hard-drives on both computers "crashed," but was unable to explain why the two hard drives had failed. Id. at 4.

On ruling on defendants' motion to dismiss, the court held that plaintiff had stated a claim for conversion and replevin of information maintained solely on a computer where in the complaint plaintiff "identifies the specific documents it demanded" from defendant. Id. at 17. The specific "documents" identified included the computer "code" for a contract entry system, as well as technical information and other information on

past and ongoing company projects. The court held that the plaintiff:

has a superior right of possession to these stored documents because it is the legal owner of the proprietary business information. Further, The Knot sufficiently alleges that Rotteveel exercised unauthorized dominion over the documents by either removing or deleting them from the computer's hard drive to the exclusion of The Knot's rights.

Id. at 18. (internal citations to exhibits omitted). Citing to *Shmueli*, the court found that "these allegations are sufficient to plead a cause of action for conversion and replevin." Id.

### Conclusion

As noted above, the formerly longstanding view of the tort of conversion would require that for such a claim to be sustained that the "property" must be in a tangible form. However, the tort of conversion is evolving in an attempt to keep in step with the advances in technology, where "property" may now only exist, for instance, on a computer hard drive in the form of computer code or as an electronic document. This evolution is required as more and more businesses are developing "property" that may only exist in electronic form, and migrating to systems through which their information may solely be retained in electronic form.

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