

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**

C SYSTEMS, INC., an Idaho Corporation,)
)
Plaintiff,)
)
vs.)
)
IMBRIS, INC., an Idaho Corp., KAREN)
DUNGAN, ANITA NIKIFOUK, A.J. SIMS,)
JAMES WYMA AND RICHARD McGEE,)
)
Defendants.)

Case No. **CV 2002 2788**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT
McGEE SUMMARY JUDGMENT**

I. PROCEDURAL BACKGROUND.

On August 13, 1999, Donald Campbell and C Systems, Inc., as plaintiffs filed an action against several defendants, including Richard McGee, making several allegations including but not limited to breach of fiduciary duty and breach of contract. Kootenai County Case No. CV 1999 4650. That case was assigned to District Judge John P. Luster. In that case, C Systems alleged that McGee attempted to divert assets into Sabrecross (a new and separate corporation that McGee and others had established). C Systems later alleged in an *affidavit* in that case, that McGee diverted assets to Imbris, Inc. Affidavit of Donald Campbell in CV1999 4650, dated March 14, 2001, p. 2, ¶¶ 3-5, attached as Exhibit 5 to the Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment in CV 2002 2788. This is the same allegation which C Systems makes in the current action. Complaint, pp. 6-10, ¶¶ IX-XVI.

In Kootenai County Case number CV 1999 4650, a special master was appointed by Judge Luster, and on January 18, 2001, McGee and the other defendants moved for summary judgment on all claims made by Campbell and C Systems. The defendants asserted in their summary judgment motion “that there was, in fact, no diversion of business assets, personnel and resources as alleged in the Complaint, on August 15, 1999, or thereafter.” The plaintiffs Campbell and C Systems objected and filed a response brief supported by the affidavit of Campbell which was signed by Campbell on March 14, 2001.

On March 23, 2001, in spite of the above referenced allegations, Judge Luster signed an order granting summary judgment in favor of the defendants. Order Granting Summary Judgment in Case No. CV 199 4650, attached as Exhibit 5 to the Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment in CV 2002 2788.

On April 23, 2002, the Complaint in the present case, CV 2002 2788 was filed. In this case, C Systems, Inc., filed a verified complaint, signed by Campbell as president of C Systems, against the defendants Imbris, Inc., Karen Dungan, Anita Nikiforuk, A.J. Sims, James Wyma and Richard L. McGee. In this case, C Systems makes claims against McGee and the other defendants that arise from their collective conduct in the period of January through the late summer of 2000 which resulted in the unlawful transfer of C systems assets to Imbris, Inc. during the months of March through May of 2000. Complaint, pp. 6-10, ¶¶ IX-XVI. In this case, Campbell in his verified complaint alleges C Systsms is, at all times pertinent to this action, a corporation duly organized under the laws of the State of Idaho. *Id.* pp. 1-2, ¶ I.

Oral argument was held on January 9, 2006. Just prior to oral argument on McGee’s Motion for Summary Judgment, the Court granted the Motion to Strike (made

at argument but referenced in Response to Plaintiff's Memorandum in Opposition to McGee's Motion for Summary Judgment, p. 2) paragraphs 7, 8 and 9 of the Affidavit of Donald Campbell filed January 3, 2006, in the present matter.

II. ANALYSIS.

A. Introduction.

McGee moves for summary judgment on the grounds of *res judicata* and claim preclusion as well as a lack of evidence on damages on C Systems' conversion claims. Preliminarily, McGee argues that C Systems lacks standing in the present case. Brief in Support of Motion for Summary Judgment, p. 1-2.

1. Standing.

McGee argues that on April 23, 2002, when C Systems filed the verified complaint against the various defendants, Campbell as president of C Systems claimed that C Systems was a corporation duly organized under the laws of the State of Idaho. McGee alleges that C Systems, Inc., was administratively dissolved on September 1, 2001, over a year **before** the current action was filed, and that since that time, C Systems has been incorporated by Michael L. Potter of B.Y.W.D. who also operates as president of C Systems, Inc. Brief in Support of Motion for Summary Judgment, p. 1; Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment, Exhibit 1 and 2. McGee argues this action was instituted by a dissolved corporation and that the new president of C Systems did not verify the complaint which calls into question C Systems' standing and authority to maintain this action. C Systems has not brought forth any evidence to place McGee's assertion at issue, nor has C Systems sought to amend its Complaint in this matter. C Systems has not argued against this claim in its Memorandum in Opposition to McGee's Motion for Summary Judgment.

