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STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

ANIL SHAH,
Plaintiff/Counter-Defendant,

vs.

Case No. 18-2879-CB

STEVEN DUFFY,
Defendant/Counter-Plaintiff/
Third-Party Plaintiff/ Third-Party
Counter-Defendant,

vs.

SHELBY PACKAGING COMPANY, INC.,
Third-Party Defendant/
Third-Party Counter-Plaintiff.

SHELBY PACKAGING COMPANY, INC.,
Plaintiff,

Case No. 18-37⁶⁶~~28~~-CB
CONSOLIDATED

vs.

J.K. GRINDING, INC, d/b/a TRI-Precision Tool,
Defendant.

OPINION AND ORDER

Shelby Packaging Company, Inc. ("Shelby") filed a Motion for Reconsideration RE:
A Potential Ambiguity in the Court's December 12, 2019 Opinion and Order.

I. Background

For judicial economy, the Court incorporates the factual and procedural background set forth more fully in its December 12, 2019 Opinion and Order. Essentially, in 1993 Steven Duffy formed Shelby, a company that makes packaging products. The present litigation arose as a result of disputes related to Mr. Anil Shah's purchase of an

interest in Shelby. Among the various claims, Shelby filed an Amended Counter-complaint against Mr. Duffy alleging five counts, including two claims of unjust enrichment, conversion, breach of contract, and breach of fiduciary duty.

Mr. Duffy moved for summary disposition under MCR 2.116(C)(8) and (10) of Shelby's claims in the Counter-complaint. In its December 12, 2019 Opinion and Order, The Court denied the motion on counts I, III, IV and V, primarily for failure to cite sufficient law or facts in the record to properly bring the matters before the Court.

As to count II (conversion) of Shelby's Counter-complaint, the Court reviewed the subcategories of alleged conversion, including proceeds from Gaylord Boxes, electronic records, equipment, business opportunities, and bank accounts. The Court denied Mr. Duffy's motion for summary disposition of count II except for the part of the claim relating to proceeds from the Gaylord boxes. To the extent Shelby claimed conversion of the checks from the sale of the boxes, the Court granted Mr. Duffy's motion.¹

Shelby filed its Motion for Reconsideration to clarify potential ambiguity because the Court's Opinion addressed two distinct conversion of money claims. That is, the Court dismissed the conversion of money claim regarding check proceeds from the sale of the Gaylord boxes but denied Mr. Duffy's motion for summary disposition regarding conversion of money from the bank accounts. Shelby seeks clarification of whether the Court's Order that dismissed the conversion claim to the "extent Shelby claims conversion of money" includes the claims for conversion of money in the bank accounts.

II. Standard of Review

"The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct

¹ The Court noted that Shelby abandoned claims for vehicle keys, titles and phone numbers.

any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties.” *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). “The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court.” *Cole v Ladbrooke Racing Michigan, Inc*, 241 Mich App 1, 8; 614 NW2d 169 (2000).

Courts are “permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court.” *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). The trial court does not abuse its discretion “in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court’s original order.” See e.g., *Chareneau v Wayne Co Gen Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987). If a trial court wants to give a ‘second chance’ to a motion it has previously denied, it has every right to do so, and MCR 2.119(F)(3) does nothing to prevent this exercise of discretion. *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000) citation omitted.

III. Arguments, Law and Analysis

In its Motion for Reconsideration, Shelby refers to a conversation that occurred at the December 19, 2019 settlement conference where it requested clarification of the Court’s Opinion and Order regarding conversion of money. The Court also addressed the matter on the record on January 6, 2020 and stated that it granted summary disposition only with respect to the checks Mr. Duffy received for the boxes and intended its decision to be narrowly construed. Specifically, while the Court decided that Shelby cannot proceed on a conversion claim on the basis of a check made payable to Mr. Duffy, the conversion claim survived in other respects. That is, if the boxes were Shelby’s

property, then Shelby could still pursue that part of the conversion claim. Given that Shelby filed the present Motion for Reconsideration on the same issue, the Court will further clarify its decision and rationale here.

Conversion is any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). To prove conversion of money, a defendant must have obtained money without the owner's consent to the creation of a debtor-creditor relationship and must have an obligation to return the specific money entrusted. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), quoting *Head v Phillips Cam per Sales & Rental, Inc*, 234 Mich App 94, 111–112; 593 NW2d 595 (1999). A plaintiff claiming conversion must also allege that the "initial exercise of domain over the property" was wrongful. *Id.* at 592.

