

STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA

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Grand Haven, Michigan 49417
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ROBBINS ROAD REAL ESTATE, L.L.C.,
a Michigan limited liability company, and
BOWLING FAMILY INVESTMENT, L.L.C.,
a Michigan limited liability company,
Plaintiffs/Counter-Defendants,

OPINION AND ORDER ON
MOTION FOR PARTIAL
SUMMARY DISPOSITION

v

MOBILELINK MICHIGAN, LLC,
a Michigan limited liability company,
Defendants/Counter-Plaintiffs.

File No. 23-007223-CB

Hon. Jon A. Van Allsburg

Plaintiffs/Counter-Defendants seek partial summary disposition of Count II of defendants'/counter-plaintiffs' counterclaim under MCR 2.116(C)(5), (7), and (8). There is very little disagreement between the parties as to the facts regarding this count. In a 2021 case, plaintiff Robbins Road Real Estate, LLC ("Robbins") sued defendant Mobilelink Michigan LLC ("Mobilelink"), but Robbins inadequately served the summons and complaint on Mobilelink. Robbins nonetheless was able to enter a default judgment against Mobilelink.

Robbins then obtained a writ of garnishment and served it on Mobilelink's bank, obtaining a cashier's check for \$3,197.83 out of Mobilelink's funds dated August 31, 2022. After several requests from Mobilelink and resulting litigation, Robbins agreed to set aside the default due to the improper service. On September 9, 2022, the parties signed a stipulated order to set aside the default judgment, cancel the garnishment, and immediately return the garnished funds.¹ In a series of emails sent September 8, 2022, counsel for Robbins confirmed that they had the cashier's check and asked how Mobilelink would like it returned. On the same day, counsel for Mobilelink responded with payment instructions. Robbins did not return the funds until a month later.

On October 7, 2022, counsel for Robbins again emailed Mobilelink's counsel to ask for payment instructions, and counsel responded with instructions. This time the check was shipped

¹ The stipulated order entered September 13, 2022, states in relevant part: "IT IS FURTHER ORDERED the July 25, 2022 Request and Writ for Garnishment (Nonperiodic) to garnishee-defendant Chase is vacated, and any garnished funds shall be immediately returned to Defendant's bank account and/or released for availability to Defendant."

to Mobilelink, arriving October 12, 2022. Mobilelink argues that by garnishing their funds and withholding the cashier's check for a month before returning it, Robbins converted Mobilelink's property to its own use and is therefore liable for statutory conversion under MCL 600.2919a.

Standard of Review

A motion for summary disposition under MCR 2.116(C)(5) may be granted when "the party asserting the claim lacks the legal capacity to sue." A motion for summary disposition under MCR 2.116(C)(7) can be justified by a prior judgment on this claim before commencement of this action. In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5) or (C)(7), this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties.² When reviewing a motion under (C)(7), plaintiff's well-pled factual allegations are accepted as true and are to be construed in favor of the plaintiff.³ Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material.⁴ However, the moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial.⁵ If such material is submitted to the court, it *must* be considered.⁶

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.⁷ When deciding a motion brought under this section, a court considers only the pleadings. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.⁸ All reasonable inferences or conclusions that may be drawn from the factual allegations must be accepted by the court as true. However, "conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action."⁹ A (C)(8) motion may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.¹⁰

² *UAW v Cent Michigan Univ Trustees*, 295 Mich App 486, 493; 815 NW2d 132 (2012); *Jones v State Farm Ins Co*, 202 Mich App 393, 396-97; 509 NW2d 829 (1993).

³ *Wakefield v Hills*, 173 Mich App 215, 220; 433 NW2d 410 (1988).

⁴ *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

⁵ *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008).

⁶ *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

⁷ *Maiden*, 461 Mich at 119.

⁸ *Id.*

⁹ *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014).

¹⁰ *Maiden*, 461 Mich at 119.

Analysis

Common-law conversion is defined as “any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.”¹¹ Statutory conversion occurs when the converter puts the other person's property to the converter's own use.¹² MCL 600.2919(a) establishes a cause of action for statutory conversion, and for treble damages.

(1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

(a) Another person's stealing or embezzling property or converting property to the other person's own use.

