

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

BRYCEWOOD HOMEOWNERS  
ASSOCIATION,

Plaintiff,

vs.

Case No. 2014-1055-CK

CRANBROOK PROPERTY  
MANAGEMENT, INC., EDWARD  
MCCLELLAN, and MARY MCCABE,

Defendants.

and

CRANBROOK PROPERTY  
MANAGEMENT, INC.,

Cross-Plaintiff,

vs.

MARY MCCABE,

Cross-Defendant,

vs.

DANIEL MCCABE,

Third-Party Defendant.

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OPINION AND ORDER

Cross-Plaintiff Cranbrook Property Management, Inc. (“Plaintiff”) has filed a motion for entry of default judgment against cross-defendant Mary McCabe (M. McCabe”) and Third-Party Defendant Daniel McCabe (“D. McCabe”) (D. McCabe and M. McCabe collectively “Defendants”).

In addition, Defendants have each filed a motion to set aside the default entered against them with respect to Plaintiff's claims. Plaintiff has filed a response requesting that the motion be denied.

### *Facts and Procedural History*

M. McCabe is Plaintiff's former employee. M. McCabe allegedly ran the day-to-day operations of the business while its principal was away caring for his ailing wife. During that time, M. McCabe wrote checks to herself and D. McCabe from Plaintiff's client accounts. In total M. McCabe wrote \$182,508.34 in checks. M. McCabe was convicted of embezzlement and ordered to pay restitution of \$182,508.34.

On May 10, 2014, Defendants were served with Plaintiff's complaint in this matter. On January 14, 2015, a default was entered against M. McCabe. On January 29, 2015, a default was entered against D. McCabe. On February 3, 2015, Plaintiff filed its instant motion for entry of default judgment against M. McCabe. On February 17, 2015, Plaintiff filed its instant motion for entry of default judgment against D. McCabe. On February 25, 2015, Defendant filed their motions to set aside the defaults. On March 5, 2015, Plaintiff filed its response to Defendants' motions.

On March 9, 2015, the Court held a hearing in connection with the motions and took the matters under advisement.

### *Standards of Review*

MCR 2.603(A)(1) provides that "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party." Pursuant to MCR 603(D)(1), "A motion to set aside a default or a default judgment, except when

grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.”

*Arguments and Analysis*

(1) Defendants’ Motions to Set Aside Default

a. D. McCabe

In his motion, D. McCabe contends that a default should not have been entered against him because he answered the complaint by filing a June 2, 2015 letter with the Court. However, the letter did not specifically address any of the allegations contained in Plaintiff’s complaint. MCR 2.111(D) provides that “[e]ach denial must state the substance of the matters on which the pleader will rely to support the denial.” The intent of the rule is that the pleader states why the allegation is untrue, and it serves to provide the opposing party with notice of the nature of the claim or defense. *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317-318; 503 NW2d 758 (1993).

In this case, Plaintiff’s complaint against D. McCabe alleges that M. McCabe wrote checks to D. McCabe, that D. McCabe endorsed the checks, and deposited the funds into Defendants’ account for their own use. While D. McCabe filed a letter in response to the complaint, the letter did not specifically address each individual allegation in Plaintiff’s complaint. Moreover, while D. McCabe states that the Sterling Heights Police Department has previously concluded that he did not endorse any of the checks at issue, he has not specifically denied endorsing the checks. Further, although D. McCabe stated that he attempted to stop his wife’s actions by contacting Plaintiff on three occasions, he has failed to state that those were the only occasions during which he knew about M. McCabe’s wrongful actions. For these reasons, the Court is convinced that D. McCabe’s letter does not constitute a responsive pleading that

satisfies the requirements of MCR 2.111(D).

With respect to a meritorious defense, MCR 2.603(D), the rule governing a motion to set aside a default, requires the filing of an “affidavit of facts showing a meritorious defense [.]” MCR 2.603(D)(1). The affidavit D. McCabe filed contains little more than a conclusory recitation of his belief in the merits of Plaintiff’s claim. *Huntington Nat’l Bank*, 292 Mich App at 394 (“Defendant failed to present any evidence, other than his own unsupported assertion, that he could defend against plaintiff’s claim.”); *Novi Constr. Inc. v Triangle Excavating Co.*, 102 Mich.App 586, 590; 302 NW2d 244 (1980) (holding that the defendants’ “affidavit was insufficient because it stated a mere conclusion and did not give a factual basis for that conclusion.”). Indeed, in his affidavit, D. McCabe merely attacks the sufficiency of Plaintiff’s pleadings rather than testifying that the facts alleged in Plaintiff’s complaint are false. While D. McCabe testified that he is not liable to Plaintiff on any cause of action alleged in the complaint, he fails to set forth facts establishing his defense. Consequently, the Court is convinced that D. McCabe has failed to provide the Court with an affidavit of facts showing a meritorious defense as required by MCR 2.603(D)(1). As a result, his motion must be denied.

b. M. McCabe

In her motion, M. McCabe asserts that she may not be held liable for conversion where she has already been ordered to pay restitution for the full amount allegedly taken. However, M. McCabe has failed to provide the Court with any authority whatsoever in support of her position. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Moreover, MCL 600.2919a, the statute governing statutory conversion, provides that the remedy for

statutory conversion is in addition to any other right or remedy the person may have at law or otherwise. Based on M. McCabe's failure to support her position, as well as the clear and unambiguous language of MCL 600.2919a, the Court is convinced that the previous restitution award does not preclude Plaintiff from pursuing its conversion claim.

In addition, the Court is convinced that, contrary to M. McCabe's position, collateral estoppel does not apply in this matter. For collateral estoppel to apply, a previous action between the same parties must have taken place and culminated in a final judgment. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). The only previous action regarding the facts at issue in this matter was the criminal proceeding against M. McCabe. However, Plaintiff was not a party to that matter. Consequently, collateral estoppel does not apply.

## 2) Plaintiff's Motion for Default Judgment

While, for the reasons discussed above, Defendants are not entitled to have the defaults set aside, the Court is convinced that Defendants should be given an opportunity to challenge the amount of damages sought by Plaintiff. Consequently, the Court will hold an evidentiary hearing on the issue of damages.

### *Conclusion*

Based upon the reasons set forth above, Defendant/Cross-Defendant Mary McCabe's and Defendant/Third-Party Defendant Daniel McCabe's motions to set aside defaults are DENIED. In addition, Defendant/Cross-Plaintiff Cranbrook Property Management, Inc.'s motion for entry of default judgment remains under advisement pending an evidentiary hearing on the amount of damages. Defendant/Cross-Plaintiff Cranbrook Property Management, Inc.'s counsel shall contact the Court in order to set a date for the evidentiary hearing. This Opinion and Order neither resolves the last claim nor closes the case. *See* MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: March 27, 2015

Cc: *via e-mail only*  
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