

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

ROBERT MALCOLM, an individual and)
GOLF & WINE, LLC, an Idaho Limited)
Liability Company,)
Plaintiffs,)
vs.)
BORDEN LADNER GERVAIS LLP, an)
Ontario Limited Liability Partnership,)
Defendant.)
_____)

Case No. **CV 2010 1910**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the motion for summary judgment brought by defendant Borden Ladner Gervais, LLP (a Canadian law firm organized in Ontario and having offices in Vancouver, British Columbia). Complaint, p. 1, ¶ 1.2; Answer, p. 2, ¶ 1.2. Plaintiff Robert Malcolm (Malcolm) *pro se* filed his Complaint against Defendant Borden Ladner Gervais, LLP (BLG) on March 9, 2010. BLG was retained by the children of Edward Fu (Fu), the beneficiaries of a trust created in 1995. Fu passed away in May 2008, and Fu's children are also the beneficiaries of Fu's will. Malcolm was appointed as executor of the will. The trust:

...[W]holly owns an Isle of Jersey company called Woodwest Holdings Limited ("Woodwest"). Woodwest wholly owns a State of Washington company called West Wood Investments, Inc ("West Wood"). West Wood also owns 99.9% of a State of Idaho limited liability company called Fortress, LLC ("Fortress").

Affidavit of Gary L. Wilson, p. 2, ¶ 5. (Gary Wilson (Wilson) is a member of BLG, and

Malcolm claims Wilson and another director were appointed as directors of West Wood, Complaint p. 4, ¶3.18). Woodwest Holdings Limited is an Isle of Jersey Private Company. *Id.*, p. 2, ¶ 3.2. (The Isle of Jersey is not part of the United Kingdom but is a possession of the British Crown, and is part of the Channel Islands, located closer to France than England. The Isle of Jersey is near the Isle of Guernsey, both of which were sources for dairy cattle bearing the names of those islands brought over by emigrants to the United States). Malcolm was issued the remaining 0.1% interest in Fortress. Affidavit of Gary L. Wilson, p. 2, *Id.*, ¶ 6. “Fortress is the sole owner of several subsidiary companies, including 313 Sherman Avenue, LLC, which owns the building in which the Wine Cellar restaurant is situated.” *Id.*, ¶ 7. The Wine Cellar is a restaurant in Coeur d’Alene, Idaho. “Malcolm was the member manager of Fortress and President of West Wood.” Complaint, p. 2, ¶ 3.3.

Malcolm managed Fortress until November 2008, and alleges he contributed his personal resources to Fortress and West Wood, “including loans and personal guarantees to lenders and suppliers.” Complaint, p. 3, ¶¶ 3.8 - 3.9. In October 2008, Malcolm was informed by BLG that the beneficiaries wished for BLG to manage West Wood and Fortress with Malcolm’s cooperation. *Id.*, p. 4, ¶ 3.18.

Malcolm alleges BLG’s actions, presumably at the request of the beneficiaries, “were unjustified, willful interference with Malcolm’s contractual agreement with Woodwest to manage West Wood and Fortress and Malcolm’s rights as member manager of Fortress.” Complaint, p. 6, ¶ 4.2. Malcolm also alleges BLG’s actions amounted to the willful conversion of the Wine Cellar restaurant, of West Wood property (then under the control of Malcolm), and of Malcolm’s property interest in and rights to confidential corporate and personal records. *Id.*, p. 7, ¶¶ 4.6 - 4.8. Finally, Malcolm

alleges BLG unlawfully interfered with his contractual agreements with Woodwest, West Wood, Fortress, Coeur d'Alene attorney Robert Fasnacht, accountant Michael Bibin, the Wine Cellar, LLC, and possibly others. *Id.*, p. 8, ¶ 4.12.

On August 19, 2010, BLG filed its Motion for Summary Judgment, memorandum in support thereof, and the Affidavit of Gary Wilson. On October 25, 2010, Malcolm filed his "Memorandum" and an "Affidavit of Robert D.C. Malcolm". The Memorandum contained a suggestion (not a motion), that "The affidavit of Wilson should be struck in whole..." Memorandum, p. 2. On November 2, 2010, BLG filed its "Reply Memorandum in Support of Defendant's Motion for Summary Judgment, Motion to Strike." Oral argument was held on November 9, 2010. This matter is currently set for a five-day jury trial commencing March 14, 2011.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting

inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

III. ANALYSIS.

A. Golf & Wine is Not Represented in this Action.

Preliminarily, and although not raised by either party, Malcolm cannot represent anyone other than himself *pro se*. The Idaho Supreme Court has stated:

We recognize the inherent right of a natural person to represent himself Pro Se, but this right does not extend to representation of other persons or corporations.

