STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PRECISION STANDARD, INC.,

Plaintiff,

-vs-

ADP TAX SERVICES, INC.,

Defendant.

Case No. 2024-205934-CB

Hon. Victoria Valentine

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OPINION AND ORDER REGARDING DEFENDANT'S ADP TAX SERVICE INC'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held on the
14th day of August 2024 in the County of
Oakland, State of Michigan
PRESENT: HON. VICTORIA A. VALENTINE

The matter before the Court is on Defendant, ADP Tax Service, Inc's ("ADP") Motion for Summary disposition under MCR 2.116 (8), and (10), seeking dismissal of Plaintiff, Precision Standard Inc's ("Precision"), 2-count complaint. The Court has read the briefs, and Court file. This Opinion and Order is entered without oral argument. MCR .119(E)(3).

PERTINENT FACTS

On June 18, 2020, Precision and ADP entered into a payroll agreement ("Agreement").[1] Under this Agreement ADP would perform complete payroll and tax services for Precision. These services include:[2]

- Processing and paying Plaintiff's employees' payroll from Defendant's own bank account with funds advanced by Plaintiff based on requests for funds from Defendant.
- Managing Plaintiff's payroll taxes by automating the proper deductions from Plaintiff's employees' wages and delivering the right amount of payroll taxes to the state and federal government from Defendant's own bank account.
- Performing tax filing services for Plaintiff.

Precision's complaint alleges that Plaintiff complied with the terms of the parties' agreement and timely paid ADP's invoices.[3] For the years 2020-2022, it paid ADP a total of $250,419.91 for ADP's payroll and tax filing services,[4] which was intended to be used to prepay Precision's payroll tax owed to the state and federal governments.[5] Yet, while ADP received these requested total payments from Precision, ADP failed to timely file Precision's payroll tax returns or timely pay Precision's payroll taxes to the federal government.[6]

Precision contends ADP was obligated to provide advice and to act for the benefit of Precision in regard to Precision's payroll tax obligations.[7] And while ADP provided W-2s to Precision's employees, ADP failed to file payrolls returns and failed to pay the employee

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[1] Complaint ¶ 5; Defendant's MSD Exhibit 2: Agreement. The Court notes that while Plaintiff's complaint references the Agreement, it neither attaches nor alleges a count of breach of the Agreement.
[2] Complaint ¶ 5.
[3] Complaint ¶ 6.
[4] Complaint ¶ 6.
[5] Complaint ¶ 7.
[6] Complaint ¶ 9.
[7] Complaint ¶ 8.

withholding taxes listed on the W-2s.[8]

Precision argues that, without any explanation, beginning in August of 2021, it received a series of checks from ADP that Precision was instructed to deposit.[9] Eventually ADP admitted to Precision that it failed to file Precision's payroll tax returns or pay the payroll taxes.[10] Accordingly, Precision retained the services of a Certified Public Accountant and an attorney to ensure Precision was tax compliant compliance with federal and state payroll tax laws.[11] Precision alleges it paid in excess of $10,776.08 to these professionals.[12]

Precision then filed its 2-count complaint alleging breach of fiduciary duty, and common law and statutory conversion (MCL 600.2919a).[13] Precision's complaint seeks $32,328.24 in damages that is calculated by trebling the $10,776.08 it paid for the professional services pursuant to MCL 600.2919a.

ADP responds by filing this motion for summary disposition under MCR 2.116(C)(8) and (10). ADP seeks dismissal of Precision's complaint, arguing that Precision's claims are barred because they arose out of the contract. ADP also seeks sanctions and attorney fees for Precision's filing of this Complaint, which ADP claims is frivolous.

Precision responds and argues that the economic loss doctrine does not apply to service contracts, like the one at issue. Precision also argues that ADP had a fiduciary duty to not convert the trust funds it held; that ADP's silent fraud forced Precision to seek professional tax assistance;

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[8] Complaint ¶ 15.
[9] Complaint ¶¶ 16-17.
[10] Complaint ¶ 18.
[11] Complaint ¶¶ 19 & 20.
[12] Complaint ¶14.
[13] While Precision's Response discusses Silent Fraud, its Complaint fails to allege such a cause of action.

that the withholding of payroll tax information to prevent discovery of conversion was an element of conversion; and that Precision is not entitled to sanctions.

