

STATE OF NEW YORK  
SUPREME COURT : COUNTY FO ERIE

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PIGGLY WIGGLY CAROLINA CO., INC.,

Plaintiff,

v.

DENNIS FRANK SR., and  
SYNERGY ENERGY HOLDINGS, LLC,

Defendants.

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COMMERCIAL DIVISION  
DECISION AND ORDER

Index No.: 2014 -602644

2014 -



BEFORE:                   **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES:       **ZDARSKY, SAWICKI & AGOSTINELLI, LLP**

Joseph E. Zdarsky, Esq.,  
Daniel J. Bobbett, Esq., and  
David E. Gutowski, Esq., of Counsel  
Attorneys for Plaintiff

**HODGSON RUSS LLP**  
Steven W. Wells, Esq., and  
Craig T. Lutterbein, Esq., of Counsel  
Attorneys for Defendants

**WALKER, J.**

Plaintiff, Piggly Wiggly Carolina Co., Inc., has made an application, pursuant to CPLR §3212, for summary judgment on its breach of contract and conversion claims against Defendant, Synergy Energy Holdings, LLC ("Synergy"), and on its conversion claim against Defendant, Dennis Frank, Sr. ("Frank").

Synergy concedes it breached its agreement with Plaintiff, and does not defend against this cause of action. Accordingly, Plaintiff's motion for summary judgment is granted relative to

the First Cause of Action set forth in the Amended Complaint.

### BACKGROUND

Plaintiff, a supermarket chain, retained Synergy to audit, process, and pay utility bills for each of the stores in its chain - which at its peak numbered in excess of 100 stores. Synergy provided energy consulting services for companies, like Plaintiff, with too many physical locations to efficiently review and process utility bills internally. Frank was Synergy's managing member.

In order to service and identify its customers, Synergy developed and maintained the following system: For each of its customers, including Plaintiff, Synergy established a bank account held by, and titled to Synergy's affiliate, Utilityaccounts.com Inc., but which was identified further with each customer's name (the "Payment Accounts"); Synergy's customers remitted funds - for their respective and audited utility bills - into the Payment Accounts, which funds were then "swept" on a daily basis into a larger account for which Frank was signatory, and which allowed Synergy to collect interest on the swept funds (the "Consolidated Account"); following the sweeps into the Consolidated Account, Synergy assumed the obligation to pay its customers' utility bills, which it did by "re-sweeping" funds from the Consolidated Account to each of the Payment Accounts to cover checks drawn on the Payment Accounts for these bills.

As Frank admits, the main purpose of the daily sweeps into the Consolidated Account was to allow Synergy to collect interest on these consolidated funds (which funds, at times, totaled well into the millions). Collecting this interest was an integral part of Synergy's business model and accounted for a large portion of Synergy's revenue (as did the transaction fees Synergy charged its customers for its consulting and bill paying services - \$3.75 per

transaction)(the “Synergy Fees”). The swccps were also consistent with Synergy’s business model, whereby funds in the Consolidated Account created an asset of Synergy with a corresponding liability to pay the customers’ utility bills.

Plaintiff’s relationship with Synergy was governed by two agreements, which the parties have identified as the “TopSource<sup>1</sup> Agreement” and a Letter Agreement (collectively, the “Agreements”).

Frank acknowledged that Synergy’s internal business controls were flawed, resulting in Synergy paying more in bank fees, utility company late fees, and deposit fees than the aggregate of the funds it was collecting from its customers to pay their utility bills and the Synergy Fees.

#### STANDARD OF REVIEW

In order to prevail on a motion for summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law (*Ferluckaj v. Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]). This requires sufficient admissible evidence, which then shifts the burden to the opposing party to produce sufficient admissible proof of the existence of genuine issues of material fact (*id* at 320). “Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment (*Gilbert Frank Corp. v. Fev. Ins. Co.*, 70 NY2d 966, 967 [1988] [citation omitted]).

Moreover, factual issues raised by the opposing party must be genuine, as opposed to speculative (*Trahwen LLC v. Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1468 [4<sup>th</sup> Dept 2013]).

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<sup>1</sup>TopSource is an association of supermarkets, including Plaintiff, and other commercial entities, formed to negotiate contracts in bulk with service providers like Synergy.

## DISCUSSION

### Plaintiff's Conversion Claim Against Synergy

The Appellate Division, Fourth Department has defined "conversion" as

any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property (*Meese v. Miller*, 79 AD2d 237, 242 [4<sup>th</sup> Dept 1981]).

Where the alleged conversion is of money, a plaintiff must demonstrate that the funds it claimed were converted were specifically identifiable and designated for a purpose (*Salatino v. Salatino*, 64 AD3d 923 [3<sup>rd</sup> Dept 2009]; see also, *Amity Loans, Inc. v. Sterling Nat. Bank & Trust Co.*, 177 AD2d 277, 279 [1<sup>st</sup> Dept 1991] ["an action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question"]). Accordingly, to prevail on its motion for summary judgement against Synergy, Plaintiff must show that Synergy was required to segregate Plaintiff's funds and use them only to pay Plaintiff's utility bills.