(b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

(2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.¹³

1. Color of Law

Plaintiff Robbins argues that no conversion could have taken place because the garnishment was taken under color of a judgment that was only later set aside. Any conversion would require that control be wrongfully exerted. This argument applies at best only to the alleged wrongful garnishment, not to the delay in returning the check to Mobilelink after agreeing – and being ordered – to do so. Mobilelink argues that the default judgment was void due to the improper service they received from Robbins and that even a good faith belief that the judgment was valid is not a defense to a conversion claim for the garnishment.

Defendant cites *Bensmiller v Elias Bros Rest, Inc*, an unpublished Court of Appeals decision, to support their claim of conversion.¹⁴ In *Bensmiller*, sanctions were ordered against a decedent's estate but the prevailing party garnished the wages of the estate's personal representative, who was not named in the judgment.¹⁵ The Court allowed a conversion claim to

¹¹ *Aroma Wines & Equip, Inc v Columbian Distribution Servs., Inc*, 497 Mich 337, 351-52; 871 NW2d 136 (2015).

¹² *Id.* at 361.

¹³ MCL 600.2919a.

¹⁴ *Bensmiller v Elias Bros Rest, Inc*, unpublished opinion of the Court of Appeals, issued October 31, 1997 (Docket No. 194144), p 1, 1997 WL 33343875. There is a lack of binding precedent on the issue, so this opinion relies on nonbinding precedent that it finds persuasive.

¹⁵ *Id.*

continue based on that garnishment, holding that a good faith or mistaken belief that the garnishment was proper was not a defense to a conversion claim.¹⁶

Plaintiff relies on *Burns v Midland Funding, LLC*, an unpublished federal case applying Michigan law.¹⁷ In that case, a plaintiff obtained a default judgment and a bank levy against a defendant before the judgment and levy were set aside due to fraudulent service.¹⁸ The court in *Burns* rejected a conversion claim, holding that attempts to collect on a judgment are not wrongful merely because the judgment is later set aside.¹⁹ *Burns* considered and distinguished *Bensmiller*. In *Bensmiller*, there was never a facially valid judgment entered against the plaintiff to support wage garnishment, whereas in *Burns*, a judgment was entered and then set aside.²⁰ The situation here is analogous to the one in *Burns*, and the court concludes that the garnishment itself, and the plaintiff's retention of defendant's funds up until entry of the stipulated order of September 13, 2022, does not constitute conversion. Summary disposition is appropriate under MCR 2.116(C)(8) of defendant's claim that the garnishment of funds constituted a conversion. This does not dispose of the claim that retention of the check after the court ordered its return was a conversion.

2. Own Use

Plaintiffs argue that statutory conversion requires that the converter put the converted property to the converter's "own use."²¹ The parties agree that the cashier's check was not negotiated or deposited but was instead returned and endorsed over to Mobilelink. This does not defeat the conversion claim. The "own use" element of statutory conversion "requires a showing that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose."²² Defendant alleges that simply holding the cashier's check made the funds unavailable to Mobilelink, thus ensuring that the assets would later be available to satisfy a future judgment against Mobilelink. This could be a purpose personal to plaintiff's interest that would satisfy the "own use" element as defined in

¹⁶ *Id.* at 3.

¹⁷ *Burns v Midland Funding, LLC*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued December 19, 2019 (Case No. 18-13637), p 1, 2019 WL 6912855.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ MCL 600.2919a.

²² *Aroma Wines & Equip, Inc v Columbian Distribution Servs., Inc*, 497 Mich 337, 340; 871 NW2d 136 (2015).

Aroma Wines. However, *Aroma Wines* also ruled that to be a question of fact for the jury to decide.²³ Accordingly, this argument does not justify summary disposition.

3. Checks as Personal Property of the Payee

“A check is considered the personal property of the designated payee.”²⁴ Plaintiffs argue that, as the designated payee, the cashier’s check belonged to them and not to Mobilelink. None of the property alleged to be converted was Mobilelink’s personal property, therefore no conversion claim can be sustained. Defendant’s position is that “[a] check may be the subject of a conversion”²⁵ and that the caselaw cited by plaintiffs only stands for the proposition that the drawer of a check could not bring a conversion action.²⁶ Defendants did not draw the check from their account, the money was garnished by their bank instead. Plaintiffs’ argument again applies only to the alleged wrongful garnishment. By agreeing to return the check, plaintiffs conceded that they were no longer entitled to it. Plaintiffs cannot continue to claim the check as their own personal property after a court order to return it.

