

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER
MINUTE ORDER**

Department: C 15

COURT CONVENEED AT: -----	ON: NOVEMBER 28, 2006
JUDGE / COMM: DANIEL J. DIDIER	CLERK: CHERYL NEUENSCHWANDER
BAILIFF: J. HAGER	REPORTER: NONE

AND THE FOLLOWING PROCEEDINGS WERE HAD:

03CC15060 PAYDAY LOAN CORPORATION VS BENJAMIN MARSH

The Court having taken this matter under submission now rules as follows:

After court trial in this matter, including review of the evidence, both testimonial and documentary, the taking of judicial notice of the pleadings and court file, and argument presented, the court, on its own motion, issues the statement of decision per CC632 and Cal. Rules of Ct. 232, making the following critical findings:

1. This matter is set for jury trial, as requested by plaintiff, Payday Loan Corporation ("Payday").
2. Defendant, Carrlisa Fitch, did not appear at trial, and her default was taken. Plaintiff's counsel will proceed to obtain a default judgment by declaration per CCP585(d).
3. At the outset, Defendant, Benjamin Marsh, filed two motions: (A) Motion for judgment on the pleadings, and (B) Motion to bifurcate trial on the constructive trust claim. Motion B was granted, as noted, infra; with Motion B taken under submission.
4. Payday's action against Benjamin Marsh pertains only to the First and Fifth causes of action for Civil Conspiracy and Constructive Trust, respectively. Plaintiff alleges that it is the victim of check cashing fraud in that, amongst many defendants, defendants brother, Talcum Marsh, gave monies fraudulently obtained to Benjamin Marsh, some of which were used to obtain or make payments on parcels of real property presently maintained in Benjamin's name. Plaintiff seeks a determination than Benjamin holds these properties as a

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constructive trustee for the benefit of plaintiff. The civil conspiracy count does not include Benjamin, by name, and it does not contain specific allegations or overt acts pertaining to wrongdoing by Benjamin, only by reference to the fifth cause of action for commingling of funds and constructive trust. No civil wrong, by way of tort, or otherwise, is alleged in the conspiracy count.

5. Court considers the "gist of the action test." *C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal. 3d 1, 9. Constructive trust is an equitable remedy. Evidence is primarily documentary, and is the basis of both counts. While the conspiracy count is legal, the equitable remedy preponderates, and the court will try the constructive trust count first. CCP 598, 1048.

6. Plaintiff exhibits 1-8, 27-28, 31-33, 35, 37-38, 40-46, and 50 were received into evidence, with defendant's objection as to relevancy and hearsay taken under submission. Judicial notice was taken of the federal criminal proceedings contained in the above exhibits.

7. While the evidence discloses substantial fraud by the various defendants against, inter alia, Payday Loan Corporation. Plaintiff has failed to satisfy the burden of proof to establish a constructive trust over funds used to acquire or service mortgage obligations of the real properties noted in the fifth cause of action.

8. There is no compelling evidence linking the corpus funds used to acquire or to service mortgage

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obligations of real properties owned by Benjamin Marsh to Payday Loan Corporation or to Talcum Marsh. Evidence exists to raise inferences that Talcum Marsh and Benjamin Marsh may have commingled funds and that the source of the funds may even have been fraudulently obtained. However, more than a bare inference is required to tie plaintiffs funds to the corpus or 'res' to establish a constructive trust. CC2223, 2224; *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal. App. 4th 980, 990. There is no tracing of funds between the parties. Dates noted in the complaint and the evidence differ, and only relate to funds in a generic sense. Benjamin Marsh's guilty plea to "structuring" in federal court, and the factual basis therein, does not implicate the corpus of funds related to the real properties. Based on this record, there is no evidence of wrongful conduct, tortuous or otherwise, of Benjamin Marsh, by way of conversion or conspiracy that can attributed to funds of Payday Loan Corp, to his brother's criminal conduct, or that of Carlissa Fitch, much less to funds used for his real properties.

9. The complaint does not state a cause of action against Benjamin Marsh as to the first cause of action for conspiracy. Motion for Judgment on the Pleadings is granted. Motion is timely. *Stoops v. Abbassi* (2002) 100 Cal. App. 4th 644, 650. A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. *Unruh v. Truck Insurance Exchange* (1972) 7 Cal. 3d

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616,631. The plaintiff must then allege that each alleged conspirator in some way participated in the wrong. *Ibid.* Plaintiff has made no such allegations, and has not indicated the participation of Benjamin Marsh, or any linkage between him and the other alleged co-conspirators. Plaintiff has orally moved to amend the conspiracy cause of action, to conform to proof. Court does not believe the facts of the case, based on the record, would support any amendment to bring Benjamin Marsh within the ambit of the conspiracy cause of action. Motion for leave to amend denied. Nonetheless, even if amendment was allowed, this court's finding, in bifurcating and first trying the equitable cause of action for constructive trust, that there is no conversion or evidence of wrongful conduct, as such, would be dispositive as to the first cause of action, and renders such cause moot, precluding the need for further trial of the legal action, either by court or jury. *Walton v. Walton* (1995) 31 Cal. App. 4th 277,

10. Judgment for Defendant Benjamin Marsh on the First and Fifth causes of action.

Defendant awarded costs. Defendant to prepare the Judgment.

11. Continued jury trial, presently calendared for December 4, 2006, is ordered off-calendar.

ENTERED 11/28/06

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CLERK'S CERTIFICATE OF MAILING (C.C.P. 1013A) - I certify that I am not a party to this cause, over 18, and a copy of this document was mailed first class postage fully prepaid, in a sealed envelope addressed as shown. Mailing and execution of this certificate occurred on 11/29/2006 in Santa Ana, California.

ALAN SLATER, CLERK, by Cheryl Neuenschwander, Deputy

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