The Court is not persuaded by McGee's argument that C Systems lacked standing to bring this lawsuit at its inception or to maintain the lawsuit at present. Idaho Code § 30-1-1421(3) states:

A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section 30-1-1405, Idaho Code, and notify claimants under sections 30-1-1406.

Under I.C. §30-1-1405 (2)(e), a dissolved corporation in winding up and liquidating its business and affairs is not prevented in "commencement of a proceeding by the corporation in its corporate name."

2. *Res Judicata* and Claim Preclusion.

McGee argues that when C Systems filed the present action C Systems made many of the same allegations against McGee which were already decided by the Court in CV 1999 4650. McGee claims C Systems is now seeking to relitigate the very same issues raised in that earlier action.

McGee relies on *Hindmarch v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) which held "the doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or *which might have been made.*" (emphasis added). McGee also argues "a party cannot split claims even if the remedies or forms of relief request in one suit are different from those demanded in another." *Id.*, citing *Wing v. Hulet*, 106 Idaho 912, 915-16, 684 P.2d 314, 317-318 (Ct.App. 1984).
Brief in Support of Summary Judgment, p. 3.

McGee contends that C Systems made a breach of fiduciary claim against McGee in CV 1999 4650, which was dismissed and that C Systems now raises virtually

the same claim in the current action except it has been re-labeled as a conversion claim. Brief in Support of Motion for Summary Judgment, p. 3. McGee argues this Court should not condone this type of piecemeal litigation. *Id.*

C Systems argues summary judgment should not be granted because the Complaint in CV 99-4650 reflects that C Systems asserted claims based upon McGee's conduct in 1999 wherein he threatened to transfer assets of C systems to Sabrecross, Inc. C Systems argues the Complaint in CV 99-4650 did not allege any other conduct by McGee as a basis for relief that was sought by C systems. Memorandum in Opposition to McGee's Motion for Summary Judgment, pp. 2-4.

C Systems argues the Complaint in the present case makes claims against McGee and the other defendants that arise from their collective conduct in the period of January through the late summer of 2000 which resulted in the unlawful transfer of C Systems assets to Imbris, Inc. C Systems argues there is no claim in the instant case which arises from the conduct of McGee in August 1999, which conduct formed the basis for the claims in 99-4650. Memorandum in Opposition to McGee's Motion for Summary Judgment, pp. 2-4.

C Systems, relying on *Mock* and *Wing*, urges the determination of this issue revolves around whether the claims arise from the same set of facts or "transaction." C Systems contends the facts that form the basis for the present claims had not occurred when Kootenai County Case Number CV 1999 4650 was filed and, thus, the claims in the two cases arise from two different sets of actions and do not arise from the same set of facts or transactions. Furthermore, C Systems argues that the parties are different in this case and that as a matter of law, the summary judgment in CV 1999 4650 does not bar or preclude the prosecution by McGee of the claims against him for

his role in the conversion of assets by the defendants in January through August of 2000. C Systems claims defendants acted collectively to convert the assets of C Systems by engaging in a course of conduct to transfer the assets of C Systems to Imbris, Inc. without lawful authority or consideration and that this started to occur in January 2000. Memorandum in Opposition to McGee's Motion for Summary Judgment, pp. 2-4.

Res judicata is comprised of claim preclusion and issue preclusion. Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claims. The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. *Hindmarch v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). A party cannot split claims even if the remedies or forms of relief requested in one suit are different from those demanded in another. *Id.*, citing *Wing v. Hulet*, 106 Idaho 912, 915-16, 684 P.2d 314, 317-318 (Ct.App. 1984).

On August 13, 1999, Campbell and C Systems, Inc., filed the earlier action against several defendants, including Richard L. McGee, making several allegations including but not limited to a claim for breach of fiduciary duty and breach of contract. Campbell and C Systems therein alleged McGee attempted to divert assets into *Sabrecross*. Later, in that same action, Campbell and C Systems alleged in an affidavit that McGee diverted assets to *Imbris, Inc.*, which is the **same allegation made in the current action**.

On January 18, 2001, defendant McGee and Sabrecross Inc., in that earlier

action moved for summary judgment on all claims made by the plaintiffs Campbell and C Systems and asserted that there was, in fact, no diversion of business assets, personal and resources as alleged in the Complaint, on August 15, 1999, or thereafter. Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment in CV 2002 2788, Exhibit 4. Campbell and C Systems objected and filed a response brief supported by the affidavit of Campbell which was signed on March 4, 2001. Campbell alleged in his affidavit that the action should not be dismissed because:

3. That due to the actions of Rick McGee, C Systems was divested of its business, including substantially of all its equipment, cash, receivables, customers, leasehold, facilities, and improvements and ongoing business on or about April, 28, 2000.