Weston v. Gritman Memorial Hospital, 99 Idaho 717, 720, 587 P.2d 1252, 1255 (1978).

In *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 215 P.3d 457

(2009), the Idaho Supreme Court discussed its holdings in two previous cases. In

White v. Idaho Forest Indus., 98 Idaho 784, 572 P.2d 887 (1977) and *Kyle v. Beco*

Corp., 109 Idaho 267, 707 P.2d 378 (1985), the Court adopted the rule that business

entities must be represented by attorneys before the Idaho Industrial Commission; the

rule applies equally to the practice of law before any judicial body. *Indian Springs*, 147

Idaho 737, 744-45, 215 P.3d 457, 464-65.

In sum, the law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body or a judicial body.

Id. In *Indian Springs, LLC*, the Idaho Supreme Court specifically noted that although

individuals are permitted to represent their property interest in a *pro se* capacity,

trustees may not do so. 147 Idaho 737,745, 215 P.3d 457, 465. "It is fairly well-

established that a trustee's duties in connection with his or her office do not include the

right to present an argument *pro se* in the courts." *Id.* Thus, although Malcolm may

represent himself *pro se*, he may not represent the interests of Golf & Wine, LLC (an

entity named as a plaintiff in the instant litigation) *pro se* in accordance with Idaho law.

B. Cross Motions to Strike.

At oral argument on November 9, 2010, the Court granted BLG's motion to strike and denied Malcolm's motion to strike. The following is a brief analysis regarding those rulings.

In Malcolm's October 25, 2010, reply to BLG's motion for summary judgment, captioned simply "Memorandum", he moves the Court to strike Gary Wilson's Affidavit. And, in BLG's Reply Memorandum in Support of Defendant's Motion for Summary Judgment, Motion to Strike, BLG moves the Court to strike all attachments to Malcolm's October 25, 2010, Affidavit in addition to two paragraphs contained in the Affidavit.

The decision to grant or deny a motion to strike is reviewed under the abuse of discretion standard. *State v. Campbell*, 123 Idaho 922, 925, 854 P.2d 265, 268 (Ct.App. 1993). The weight to be given an affidavit is a matter for this Court. *City of McCall v. Seubert*, 142 Idaho 580, 588, 130 P.3d 1118, 1126 (2006) ("The City's argument that the affidavit is irrelevant, lacking in foundation and based upon hearsay are likewise without merit, particularly in light of the district judge's statement that he would consider the affidavit and 'give it the weight to which [he] think[s] it's entitled.'")

Malcolm seeks an Order of this Court striking Gary Wilson's Affidavit in its entirety, "as being misleading, or in part, as being not factual, but merely the opinions of Wilson." Memorandum, p. 2, ¶ 2. Specifically, Malcolm takes issue with Wilson not being an attorney licensed in either Idaho or the Isle of Jersey, and therefore seeks to have paragraphs 3, 8, and 9 of Wilson's affidavit stricken. Memorandum, pp. 2-3, ¶¶ b, c and f. Additionally, Malcolm argues paragraph 13 is mere opinion and the words "upon learning of Malcolm's misfeasance" should be stricken; paragraph 16 should be

stricken as being only opinion and the documents referred to therein are inadmissible and incomplete and void for uncertainty; paragraph 17 is irrelevant; paragraph 20 is incorrect; and paragraph 21 is “a matter for resolution in the trial of this case.” *Id.*, pp. 3-4, ¶¶ k, l, m, o, and p.

In its Reply Memorandum, BLG seeks an Order of the Court striking paragraph 13 of Malcolm’s Affidavit, in addition to all exhibits referenced within that paragraph and attached to the affidavit, for failing to set forth facts making such attachment admissible. Reply Memorandum in Support of Motion for Summary Judgment, pp. 4-5. BLG also argues paragraphs 14 and 15 of Malcolm’s Affidavit contain inadmissible hearsay. *Id.*, p. 5.

Affidavits supporting or opposing summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters contained in the affidavit. I.R.C.P. 56(e). Reviewing Courts will only consider proof that complies with Rule 56(e) when considering a trial court’s ruling on summary judgment. *Tri State Land Co., Inc. v. Roberts*, 131 Idaho 835, 839, 965 P.2d 195, 199 (Ct.App. 1998). In *Tri State*, the Court held a declaration had properly been excluded from consideration by the District Court where it was unsworn, made no statement that facts contained within it were based on personal knowledge, and contained hearsay information. 131 Idaho 835, 838-39, 965 P.2d 195, 198-99.

