**SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. THOMAS AND ST. JOHN**

| | | |
|---|---|---|
| **PEOPLE OF THE VIRGIN ISLANDS,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **CASE NO. ST-08-CR-425** |
| | ) | **CASE NO. ST-08-CR-426** |
| **PETER R. NAJAWICZ, AMOS W. CARTY, JR., and RODNEY E. MILLER, SR.,** | ) | **CASE NO. ST-08-CR-427** |
| | ) | |
| **Defendants.** | ) | |

## MEMORANDUM OPINION

Pending before the Court is Defendant Amos Carty's June 29, 2011, Motion for Judgment of Acquittal. For the following reasons, Defendant's motion will be denied.

## STANDARD

Pursuant to Fed. R. Crim. P. 29, in deciding a motion for judgment of acquittal a court reviews the evidence in the "light most favorable to the [g]overnment" and considers whether, as a matter of law, the evidence presented by the government is sufficient to sustain a conviction.[1] A motion for judgment of acquittal may be denied if a rational jury could find a defendant guilty beyond a reasonable doubt based on the admitted evidence, testimony of the government's witnesses, and the jury instructions.[2] A verdict can be overturned only where there the record contains "no evidence ... from which the jury could find guilt beyond a reasonable doubt."[3] The Court must decide the

---

[1] *People v. Brewley*, 49 V.I. 137, 140 (V.I. Sup. Ct. 2007).

[2] *Id.*

[3] *Id.* (*quoting U.S. v. Anderson*, 108 F.3d 478, 480 (3d Cir. 1997)). *See also Gov't of the V.I. v. Adams-Tutein*, 47, V.I. 514, 520 (D.V.I., 2005) (*citing U.S. v. Casper*, 956 F.2d 416, 412, 421 (3d Cir. 1992).

motion for judgment of acquittal on the basis of the evidence at the time the court reserved its decision on the motion.[4]

**ANALYSIS**

Defendant challenges counts 42 and 43 charging violations of 14 V.I.C. § 834(2);[5] counts 38, 39, and 44 charging violations of 14 V.I.C. §§ 1089 and 1094(2);[6] counts 37, 40, and 41 charging violations of 14 V.I.C. § 1662;[7] count 2 charging violations of 14 V.I.C. §§ 551 and 552;[8] and counts 1 and 36 charging violations of 14 V.I.C. § 605.

In general, Defendant asserts that he provided the Hospital's Board of Directors with all the necessary documents associated with Defendant Miller's employment contracts and therefore lacked the specific intent to obtain money by false pretenses, to embezzle, and to commit conspiracy.

**Count 42**

Count 42 charges Carty with fraudulently inserting a waiver clause in Miller's 2005 employment agreement relieving Miller of any obligation to repay hospital funds advanced to him.[9] Carty asserts that the waiver clause was present in the agreement at the time the Board approved the agreement and was not secretly included later.[10] Carty also contends that Samuel Topp and Francis Jackson, members of the Executive Compensation Committee ("ECC"), were provided all necessary documents but were not

---

[4] FED. R. CRIM. P. 29(b).
[5] 14 V.I.C. § 834(2) concerns obtaining money by false pretenses.
[6] 14 V.I.C. § 1091 concerns embezzlement by fiduciaries and 14 V.I.C. § 1094 concerns the punishment for embezzlement.
[7] 14 V.I.C. § 1662 concerns the embezzlement or falsification of public accounts.
[8] 14 V.I.C. §§ 551 and 552 concern the crime of conspiracy.
[9] Government Exhibit 92-7, Employment Agreement dated May 14, 2005 at 5.
[10] Defendant Carty's Motion for a Judgment of Acquittal, at 3-7, 23, June 29, 2011.

familiar with the intricate details of Miller's agreement, and because of which, the Government cannot prove when the waiver clause was included in the agreement.[11]