4. McGee accomplished the transfer of such assets to Imbris, Inc. and Sabrecross, Inc., without any authorization by the Directors of C Systems, Inc. or the Special Master in this case. Such actions were in violation of the restraining order that has been in effect in this case since August 13, 1999. The value of the assets transferred by McGee to Imbris, Inc. and Sabrecross, Inc. exceed \$200,000.00.

Affidavit of Donald Campbell in CV1999 4650, dated March 14, 2001, p. 2, ¶¶ 3-4, attached as Exhibit 5 to the Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment in CV 2002 2788. On March 23, 2001, in spite of the above referenced allegations, Judge Luster signed an order granting summary judgment in favor of defendants in that case, including defendant McGee.

C Systems now argues that Imbris Corporation was not mentioned in the pleadings in the CV 99-4650 complaint. On the face of the pleadings the claim against Imbris was not litigated in the CV 99-4650 case and therefore can be brought in the current case. However, Campbell's affidavit shows that Imbris Corporation was discussed in the CV 99-4650 case and all parties were fully aware of Imbris and the "attempted" diversion of business assets to Imbris in the CV 1999 4650 case. Why

would Campbell make Judge Luster aware of this purported claim if it were not relevant, if it were not intended to be adjudicated?

This Court finds that these facts did in fact arise from the same set of facts or transaction. While Imbris might not have been involved at the time the complaint was filed in 1999, Imbris was certainly a major factual part of CV 1999-4650 by the time Campbell filed his affidavit in that case and by the time Judge Luster granted summary judgment in favor of McGee in 2001.

McGee argues, and this Court agrees, that C Systems has filed the current action making many of the same allegations against McGee that he made in the 1999 matter assigned to Judge Luster. While the corporation “Imbris” was not mentioned in the complaint, Imbris is clearly used by Campbell in his affidavit submitted to Judge Luster, and Campbell uses Imbris almost interchangeably with Sabrecross. Plaintiff in the CV 99-4650 case told Judge Luster that “McGee accomplished the transfer of such assets to Imbris, Inc., and Sabrecross, Inc., without any authorization by the Directors of C Systems, Inc. or the Special Master in this case.” Affidavit of Donald Campbell in CV1999 4650, dated March 14, 2001, p. 2, ¶ 4, attached as Exhibit 5 to the Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment in CV 2002 2788. Campbell unequivocally told Judge Luster that McGee “accomplished” these transfers of assets to Imbris. Campbell used past tense language. While Campbell now argues the Complaint in the 1999 case did not include Imbris, Campbell’s own affidavit clearly did include Imbris and clearly specified the conduct being attributed to McGee vis-a-vis Imbris. The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made *or which might have been made.* *Hindmarch*

v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). (emphasis added). Not only “might” Campbell have made these claims against McGee in the 1999 action, **he did make them** to Judge Luster. *Res judicata* and claim preclusion forbid this.

Campbell also argues that injunctive relief was requested in the earlier action and not in the present case. That argument has no merit. “As noted in § 25 of the Second Restatement, quoted above, the rule against splitting a claim applies even though the remedies or forms of relief demanded in one suit are different from those demanded in another. *Wing v. Hulet*, 106 Idaho 912, 916, 684 P.2d 314, 318 (Ct.App. 1984).

C Systems is barred by *res judicata* and claim preclusion from bringing this conversion claim against McGee in the present case, CV 2002 2788.

3. Conversion.

McGee argues C Systems’ sole cause of action as pled in the present complaint is conversion of corporate assets. Brief in Support of Summary Judgment, p. 4. There is no issue of material fact as to whether McGee exercised any dominion or control over business assets *without a right to do so*. McGee relies on *Carver v. Ketchum*, 53 Idaho 595, 26 P.2d 139 (1933); *Klam v. Koppel*, 63 Idaho 171, 118 P.2d 729 (1941); *Adair v. Freeman*, 92 Idaho 773, 451 P.2d 519 (1969), which state that a claim for conversion requires the plaintiff prove the defendant took or exercised dominion over the plaintiff’s property without a right to do so and that the plaintiff was deprived of that property causing damage to the plaintiff. McGee argues that C Systems freely admits in their answers to interrogatories that it lacks sufficient evidence against defendant McGee and that its claim is really against Imbris. Exhibit 7 to Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment in CV 2002 2788.