In count II of the Counter-complaint, Shelby alleged, inter alia:

12. At all pertinent times, Shelby had tangible and intangible personal property, including without limitation skids and Gaylord boxes sold at Shelby, the right to rent or license fees from others for use of Shelby's property, phones and phone numbers, equipment and machinery, and cash.

13. Duffy exercised dominion and control over Shelby's tangible and intangible personal property; by way of example:

- (a) Duffy received cash or other consideration from others for skids, Gaylord boxes and other tangible personal property of Shelby and for the use of Shelby's property, which consideration Duffy kept to himself and did not relinquish to Shelby;
- (b) Duffy took from Shelby and kept for himself other tangible and intangible assets of Shelby, including without limitation its phone and phone number, its electronic records, vehicle keys and titles, equipment and machinery, and business expectancies and opportunities;
- (c) Duffy caused Shelby's attorney Edward Gudeman, to form North Coast Paper & Packaging, LLC, and used it to convert for himself Shelby's intangible property, including without limitation its

- stream of business and its relationships with suppliers, customers and employees,
- (d) Duffy expended Shelby's money for purposes other than Shelby's legitimate business interests . . .
 - (e) Duffy transferred Shelby's money from an account on which Shelby's President was an authorized signatory into a new account for which Duffy made himself the only authorized signatory.

Shelby Packaging Company, Inc.'s First Amended and Supplemental Counterclaim.

Shelby further alleged Mr. Duffy's conduct was inconsistent with Shelby's right to possess and exercise control over its property and that Mr. Duffy converted Shelby's property to Mr. Duffy's use and benefit. *Id.* ¶¶14-15.

In its December 12, 2019 Opinion and Order, the Court wrote,

The sparse Amended Counter-complaint essentially alleges: that Shelby had tangible property in the form of skids, boxes, personal property and cash; Mr. Duffy exercised control over the property; Mr. Duffy took and kept for himself the property; Mr. Duffy's conduct was inconsistent with Shelby's right to possession of the property; and Shelby suffered damages. ¶¶11-15.

However, nothing in the Amended Counter-complaint alleges a factual basis for a conversion of money claim—that the defendant had an obligation to return the specific money entrusted to his care and that the defendant obtained money without the owner's consent to the creation of a debtor-creditor relationship. See again, *Head*, 234 Mich App at 111–12. As discussed above, the checks to which Shelby cites are made payable to Mr. Duffy.

Therefore, Shelby has not made any allegation or cited any facts supporting a claim that the initial exercise of dominion over the funds was wrongful. As a result, Shelby's conversion claim is dismissed to the extent it asserts a claim for conversion of money from the sale of the boxes.

December 12, 2019 Opinion and Order at 16. In a preceding section of the Opinion, the Court also wrote,

Shelby cites to its Exhibit D, which is a series of checks from General Mill Supply Co. made payable to Mr. Duffy. The memo of the checks contains various notations including "wood pallets", reference to ticket numbers, or the word "Gaylords." Shelby then cites to deposition testimony of Mr. Duffy

stating that Shelby would, as a service to its customers, remove or dispose of heavy-duty cardboard boxes (Gaylords) and sometimes he would sell the boxes for “four or five dollars.” Shelby’s Exhibit E at 98-101. Finally, Shelby cites to a document Mr. Duffy presumably provided to Mr. Shah outlining Shelby’s sales. A handwritten notation below the figures in the document states, “does not include Gaylord Sales approx. \$7,000.00 yr.” Shelby’s Exhibit F. . . .

Significantly, to the extent Shelby alleges conversion of money, the checks are payable to Mr. Duffy. Therefore, Shelby has not shown Mr. Duffy’s initial exercise of dominion over the funds was wrongful.