Plaintiff contends that Synergy was required to segregate the funds Plaintiff remitted to its respective Payment Account, which Synergy set up for Plaintiff (and to which Frank was a signatory), and labeled as "UTILITYACCOUNTS.COM INC- Piggly Wiggly Escrow". Neither the Payment Accounts, the TopSource Agreement, nor the Letter Agreement contain escrow provisions. Frank contends that Plaintiff's Payment Account was mistakenly labeled "Escrow" by a low-level Synergy employee lacking authority to do so, and that, because a large portion of Synergy's revenues were to be derived from interest earned on the Consolidated Account, Synergy would never have entered into an "escrow relationship" with any of its customers

wherein it would be required to segregate funds and not utilize the Consolidated Account.

Regardless, it is clear from the record that Frank (and Synergy) knew that the funds Plaintiff remitted to its Payment Account were to be used solely to pay Plaintiff's current utility bills - not to be swept into the Consolidation Account (along with Synergy's other customers' funds) and be used to pay Synergy's bills (such as bank fees Synergy incurred on the Consolidation Account which, at times, amounted to \$50,000 per month; late fees; or insufficient funds fees), or Synergy's other customers' utility deposits, bills or late charges. Moreover, Frank testified during his deposition that Plaintiff's wire transfers into its Payment Account corresponded with, and were in the exact amount required to pay Plaintiff's current utility bills - as Synergy itemized, audited and reported on allocation statements it e-mailed to Plaintiff on at least a weekly basis.

Equally important, in the months immediately preceding Synergy's financial collapse (and no later than September, 2010), Frank was aware of "shortfalls" in the Consolidation Account, and that "[Defendants] could not fix the problem ... [which peaked at] something in excess of six million [dollars]" (May 28, 2013 deposition of Dennis M. Frank, Sr ("Frank EBT"), at pp. 237-8).

Incredibly, Defendants continued to solicit, collect and sweep funds from the Payment Accounts into the woefully underfunded Consolidation Account - under the auspices of paying its customers' respective current utility bills. With respect to Plaintiff, during the period October 5-10, 2010, those sweeps amounted to \$649,114.99 (Affidavit of Robert Masche, sworn to on August 19, 2014, at Ex. "O", and Affidavit of Robert Masche, sworn to on January 2, 2015, at Ex. "A").

Plaintiff is entitled to summary judgment on its Second Cause of Action against Synergy [see *Amity Loans, Inc v. Sterling National Bank & Trust Co.*, 177 AD2d 277 (1<sup>st</sup> Dept. 1991)].

**Plaintiff's Conversion Claim Against Frank**

Frank, as Synergy's corporate officer, may not be held liable for conversion unless he knew of, or participated in Synergy's commitment of the tort (*Fitch v. TMF Sys.*, 272 AD2d 775 [3<sup>rd</sup> Dept 2000]). This Court has determined that Synergy committed the tort of conversion - a predicate to a finding that Frank is personally liable. As set forth above, while fully aware of the magnitude of the Consolidation Account shortfall and that it could not be rectified, Frank (a signatory to both the Payment Accounts and the Consolidation Account) continued to cause (or at least have knowledge of) fund sweeps from Plaintiff's Payment Account to the Consolidation Account.

Plaintiff is entitled to summary judgment on its Second Cause of Action against Frank (*KeyBank v. Grossi*, 227 AD2d 841 [3<sup>rd</sup> Dept. 1996]; see also *People v. Apple Health & Sports Clubs, Inc.*, 206 AD2d 266 [1<sup>st</sup> Dept. 1994][*lv denied* 84 NY2d 1004]; *Retropolis, Inc. v. 14<sup>th</sup> Street Development LLC*, 17 AD3d 209 [1<sup>st</sup> Dept. 2009]).

Accordingly, it is hereby

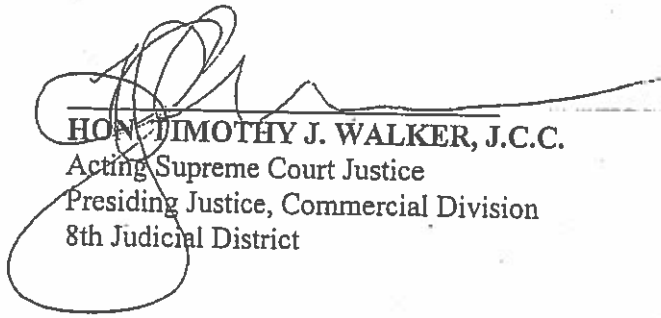
**ORDERED**, that Plaintiff's motion for summary judgment on its First Cause of Action in the Amended Complaint (breach of contract) is granted, and Plaintiff is awarded the sum of \$649,114.99, together with interest from October 10, 2010, and costs; and it is further

**ORDERED**, that Plaintiff's motion for summary judgment on its Second Cause of Action in the Amended Complaint (conversion) against Synergy and Frank, jointly and severally, is granted, and Plaintiff is awarded the sum of \$649,114.99, together with interest from October

10, 2010, and costs.

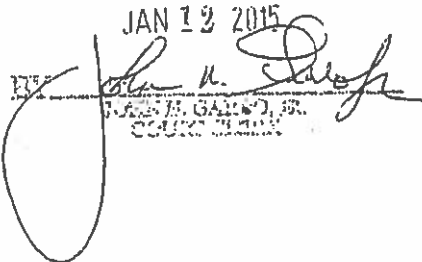
This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: January 12, 2015  
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.  
Acting Supreme Court Justice  
Presiding Justice, Commercial Division  
8th Judicial District

GRANTED

JAN 12 2015  
BY   
JOHN H. GAROFALO, JR.  
COURT CLERK