



Neutral

As of: August 3, 2016 10:49 AM EDT

[Hearst Mags. v Greenstone/Fontana Corp.](#)

Supreme Court of New York, Appellate Division, First Department

May 31, 2016, Decided; May 31, 2016, Entered

1306, 101809/10

Reporter

139 A.D.3d 623; 30 N.Y.S.3d 859; 2016 N.Y. App. Div. LEXIS 3997; 2016 NY Slip Op 04132; 2016 WL 3046580

Hearst Magazines, etc., Plaintiff-Respondent, v [Greenstone/Fontana Corp.](#), et al., Defendants, Jeanne [Fontana](#), Defendant-Appellant.

after a bench trial, in [*624] favor of plaintiff and against, inter alia, defendant Jeanne [Fontana](#) in the aggregate amount of \$88,353.81, unanimously affirmed, with costs.

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As a general matter, the unasserted claim by plaintiff magazine against its frequent advertiser would not constitute a cognizable claim for damages (see [Phillips-Smith Specialty Retail Group II v Parker Chapin Flattau & Klimpl](#), 265 AD2d 208, 210, 696 N.Y.S.2d 150 [1st Dept 1999], lv denied 94 NY2d 759, 726 NE2d 483, 705 NYS2d 6 [2000]). Moreover, where the funds were converted by defendant advertising agency, but the ad for which it received the funds nevertheless ran, there is no claim for conversion of the funds (see generally [Hillsley v State Bank of Albany](#), 24 AD2d 28, 30, 263 N.Y.S.2d 578 [1st Dept 1965]).

Prior History: [Hearst Magazines v. Greenstone/Fontana Corp.](#), 2016 N.Y. Misc. LEXIS 703 (N.Y. Sup. Ct., Feb. 22, 2016)

Counsel: [***1] Peter C. Kaiteris, P.C., Bayport (Peter C. Kaiteris of counsel), for appellant.

Law Offices of Bernard D'Orazio & Associates, P.C., New York (Bernard D'Orazio of counsel), for respondent.

Judges: Tom, J.P., Mazzaelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

However, where, as here, a fiduciary profits from a breach of loyalty, those profits must be paid over to the principal (see [Tsutsui v Barasch](#), 67 AD3d 896, 898-899, 892 N.Y.S.2d 400 [2d Dept 2009]). Accordingly, the trial court properly entered judgment in plaintiff's favor in the amount of the ill-gotten proceeds.

Opinion

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. [***2]

[**859] [*623] Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 4, 2015,

ENTERED: MAY 31, 2016