The waiver clause is an unusual provision, enabling Miller to permanently acquire an unlimited amount of hospital funds.[12] Assuming, *arguendo*, that the waiver clause was present in the agreement at the time the Board approved the agreement, there is sufficient evidence for a rational jury to find that Carty's incorporation of the clause into the agreement, and his failure to alert the ECC or the Board of the inclusion of the unusual clause, constitutes a breach of Carty's fiduciary duty that rises to the level of criminal fraud and Carty possessed the requisite intent to defraud.[13]

**Counts 43 and 44**

Counts 43 and 44 charge Carty with fraudulently attaching Schedule A to Miller's 2005 and 2007 employment agreements to facilitate payments to Miller without the knowledge or consent of the Board. Carty asserts that Schedule A was present in the agreement at the time the Board approved the agreement and was not secretly included later.[14] Schedule A, among other provisions, provides for a housing allowance in the amount of $40,000 annually and an "Irrevocable Rabbi Trust" with annual contributions exceeding $125,000.[15]

---

[11] *Id.*

[12] Government Exhibit 92-7, Employment Agreement dated May 14, 2005 at 5 (waiving "the repayment of any amounts advanced to Miller prior to the execution of [the] . . . agreement).

[13] *See Generally Gov't of the V.I. v. Adams-Tutein*, 47, V.I. 514, 520 (D.V.I., 2005) (*citing U.S. v. Casper*, 956 F.2d 416, 412, 421 (3d Cir. 1992).

[14] Defendant Carty's Motion for a Judgment of Acquittal, at 18-21, 23-24, June 29, 2011.

[15] Government Exhibit 92-7, Employment Agreement dated May 14, 2005, "Schedule A" at 1-4.

"[E]mbezzlement, unlike ordinary theft or fraud, involves not only a taking but also an action akin to a breach of fiduciary duty."[16] While "not every breach of every fiduciary duty works a criminal fraud,"[17] "a failure to disclose a conflict of interest or a breach of fiduciary duty [can] constitute ... a scheme to defraud."[18] Assuming, *arguendo*, that the Schedule A was present in the agreement at the time the Board approved the agreement, there is sufficient evidence for a rational jury to find that Carty's attachment of Schedule A to the agreement, and his failure to alert the ECC or the Board of the addendum, constitutes a breach of Carty's fiduciary duty that rises to the level of criminal fraud and embezzlement.

**Counts 37 and 41**

Count 37 charges with Carty with the fraudulent transfer of hospital funds under the guise of a 2005 employment agreement, and count 41 charges Carty with the fraudulent approval and disbursement of hospital funds to Miller. As with count 44, Carty argues that all necessary documentation associated with Miller's agreement was presented to the Board and the Board's approval of the agreement was simply a poor business decision.[19] Similarly as with count 44, considering that Carty owed a fiduciary duty to the Board as hospital counsel, there is sufficient evidence for a jury to find that Carty's failure to fully disclose the ramifications of the agreement's provisions to the Board was a breach of Carty's fiduciary duty that rises to the level of criminal fraud and embezzlement.

---

[16] *U.S. v. Badaracco* 954 F.2d 928, 938 (3d Cir. 1992).
[17] *U.S. v. George*, 477 F.2d 508, 512 (7th Cir.1973).
[18] *U.S. v. Moran,* 312 F.3d 480, 493 – 94, Footnote 19 (1st Cir. 2002).
[19] Defendant Carty's Motion for a Judgment of Acquittal, at 16-18, June 29, 2011.

**Count 40**

Count 40 charges Carty with fraudulent appropriation of hospital funds by arranging a write-off or waiver of a $10,000 debt he owed to the hospital. Carty contends that the write-off was an accounting maneuver that removed the debt from the Hospital's accounting books, but did not prevent the Hospital from collecting the debt.[20] Carty also alleges that several other hospital employees owe money to the Hospital and that the Government's prosecution of Carty for these funds amounts to selective prosecution.[21] The record contains sufficient evidence to sustain a conviction on the charge. In addition, a rational jury could infer, under the totality of the circumstances of the case, that Defendant's participation in the write-off demonstrates an intent to commit fraud.