Here, the Affidavit of Malcolm contains no statement that the facts contained within it are based on his personal knowledge, nor does Malcolm’s affidavit affirmatively show he is competent to testify to the matters contained therein. Arguably, Malcolm’s entire affidavit is therefore not compliant with the requirements of I.R.C.P. 56(e) and

improperly before the Court.

Paragraph 13 purports to lay the foundation for the attachments made as Exhibit

1. Malcolm testifies:

Attached as exhibit 1 are copies of various emails, letter, and documents involving Mr. Wilson and his clients. In essence Mr. Wilson requested cooperation and demanded obedience. He took possession of assets of me, my companies, and the companies I managed, as set forth in the January 13, 2009 letter from Davis, LLP to Mr. Wilson.

Affidavit of Robert Malcolm, p. 3, ¶ 13. Idaho Rule of Civil Procedure 56(e) requires items offered in support of or opposition to a motion for summary judgment to be attached to an affidavit verifying the items' authenticity. I.R.C.P. 56(e); *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 820, 21, 979 P.2d 1174, 1178-79 (1999). Additionally, none of the items attached to Malcolm's affidavit as Exhibit 1 are sworn or certified copies as required by the Rule.

Paragraph 14 of Malcolm's affidavit contains a statement regarding all that Wilson has acknowledged. This paragraph could possibly have been made upon personal knowledge of Malcolm (if Malcolm heard Wilson state these matters), but that is not known. Malcolm may have been able to supplement his affidavit with reference to when and where Wilson acknowledged his role was or was not that of director or officer, but Malcolm did not do so.

Paragraph 15 cannot have been made on personal knowledge of Malcolm. Malcolm purports to set forth for the Court matters which Wilson and his clients may have believed, and that such beliefs and actions were formed and made for the purpose of evading Canadian tax laws. There is simply no support for such speculative assertions by Malcolm.

As such, the Court must strike paragraphs 13, 14 and 15, and the attachments to

paragraph 13.

Malcolm's objection to the Affidavit of Gary Wilson is more problematic. Wilson was listed in BLG's expert witness disclosure filed on October 15, 2010. Thus, Wilson may render an opinion. At oral argument Malcolm argued that at the time Wilson's affidavit was filed (August 19, 2010), Wilson had not yet been identified as an "expert" in BLG's expert witness disclosure. However, BLG's expert witness disclosure was not due until 150 days before trial (Pre-trial Order, p. 5, ¶ 5), and was timely filed on October 15, 2010.

Malcolm's objections based on Wilson not being licensed as an attorney in Idaho or the Isle of Jersey have no merit. There is no requirement that an attorney be licensed in the State of Idaho in order to be able to render an opinion in Idaho litigation. Similarly, there is no merit to Malcolm's argument that Wilson was not an Isle of Jersey attorney.

To the extent Wilson's statements were made upon his personal knowledge, which the Affidavit itself never affirmatively states, the paragraphs would be admissible. Paragraph 13 of Wilson's affidavit refers to the attached Exhibit C and never makes mention of Malcolm's alleged misfeasance. The exhibits to Wilson's Affidavit do not purport to be sworn or certified copies, but Wilson does verify the authenticity of Exhibit C, albeit not explicitly. Malcolm does not set forth any support for the contention that opinion statements by Wilson must be stricken. And, although paragraph 16 does not refer to or attach any Exhibits, Malcolm seeks an Order of the Court deeming the attachments inadmissible. The statements made by Wilson in paragraphs 20 and 21 are made upon Wilson's personal knowledge and the weight to be given them remains a matter committed to this Court's discretion. See *City of McCall*, 142 Idaho 580, 588,

130 P.3d 1118, 1126. It is proper for this Court to deny Malcolm's motion to strike. If there are any defects in Wilson's affidavit, they are without consequence, as the motion for summary judgment turns on purely legal grounds.

C. BLG's Motion for Summary Judgment.

BLG moves the Court for summary judgment on Malcom's claims upon two grounds: (1) BLG cannot have tortiously interfered with Malcolm's contracts or prospective business advantages because (a) it acted on behalf of its clients, the beneficiaries of Fu's trust and will, and (b) BLG's conduct was privileged; and (2) Malcolm had no interest in the Wine Cellar restaurant, either individually or as sole member of Golf & Wine, LLC, which could have been converted. Memorandum in Support of Motion for Summary Judgment, pp. 5-9. In response, Malcolm argues only that BLG has not shown Woodwest was or is its client; that prior to January 30, 2009, BLG and its clients have not shown they were shareholders, directors, or officers in West Wood or Fortress; and West Wood and Fortress were never members, owners, or managers of Golf & Wine, LLC. Memorandum, p. 2, ¶¶ a-c.

