

169 A.D.3d 649  
Supreme Court, Appellate Division,  
Second Department, New York.

GMP **FUR** TRADE FINANCE, LLC, Respondent,  
v.  
Dean **BRENNER**, Appellant, et al., Defendants.

2016–07740

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2016–12752

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(Index No. 4859/11)

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Argued—October 19, 2018

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February 6, 2019

### Synopsis

**Background:** Appeal was taken from order and judgment of the Supreme Court, Nassau County, [Stephen A. Bucaria, J.](#), entered in favor of plaintiff in action to recover damages for breach of fiduciary duty, breach of contract, conversion, and fraud.

**Holdings:** The Supreme Court, Appellate Division, Second Department, held that:

[1] on motion for summary judgment in action for breach of fiduciary duty, plaintiff lender failed to establish its prima facie entitlement to judgment as a matter of law.

[2] on motion for summary judgment in action for breach of contract and conversion, lender failed to establish its prima facie entitlement to judgment as a matter of law; and

[3] on motion for summary judgment in action for fraud, lender failed to establish prima facie entitlement to judgment as a matter of law.

Affirmed in part, and dismissed in part.

West Headnotes (5)

### [1] Appeal and Error

➔ [Effect of right to review on appeal from final judgment](#)

Right of direct appeal with regard to order granting plaintiff lender's motion for summary judgment against defendant on issue of damages in action for breach of fiduciary duty terminated with the entry of judgment.

[Cases that cite this headnote](#)

### [2] Judgment

➔ [Evidence and Affidavits in Particular Cases](#)

On motion for summary judgment in action for breach of fiduciary duty, hearsay evidence that defendant had misappropriated funds, along with unauthenticated bank records, were insufficient to establish lender's prima facie entitlement to judgment as a matter of law.

[Cases that cite this headnote](#)

### [3] Fraud

➔ [Fiduciary or confidential relations](#)

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct.

[Cases that cite this headnote](#)

### [4] Judgment

➔ [Contracts](#)

### Judgment

➔ [Torts](#)

On motion for summary judgment in action for breach of contract and conversion, hearsay evidence that defendant had misappropriated funds was insufficient to

establish lender's prima facie entitlement to judgment as a matter of law.

[Cases that cite this headnote](#)

## [5] Judgment

 Torts

On motion for summary judgment in action for fraud, lender failed to establish that defendant made a misrepresentation upon which lender justifiably relied, as required to establish its prima facie entitlement to judgment as a matter of law.

[Cases that cite this headnote](#)

### Attorneys and Law Firms

**\*\*386** [Mark E. Goidell](#), Garden City, NY, for appellant.

Allison M. Kourbage, P.C., Melville, NY, for respondent.

[ALAN D. SCHEINKMAN](#), P.J., [JOHN M. LEVENTHAL](#), [JOSEPH J. MALTESE](#), [VALERIE BRATHWAITE NELSON](#), JJ.

### DECISION & ORDER

**\*649** In an action, inter alia, to recover damages for breach of fiduciary duty, the defendant Dean Brenner appeals from (1) an order of the Supreme Court, Nassau County (Stephen A. Bucaria, J.), entered April 13, 2016, and (2) a judgment of the same court dated July 21, 2016. The order, insofar as appealed from, granted that branch of the plaintiff's motion which was for summary judgment on the issue of damages against the defendant Dean Brenner and denied the cross motion of the defendant Dean Brenner, made jointly with the defendant Harmon Levine, for a jury trial on the issue of damages. The judgment, insofar as appealed from, upon an order of the same court dated July 28, 2014, granting that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging breach of fiduciary duty insofar as asserted against the defendant Dean Brenner, and upon the order entered April 13, 2016, is in favor of the plaintiff and against the defendant Dean Brenner in the total sum of \$ 1,755,630.79.

ORDERED that the appeal from the order entered April 13, 2016, is dismissed; and it is further,

ORDERED that the judgment is reversed insofar as appealed from, on the law, that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging breach of fiduciary duty insofar as asserted against the defendant Dean Brenner is denied, the order dated July 28, 2014, is modified accordingly, and so much of the order entered April 13, 2016, as granted that branch of the plaintiff's motion which was for summary judgment on the issue of damages against the defendant Dean Brenner and denied the cross motion of the defendant Dean Brenner for a jury trial on the issue of damages is vacated; and it is further,

ORDERED that one bill of costs is awarded to the defendant Dean Brenner.