**Counts 38 and 39**

Count 38 charges Carty with unlawfully appropriating hospital funds under the guise of an annual stipend agreement. Count 39 charges Carty with unlawfully appropriating hospital funds under the guise of bonuses he arranged with Najawicz and Miller. Carty asserts that it was not his job to make sure the Board read the documents he presented to it, and the Board's approval of the documents that facilitated the excessive payments simply amounted to poor business decisions by the Board.[22] Similarly to count 44, a rational jury could conclude that Defendant's failure to advise the Board of the contents of the documents he provided to the Board was a breach of Carty's fiduciary duty that rises to the level of criminal fraud and embezzlement.

---

[20] *Id.* at 16-17.
[21] *Id.*
[22] *Id.* at 18-22.

**Counts 1, 2, and 36**

Counts 1 and 36 charges Carty with conducting or participating in the affairs of the hospital through a pattern of criminal activity to defraud the Hospital of its funds in violation of 14 V.I.C. § 605(d) and 14 V. I. C. § 605(a) respectively. Count 2 charges Carty with conspiring with Defendants Miller and Najawicz to embezzle Hospital funds in violation of 14 V.I.C. § 551.

Carty contends that he, Miller, and Najawicz had a business relationship and that the agreements that entitled Defendants to hospital funds were approved by the Board. Thereby, Carty asserts he did not engage in any sort of "criminal organization," "criminal activity," or "criminal conspiracy."[23] A defendant's "participation in a conspiracy may be demonstrated by showing that [the] defendant ... deliberately closed his eyes to what otherwise would have been obvious to him."[24] Further, "the elements of a conspiracy may be proven entirely by circumstantial evidence."[25] Thus, in the totality of the circumstances of this case,[26] the record reflects sufficient evidence such that a rational jury could conclude that (1) Carty's receipt, disbursement, and approval of various reimbursements, stipends, and bonuses beyond his and his co-Defendants' salaries amounts to criminal activity; and (2) Carty's failure to fully disclose the ramifications of the provisions in the agreements he submitted to the Board was a breach of Carty's

---

[23] Defendant Carty's Motion for a Judgment of Acquittal, at 13-16, June 29, 2011.
[24] *United States v. Flores*, 454 F.3d 149, 155 (3d Cir. 2006).
[25] *Francis v. People of V.I.*, 52 V.I. 381, 388 (Sup. Ct. 2009) ("[T]he essential elements for a section 551 conspiracy are an agreement and an overt act done in furtherance of the conspiracy.").
[26] *Anderson*, 108 F.3d at 485 (noting that a rational juror will consider the "totality of all the surrounding facts and circumstances" of Defendant's conduct).

fiduciary duty that indicates an intent to conspire to embezzle, an intent to conspire to violate 14 V.I.C. § 605(a), and an intent to violate 14 V.I.C. § 605(d).

Accordingly, Defendant's motion will be denied. An Order consistent with this Opinion shall follow.

Dated: October 5, 2012

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:
Lori B. Tyson
Court Clerk Supervisor 10/5/12

**SUPERIOR COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. THOMAS AND ST. JOHN**

| | | |
|---|---|---|
| **PEOPLE OF THE VIRGIN ISLANDS,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **CASE NO. ST-08-CR-425** |
| | ) | **CASE NO. ST-08-CR-426** |
| **PETER R. NAJAWICZ, AMOS W. CARTY, JR., and RODNEY E. MILLER, SR.,** | ) | **CASE NO. ST-08-CR-427** |
| | ) | |
| **Defendants.** | ) | |

## ORDER

Upon consideration of the premises, it is hereby

ORDERED that Defendant Amos W. Carty, Jr.'s Motion for Judgment of Acquittal is DENIED; and it is

ORDERED that a copy of this Order shall be served on the Defendants Miller and Najawicz and copies shall be directed to counsel of record.

Dated: October 5, 2012

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court __/__/__

by: ________
Lori B. Tyson
Court Clerk Supervisor 10/5/12