

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, In His Capacity As Court-Appointed Receiver For Oxford Global Partners, LLC, Universal Brokerage FX, and Other Receiver Entities,

Plaintiff,

v.

David and Dao Allen, Judith Averett, Patricia and Jasper Calandra, Rose Furner, Mark Hanby, Adel ("A.K.") Hilal, Geraldine Jackman, Norma Johnson, Willis Wayne King, Don and Pamela Labbee, Andrew Lyon, Jeffrey Lyon, Jeffrey Maki, Steven Perkins, Richard Plantan, Douglas Reed, David Sherman, John Sterback, Mark Stoltenberg, Jane Wamsley as trustee for the Glen Van Lehn Living Trust, Michael ("Bruce") Wu, Robert and Dianne Birk, Margaret Anderson, Mary Francoeur, George and Shirley Janssen, Joseph Koehnen, and Katherine Sobieck,

Defendants.

Civil Action No. 13-cv-1896 (SRN/SER)

**DEFENDANTS', ROBERT AND
DIANNE BIRK, MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
RENEWED MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

After this Court's Memorandum, Opinion and Order (Dkt. 175) wherein the Court, understandably, denied without prejudice the prior Motion for Summary Judgment, the Plaintiff, seemingly undeterred, says now that summary judgment is still appropriate. It flicks away the *Finn v. Alliance Bank*, ___ N.W.2d ___, 2015 WL 672406 (Minn. Feb. 18, 2015), decision as an unwanted irritant and merely relies on its second theory (unjust enrichment) to claim a right to summary judgment.

Such a proposition is entirely unsupported.

DISPUTED FACTS (ALREADY IN THE RECORD) PRECLUDE GRANTING THE PLAINTIFF'S MOTION

The Court need look no further than the Joint Affidavit of Robert and Diane Birk (Dkt. 147) previously submitted in opposition to the Receiver's last Motion for Summary Judgment to determine that there exists disputed facts precluding summary judgment. In that Affidavit, the Birks give the Court specific and supported information about various amounts for which Receiver is not entitled to a claw-back. Their expenses related to the "little house" and the confiscation of their personal property is neither devoid of consideration or

founded on fraud (see applicable law, *infra*). Put another way, the Birks did not “enrich” themselves at the expense of another. That proof of disputed facts, takes the case entirely out of the purview of Rule 56 and necessarily implicates a trial. A claim for unjust enrichment arises when a party gains a benefit illegally or unlawfully. An unjust enrichment claim may be founded upon failure of consideration, fraud, or mistake, or “situations where it would be morally wrong for one party to enrich himself at the expense of another.” Unjust enrichment also arises when a party gains a benefit “which is morally wrong” or by “circumstances that would make it unjust to permit its retention.” *See, Holman v. CPT Corp.*, 457 N.W. 2d 740, 745 (Minn. App. 1990), review denied (Minn. Sep. 20, 1990); *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W. 2d 254, 268 (Minn. App. 1996). *Klass v. Twin City Fed. Sav. and Loan Assn.*, 291 Minn. 68, 71, 170 N.W. 2d 493, 495 (1971); *Anderson v. DeLisle*, 352 N.W. 2d 794, 796 (Minn. App. 1984); *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W. 2d 137, 140 (Minn. App. 1992); *Conus Communications Co. v. Hubbell*, 2000 Minn. App. LEXIS 748 (July 18, 2000) (unpublished). Here we have the Defendants against whom summary judgment is sought having received money

in the nature of return of expenses incurred and lost personal property.

Summary judgment is not possible.

CONCLUSION

Facing the Court is a case replete with disputed facts. Summary judgment isn't appropriate and the Birk Defendants request that the Court Order that this matter be set for trial.

In the alternative, the Birks remain willing to have a judgment entered against them by the Receiver for the net amount of \$23,302.85 consistent with their prior Affidavit (Dkt. 147). It is respectfully suggested that the Plaintiff either agree to the proposed reduced Judgment or be directed to defend in a trial it's claim for a larger Judgment.

Dated: April 24, 2015

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