Plaintiffs cite another unpublished case in which summary disposition of a conversion claim was upheld, but the case undermines plaintiffs’ stated position.²⁷ In *Sault Ste Marie Tribe of Chippewa Indians v Bouschor*, checks payable to the defendants were property of the defendants and so no conversion took place.²⁸ Critically, those defendants “were under no obligation to return the specific funds paid” when the conversion claim was made.²⁹ “To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care.”³⁰ In this case, the parties agreed that plaintiffs would return, not the specific cashier’s check, but the “garnished funds.” Summary disposition is not appropriate for the claim that retention of the cashier’s check itself constituted a conversion.

²³ *Id.* at 361.

²⁴ *Pamar Enterprises, Inc v Huntington Banks of Mich*, 228 Mich App 727, 734; 580 NW2d 11 (1998).

²⁵ *Sutter v Ocwen L Servicing, LLC*, unpublished opinion of the Court of Appeals, issued May 24, 2016 (Docket No. 320704), 2016 WL 3003346.

²⁶ *Pamar Enterprises, Inc*, 228 Mich App at 734.

²⁷ *Sault Ste Marie Tribe of Chippewa Indians v Bouschor*, unpublished opinion of the Court of Appeals, issued November 18, 2008 (Docket No. 276712), 2008 WL 4923039, rev’d in part on other grounds, 485 Mich 1045; 777 NW2d 143 (2010).

²⁸ *Id.* at *17.

²⁹ *Id.*

³⁰ *Head v. Phillips Camper Sales & Rental, Inc.*, 234 Mich App 94, 111; 593 NW2d 595 (1999).

4. Actual Damages

Finally, plaintiffs argue that summary disposition is appropriate because defendant has suffered no damages. The parties agree that the cashier's check and all garnished funds were returned to Mobilelink by October 10, 2022 (arriving October 12, 2022), well before this counterclaim was filed. Defendant argues that they are nevertheless entitled to treble damages as a punitive measure. The conversion statute allows recovery of "3 times the amount of actual damages sustained, plus costs and reasonable attorney fees."³¹ "Actual damages" are not defined in the statute, but are explored in *Alken-Ziegler, Inc v Hague*.³² There, the Court of Appeals held that third-party insurance reimbursements did not reduce actual damages, but repayment of embezzled funds by the defendant embezzler would have done so.³³

Return of the cashier's check a month after entry of the order requiring it does not avoid all damages here. Damages in a conversion case include interest from the date of conversion.³⁴ In the light most favorable to the nonmoving party, plaintiff was obligated to return the cashier's check "immediately." In the absence of a specific deadline, that order called for return within a reasonable time, accounting for delivery or mailing time. Defendant's actual damages may therefore include interest on the amount allegedly converted from the "reasonable delivery date" until the date that defendant received its check. While this would be a paltry sum, even after being trebled, it is still enough to defeat plaintiff's motion for summary disposition. It may not justify continued litigation, however, and may not be enough to avoid a motion by plaintiff for sanctions for allegedly pursuing a claim for an improper purpose, such as to needlessly increase the cost of litigation. MCR 1.109(E)(5)(c).

Conclusion

Plaintiff/counter-defendants' motion for partial summary disposition is GRANTED IN PART regarding defendant/counter-plaintiff's theory of conversion by wrongful garnishment, but otherwise DENIED. The issue of fees and costs is reserved for trial.

IT IS SO ORDERED.

This is not a final order and does not close this case.

Date: June 23, 2023


Hon. Jon A. Van Allsburg, Circuit Judge

³¹ MCL 600.2919a.

³² *Alken-Ziegler, Inc v Hague*, 283 Mich App 99; 767 NW2d 668 (2009).

³³ *Id.* at 103 n5, citing *In re Hamama*, 182 BR 757 (1995).

³⁴ *Ehman v Libralter Plastics, Inc*, 207 Mich App 43, 45; 523 NW2d 639 (1994).