Malcolm has produced no evidence to contradict BLG's assertions. A party opposing a motion for summary judgment cannot merely rest on the allegations made in the pleadings, but must contradict assertions made by the moving party via production of evidence by way of affidavit or deposition. *Worthen v. State*, 96 Idaho 175, 176, 525 P.2d 957, 958 (1974). A genuine issue of fact must be presented; raising only the slightest doubt as to the facts is not sufficient. *LePelley v. Grefenson*, 101 Idaho 422, 428, 614 P.2d 962, 968 (1980). Here, Malcolm does not address BLG's legal arguments and simultaneously fails to identify any material disputed facts.

1. Tortious Interference Claims.

BLG argues a claim for tortious interference will not lie against an attorney acting on behalf of his client. Memorandum in Support of Motion for Summary Judgment, p. 5, citing *Jones, Runft, Leroy, Coffin & Matthews, Chtd.*, 125 Idaho 607, 616-17, 873 P.2d 861, 870-71 (1994). Indeed, in a recent unpublished case, the Idaho Supreme Court wrote:

Under Idaho law it is factually impossible for a party to tortiously interfere with that party's own contract. *Ostrander v. Farm Bureau Mut'l Ins. Co. of Idaho, Inc.*, 123 Idaho 650, 654, 851 P.2d 946, 950 (1993). As noted above, the client-attorney relationship is one of agency, and in line with this Court's decision in *BECO Constr. Co., Inc. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 184 P.3d 844 (2004), where an agent is acting within the scope of his representation he shall be treated the same as his principal for the purposes of tortious interference with a contract.

Taylor v. McNichols, 2010 WL 3448851, at *19 (Idaho Supreme Court, September 3, 2010). The Idaho Supreme Court also stated, following a lengthy analysis of the litigation privilege in other jurisdictions:

Therefore, this Court holds that, as a general rule, where an attorney is sued by the current or former adversary of his client, as a result of actions or communications that the attorney has taken or made in the course of his representation of his client in the course of litigation, the action is presumed to be barred by the litigation privilege. An exception to this general rule would occur where the plaintiff pleads facts sufficient to show that the attorney has engaged in independent acts, that is to say acts outside the scope of his representation of his client's interests, or has acted solely for his own interests and not his client's.

Id., at *15. Malcolm has pled no facts sufficient to show Wilson "engaged in independent acts" "outside the scope of his representation of his client's interests".

2. Conversion Claims.

A claim for conversion has three elements: (1) that the charged party wrongfully gained dominion of property; (2) that the property is owned or possessed by the plaintiff at the time of possession; and (3) that the property in question is personal property.

See e.g. *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 743, 979 P.2d 605,

616 (1999). In the instant matter, not only has Malcolm failed to rebut BLG's argument that Malcolm had no interest in the Wine Cellar at the time there was an alleged wrongful dominion over the property, but Malcolm has not set forth how his interest in the Wine Cellar is personal property. Any interest by Malcolm in the Wine Cellar restaurant was transferred by Malcolm on October 2, 2009, to Fortress. Affidavit of Gary J. Wilson in Support of Defendant's Motion for Summary Judgment, p. 7, ¶ 22.

At this juncture, Malcolm has not set forth any legal argument or any evidence to withstand BLG's motion for summary judgment.

IV. CONCLUSION AND ORDER.

For the reasons stated above, BLG's motion for summary judgment must be granted.

IT IS HEREBY ORDERED defendant BLG's motion for summary judgment is GRANTED against plaintiff Malcolm on all of Malcolm's claims.

IT IS FURTHER ORDERED plaintiff Malcolm's claims are dismissed and defendant BLG is the prevailing party in this matter.

IT IS FURTHER ORDERED counsel for defendant BLG shall prepare a judgment consistent with this Memorandum Decision and Order.

Entered this 10th day of November, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Address</u>	<u>Lawyer</u>	<u>Fax #</u>
Robert D.C. Malcolm, pro se	P. O. Box 2089 Point Roberts, WA 98281-2089	Michael E. Ramsden, Christopher D. Gabbert	664-5884

Jeanne Clausen, Deputy Clerk