

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

BULLET EXPEDITING LLC

Plaintiff/Counter-Defendant,

vs.

Case No. 18-53-CB

EDMUND RUSSELL, INNOVATIVE
MANAGEMENT SOLUTIONS, LLC,

Defendants/Counter-Plaintiffs

OPINION AND ORDER

This matter comes before the Court on defendants/counter-plaintiffs Innovative Management Solutions, LLC (“IMS”) and Edmund Russell (“Mr. Russell”)(collectively referred to as “Defendants”) motion for partial summary disposition under MCR 2.116(C)(10) and to dismiss defendant Mr. Russell.

I. Background

On January 5, 2018, Plaintiff Bullet Expediting, LLC (“Bullet”) filed a two-count complaint against Mr. Russell, IMS and Intermediat.net, Inc. alleging: count I, tortious interference with a business relationship, and count II, fraudulent use of a financial device.¹ Specifically, Plaintiff avers that: Bullet is a trucking delivery company with 16 phone lines; that Bullet contracted with Mr. Russell to set up a phone system; Bullet hired Mr. Russell in December 2017 and terminated him the same month; in retaliation of his termination, Mr. Russell changed the passwords to Bullet’s telephone lines; without Plaintiff’s telephone line, customers could not contact the company and Bullet

¹On April 5, 2018, this Court signed the parties’ stipulated order dismissing Intermedia.net, Inc. without prejudice.

lost business.

On The Court heard oral argument on Defendants' motion for summary disposition and took the matter under advisement.

II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121. Indeed, "an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

III. Arguments, Law and Analysis

A. Individual Liability (Count I and Count II)

Defendants argue that Mr. Russell is not personally liable for the contract of IMS because a corporation is a legal entity distinct from its shareholders. Specifically, Defendants agree that there are no invoices from Mr. Russell, no checks or payments to him, all telephone charges were from IMS and IMS received all payments. Defendants also emphasize that paragraphs 13 and 14 of the Complaint state that Bullet made

monthly payments to IMS for telephone services. Therefore, according to Defendants, Mr. Russell, as an individual member of IMS, should be dismissed as a party because all relevant transactions were with IMS.

Bullet responds that it was Mr. Russell's tortious conduct—use of the credit card and terminating the phone service—that led to the present litigation. Bullet argues that corporate employees are personally liable for tortious acts in which they participate regardless of whether they act on behalf of a corporation. Therefore, Bullet concludes that it has properly named Mr. Russell as a defendant.

Generally, “the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all the corporation's stock.” *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 509; 802 NW2d 712 (2010). However, the courts can ignore this corporate fiction when it is invoked to subvert justice. *Id.* “It is well established that corporate employees and officials are personally liable for all tortious and criminal acts in which they participate, regardless of whether they are acting on their own behalf or on behalf of a corporation. *Joy Mgt Co v City of Detroit*, 183 Mich App 334, 340; 455 NW2d 55 (1990) citing *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986).

Here, Bullet has alleged that Mr. Russell committed fraud and tortious interference with a business expectancy. Since Mr. Russell could be liable personally to Bullet for tortious acts even when acting on behalf of a corporate entity, the fact that Bullet had a relationship with IMS does not preclude Bullet as a matter of law from pursuing claims against Mr. Russell. As a result, Defendants' motion to dismiss Mr. Russell from this litigation must be denied.

B. Count II (Fraudulent Use of a Financial Device)

Next, Defendants argue that the alleged fraudulent use of a credit card in Count II, fails because Mr. Russell was owed the money for services provided and the charges were reversed leaving Bullet with no damages.

Bullet responds that the present action arises out of Mr. Russell's unauthorized use of an American Express Credit Card in the amount of \$3,349 and therefore the motion for summary disposition should be denied as to count II because Bullet is entitled to seek treble damages for Mr. Russell's conduct. Bullet also contends that since Mr. Russell has invoked his Fifth-Amendment privilege, the Court may draw adverse inferences against him.

In its response brief, Bullet mentions "fraudulent conversion" in the context of its discussion of "Fraudulent use of a Financial Device." It is less than clear which cause of action Bullet relies upon in Count II. Even at oral argument, counsel identified several theories of recovery. If Plaintiff intends to base his claim MCL 750.157n prohibiting the stealing, removing, retaining, or secreting another's financial transaction device without consent, that provision is a criminal offense. Bullet has cited no authority, and the Court finds no support for using that criminal provision as a basis for a private cause of action.

To the extent that Bullet intends to assert a cause of action for fraud, it must show: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) *the plaintiff suffered damage. M&D, Inc v*

WB McConkey, 231 Mich App 22, 27; 585 NW2d 33 (1998) citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). If there are no damages, it is appropriate to grant summary disposition on fraud claims. *New Freedom Mortg Corp v Globe Mortg Corp*, 281 Mich App 63, 69–70; 761 NW2d 832 (2008), overruled on other grounds, *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74; 878 NW2d 816 (2016).

If Bullet intends to assert a cause of action for conversion, Bullet must prove a “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 support an action for conversion of money, the defendant must have obtained the 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 to his care.” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111-112; 593 NW2d 595 (1999).

Bullet has not refuted or contested that the allegedly fraudulent charges to American Express were reversed.² Instead, Bullet simply argues that the Court should deny the motion for summary disposition because Bullet is entitled to treble damages for Mr. Russell’s “conduct.” The Court finds no authority for granting a party the right to

² According to Defendants, Bullet concedes in its interrogatories 11(H) that American Express reversed the charges but Defendants did not attach the interrogatory. Bullet conceded on the record at oral argument that the charges were reversed. Once Defendants raised the argument in their motion for summary disposition, Bullet had an obligation to respond. A nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Bullet has not shown that it suffered any damages from the credit card usage.

treble damages for conduct. Instead, the conversion statute provides for the recovery of three times damages. Bullet has not established any damages that it suffered as a result of the credit card charges.³

Without damages, Bullet cannot sustain an action in fraud since damages is one of the elements of the claim. If Bullet seeks to assert a conversion claim, it has not cited any cases permitting a claim in conversion where the plaintiff has not been deprived of any property or money.⁴ The express terms of MCL 600.2919a provide a remedy for a person “damaged as a result of . . .” The only damages asserted in Count II of Bullet’s Complaint are for \$3,329 in unauthorized credit card charges. Complaint ¶¶30, 32. With no dispute remaining that those charges were reversed, Bullet has already been restored to its status quo. Therefore, summary disposition must be granted on Count II.

IV. Conclusion

For the reasons set forth above, Defendant’s motion to dismiss Mr. Russell as a party is DENIED; Defendants’ motion for summary disposition on Count II of Bullet’s complaint is GRANTED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: NOV 28 2018

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge

³ To the extent that American Express absorbed any wrongfully incurred charges, it, rather than Bullet, would be the party suffering the loss and therefore the real party in interest. See, MCR 2. 201(B)(“An action must be prosecuted in the name of the real party in interest....”).

⁴ Even considering Bullet’s contention that it is entitled to treble its damages, the trebling of no damages still equates to no damages.