McGee argues that there are no issues of material fact as to whether McGee

retained any of the alleged business property himself. McGee argues that he did not exercise dominion or control over business assets without a right to do so as he was the President of the corporation, director and a shareholder at the time. Brief in Support of Summary Judgment, p. 4. McGee argues that Plaintiff cannot establish a conversion claim against him because conversion requires dominion or control over an asset without a right to do so. *Id.* Defendant McGee claims that the two allegations against him for conversion are alleged to have occurred in February or March (of 2000) and, thus, should have been raised in CV 1999-4650. *Id.* pp. 4-5. Further, McGee argues that any allegation relating to the handling of corporate assets while the restraining order or special master was in place must be disregarded because C Systems had the opportunity to litigate those issues in CV 1999-4650 and failed to do so.

C Systems claims that beginning in January 2000 all the defendants acted collectively to convert the assets of C Systems by engaging in a course of conduct to transfer the assets of C Systems to Imbris, Inc. Memorandum in Opposition to McGee's Motion for Summary Judgment, p.5. C Systems argues the claim of conversion depends upon a showing that the defendants took property of the plaintiff without a right to do so and that the facts in the record show that the defendants acted collectively pursuant to a plan to deliver the property of C systems to Imbris without right, authority or consideration. *Id.* Plaintiff argues that these actions of the individual defendants constitute a civil conspiracy to accomplish conversion of C Systems' property to the possession and control of Imbris. *Id.* C Systems argues that the defendant's liability to him is that of a joint tortfeasor and does not depend upon his personal exercise of control over assets of which C System was divested by the defendants. *Id.* p. 6. C Systems argues that as a joint tortfeasor, McGee is liable for the damage these acts

caused to C Systems. *Id.* C Systems argues that the record before the Court presents specific facts showing a portion of McGee's role in this process to a sufficient degree and that when viewed in the light most favorable to C Systems, material of issues of fact remain in dispute and McGee is not entitled to judgment as a matter of law.

Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial or inconsistent with his rights therein, such as a tortuous taking of another's chattels, or any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of the possession, permanently or for an indefinite time. The act must be essentially tortuous, but it is not essential to conversion sufficient to support the action of trover that the defendant should have complete manucaption of the property, or that he apply the property to his own use, if he has exercised dominion over it, in exclusion of, in defiance of, or inconsistent with the owner's right.

In other words, conversion is a dealing by a person with chattels not belonging to him, in a manner inconsistent with the rights of the owner.

Carver v. Ketchum, 53 Idaho, 595, 601, 26 P.2d 139, 141, (1933).

There is no issue of material fact as to whether McGee exercised any dominion or control over business assets *without a right to do so*. McGee argued before Judge Luster, that as a co-shareholder, he owed no fiduciary duty to Campbell. Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment in CV 2002 2788, Exhibit 4, p. 3. Now, McGee argues that as president and a director he had a right to control business assets. Brief in Support of Motion for Summary Judgment, p. 4. C Systems has not countered those arguments. Therefore, C Systems cannot establish a conversion claim against McGee because conversion requires dominion or control over an asset *without a right to do so*. That element is not met in this case, summary judgment is appropriate.

Next, C Systems admits it lacks evidence against McGee as to which of C Systems' assets he appropriated. Exhibit 7 to Affidavit of Robert J. Caldwell In Support of Motion for Summary Judgment in CV 2002 2788. Summary judgment is

appropriate on this ground as well.

Additionally, the two allegations against McGee for conversion are alleged to have occurred in February or March of 2000. That being the undisputed time period, the claim of conversion should have been raised in Kootenai County Case No. CV 1999 4650, which goes right back to the *res judicata* and claim preclusion bar.

The conversion claim against McGee, which is the only claim, does not survive as there is no issue of material fact as to whether McGee exercised any dominion or control over business assets *without a right to do so*. C Systems lacks evidence against McGee as to which of C Systems' assets he supposedly appropriated.

III. ORDER.

IT IS HEREBY ORDERED that summary judgment is **GRANTED** against C Systems on its claims against defendant Richard McGee, as: 1) the claim is barred by *res judicata* and claim preclusion as the claim *could have been raised* in Kootenai County Case CV 1999 4650, indeed the claim *was* raised in that case on summary judgment, and 2) because on the only claim against McGee (conversion), there is no issue of material fact as to whether McGee exercised any dominion or control over business assets *without a right to do so*.

Entered this 11th day of January, 2006.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2006, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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