**\*650 [1]** The appeal from the order entered April 13, 2016, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment (*see Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

**\*\*387** The plaintiff commenced this action against Dean Brenner, Harmon Levine, and others to recover damages for breach of fiduciary duty, breach of contract, conversion, and fraud. The plaintiff moved, inter alia, for summary judgment on the issue of liability insofar as asserted against the defendant Dean Brenner, alleging that he had misappropriated funds and goods in connection with his servicing of four finance agreements into which the plaintiff had entered with nonparties. In an order dated July 28, 2014, the Supreme Court, inter alia, granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the breach of fiduciary duty cause of action insofar as asserted against Brenner.

Subsequently, with leave of court, the plaintiff moved for summary judgment on the issue of damages. Brenner and Levine cross-moved for a jury trial on the issue of damages. In an order entered April 13, 2016, the Supreme Court granted the plaintiff's motion and denied the cross motion, determining that the measure of damages was the

original amount loaned by the plaintiff pursuant to the four finance agreements, plus statutory interest as of the date that the plaintiff entered into the finance agreements. The judgment dated July 21, 2016, inter alia, is in favor of the plaintiff and against Brenner in the total sum of \$ 1,755,630.79. Brenner appeals.

[2] [3] In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct (see *McSpedon v. Levine*, 158 A.D.3d 618, 621, 72 N.Y.S.3d 97; *Hoeg Corp. v. Peebles Corp.*, 153 A.D.3d 607, 609, 60 N.Y.S.3d 259; *Guarino v. North Country Mtge. Banking Corp.*, 79 A.D.3d 805, 807, 915 N.Y.S.2d 84; *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644). Here, in moving for summary judgment on the issue of liability insofar as asserted against Brenner, the plaintiff relied primarily on an affidavit of its managing member, in which the managing member stated that he was told by certain nonparties that Brenner had misappropriated funds and goods. This hearsay evidence was insufficient to satisfy the plaintiff's burden of establishing its prima facie entitlement to judgment as a matter of law on the breach of fiduciary duty cause of action insofar as asserted against Brenner (see \*651 *Town of Fishkill v. Turner*, 60 A.D.3d 932, 933, 876 N.Y.S.2d 92; *Kramer v. Oil Servs., Inc.*, 56 A.D.3d 730, 731, 868 N.Y.S.2d 246; *Wen Ying Ji v. Rockrose Dev. Corp.*, 34 A.D.3d 253, 254, 823 N.Y.S.2d 400). Additionally, the plaintiff could not sustain its prima facie burden by relying on unauthenticated bank records submitted through an attorney affirmation for the first time with its reply papers (see *Poole v. MCPJF, Inc.*, 127 A.D.3d 949, 949–950, 7 N.Y.S.3d 399; *DiLapi v. Saw Mill Riv., LLC*, 122 A.D.3d 896, 900, 998 N.Y.S.2d 60; *Daguerre, S.A.R.L. v. Rabizadeh*, 112 A.D.3d 876, 879, 978 N.Y.S.2d 80; *Damas v. Valdes*, 84 A.D.3d 87, 96, 921 N.Y.S.2d 114). Thus, the Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the breach of fiduciary duty cause of action insofar as asserted against Brenner.

[4] [5] The alternative grounds for affirmance presented by the plaintiff (see *Parochial Bus Sys. v. Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 470 N.Y.S.2d 564, 458 N.E.2d 1241) are without merit. The plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on the breach of contract cause of action insofar as asserted against Brenner, as the \*\*388 plaintiff relied on hearsay evidence to establish the breach (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *MPEG LA, LLC v. Audiovox Elecs. Corp.*, 84 AD3d 1189, 1190, 923 N.Y.S.2d 861; *McMahan v. McMahan*, 66 A.D.3d 970, 970, 886 N.Y.S.2d 825). Similarly, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on the conversion cause of action insofar as asserted against Brenner, as the plaintiff relied on the same hearsay evidence to establish Brenner's unauthorized assumption and exercise of the right of ownership over its funds and goods (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). Finally, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on the fraud cause of action insofar as asserted against Brenner, as the plaintiff failed to establish that Brenner made a misrepresentation upon which it justifiably relied (see *id.*; *Matter of Imperato*, 149 A.D.3d 1072, 1073, 53 N.Y.S.3d 661).

In light of our determination, we need not reach the parties' contentions regarding damages.

SCHEINKMAN, P.J., LEVENTHAL, MALTESE and BRATHWAITE NELSON, JJ., concur.

#### All Citations

169 A.D.3d 649, 93 N.Y.S.3d 385, 2019 N.Y. Slip Op. 00858