Opinion and Order, p. 10-11. Although the Court’s Opinion could reasonably be read in terms of failure to state a claim for conversion of money under MCR 2.116(C)(8), which would appear inconsistent with its subsequent decision to deny Mr. Duffy’s motion with respect to bank accounts in subsection (E) on page 17 of the same Opinion, the Court’s primary concern was with the checks made payable to Mr. Duffy. Since the Court looked beyond the four corners of the Complaint in reaching its decision, the decision was based on MCR 2.116(C)(10).²

The Court’s decision that Shelby could not show that Mr. Duffy converted money from checks made payable to him is based on several opinions. In *Curry*, 261 Mich App at 591–92, the plaintiff could not claim conversion of funds where it lacked a property interest. See also, *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 112; 593 NW2d 595 (1999) (Defendant must have obtained the money without the *owner’s* consent. . .). For conversion purposes, a check is the personal property of the designated payee. *Pamar Enterprises, Inc v Huntington Banks of Mich*, 228 Mich App 727, 734; 580 NW2d 11 (1998), citation omitted; *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 437; 683 NW2d 171 (2004), rev’d in part on other grounds, 472

² For this reason, the Court did not address the issue of leave to amend.

Mich 192; 694 NW2d 544 (2005); see also *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992)(A person cannot convert his or her own property).

In *Echelon Homes, LLC*, the Court held that the plaintiff did not have standing for a conversion claim relating to checks made payable to the defendant from a third party because the checks did not belong to the plaintiff and therefore “the conversion of the checks did not amount to the invasion of one of the plaintiff’s legally protected interests.” *Id.*

Here, because a third-party made the checks payable to Mr. Duffy, the checks were the personal property of Mr. Duffy. In addition, the Court decided that Shelby had not satisfied the elements of proof to establish a conversion of money claim—that the initial exercise of domain was wrongful or that Mr. Duffy had an obligation to return to Shelby specific funds entrusted.

The Court’s decision that Shelby could not maintain a claim for conversion of money from the proceeds from the boxes does not prejudice Shelby’s ability to assert a claim for conversion of the boxes themselves. Although in this case Mr. Duffy allegedly sold the boxes and received payment, whether he converted the funds or converted the boxes are two distinct inquiries with different elements of proof.

Stated differently, theft of the boxes is not the same as theft of the money from the boxes. Conversion occurs at the point when wrongful dominion is asserted. *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982) citations omitted. Therefore, the conversion of boxes claim does not require, as an element of proof, a showing that Mr. Duffy subsequently sold the boxes for consideration. Regardless of the subsequent disposition of the boxes—whether he kept them, destroyed them, or sold them at a

discount—the conversion occurs at the point of the wrongful exercise of control of the boxes.

On the other hand, to show that Mr. Duffy converted the money from the boxes does not require a showing that Mr. Duffy converted the boxes themselves. Even if at all relevant times the boxes remained the property of Shelby, a conversion of money claim could arise if Shelby had shown that it had ownership of the funds, Mr. Duffy initially exercised wrongful dominion over the funds/obtained the funds without Shelby's consent to the creation of a debtor/creditor relationship, and that Mr. Duffy had obligations to return the specific money entrusted.

Here, while the Court found that the evidence did not support a conversion of money claim regarding proceeds from the boxes, a question of material fact may exist as to whether Mr. Duffy converted the boxes. Specifically, Mr. Duffy states that he disposed of the boxes with permission. See August 21, 2019 Affidavit of Steven Duffy (“[B]ecause Gaylord boxes were piling up in Shelby Packaging, Anil Shah said that he wanted the boxes gone; which I took to mean that he wanted them gotten rid of and thrown out; that Anil Shah did not care what happened to them.”). However, the parties did not fully address the boxes, as opposed to the proceeds from the boxes.

With regard to the bank account, while a question of fact may exist as to whether Mr. Duffy had authority over the account or whether he converted funds there, as he claims, the account remains in Shelby's name, the Court denied Mr. Duffy's motion for summary disposition on the failure to cite adequate evidence or law.

In short, the Court granted Mr. Duffy's motion for summary disposition on a subpart of count II of Shelby's conversion claim on the narrow basis of checks made payable to

Mr. Duffy. The Court's decision did not dismiss claims regarding the Gaylord boxes, pallets or other tangible property of Shelby. The Court's decision also did not affect claims relating to funds in the bank account.

Conclusion

For the reasons set forth above, Defendant's motion is DENIED. In accordance with MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.



HONORABLE RICHARD L. CARETTI
Circuit Court Judge

January 15, 2020

cc: Dennis J. Harris, Esq.
Edward J. Gudeman, Esq.
Donald R. Bachand, Esq.