STANDARD OF REVIEW

Summary disposition may be granted under MCR 2.116(C)(8) where "[t]he opposing party has failed to state a claim on which relief can be granted." When deciding a motion on this ground, a court may consider only the parties' pleadings. MCR 2.116(G)(5). "[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the non-moving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163 (1992). "A mere statement of a pleader's conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action." *Varela v Spanski,* 329 Mich App 58, 79 (2019) (plaintiff failed to plead facts in support of his claim but instead made conclusory statements and conclusions of law). A motion under MCR 2.116(C)(8) 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." *Wade*, 439 Mich at 163.

Summary disposition under MCR 2.116(C)(10) may be granted where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This motion tests the factual sufficiency of the complaint and "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins Co,* 460 Mich 446, 455 (1999). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)]." MCR 2.116(G)(3)(b). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue

rests on a nonmoving party, the 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. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Smith,* 460 Mich at 455 (citations omitted; emphasis added).

ANALYSIS

Based on the recent comprehensive unpublished opinion of *1-800 Bathtub, LLC v Rebath, LLC*, 2024 WL 1689099,[14] which the Court finds well-reasoned, persuasive and instructive, the Court agrees with Precision that the economic loss doctrine does not apply to service contracts. In *Bathtub,* the Court of Appeals reviewed the trial court's opinion which, *inter alia*, vacated an arbitration award on Bathtub's conversion claim having found that the arbitrator should have applied the economic-loss doctrine to bar the claim. The Court of Appeals found that the trial court reached the right conclusion for the wrong reason. In doing so, the *Bathtub* Court extensively detailed the scope, history of, and law pertaining to both the economic loss doctrine and the separate-and-distinct analysis. In its analysis it found as follows:

> The circuit court correctly vacated the portion of the arbitrator's award related to conversion. ***In doing so, it incorrectly concluded that the economic-loss doctrine barred Bathtub's conversion claim. But the economic-loss doctrine does not apply to contracts for services*****,** see *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 380; 656 NW2d 858 (2002), and it does not apply to intentional torts, see *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 374; 532 NW2d 541 (1995), so it does not bar Bathtub's conversion claim. The circuit court nonetheless reached the right conclusion—that the conversion claim is barred—because the conversion claim does not impose duties separate and distinct from the duties existing under the contract, namely, not to steal the number. See *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 83-85; 559 NW2d 647 (1997).

[14] Unpublished decisions of this Court are not binding, MCR 7.215(C)(1), but they can be "instructive or persuasive," *Paris Meadows, LLC v. City of Kentwood*, 287 Mich. App. 136 n 3, 783 N.W.2d 133 (2010).

Bathtub, supa at * 5. (Emphasis added).

The Court of Appeals then continued its analysis:

> Our starting point is that the MSA [Master Services Agreement] is a lease and a contract for services. We have only applied the economic-loss doctrine to contracts for goods, and we have specifically declined to apply the doctrine to service contracts. See *Higgins v Lauritzen*, 209 Mich App 266; 530 NW2d 171 (1995) (reversing summary disposition on basis that the economic-loss doctrine was wrongly applied to a contract for services); *Quest Diagnostics, Inc*, 254 Mich App at 379 ("This Court has declined to apply the economic[-]loss doctrine where the claim emanates from a contract for services."). ***Because the MSA was a services contract, the economic-loss doctrine does not apply. See*** **Neibarger,** ***439 Mich at 527-528***. The arbitrator reached the correct conclusion (that the economic-loss doctrine does not apply), even if it did so for the wrong reason (that the parties could not have contemplated the conversion at the time of the MSA's execution). His refusal to apply the economic-loss doctrine—albeit for the wrong reason—was not in contravention of controlling law. ***The doctrine has only been applied to the sale of goods, and never to a contract for services.***

Bathtub, supra at * 7. (Emphasis added).

Accordingly, this Court agrees with Precision that the economic loss doctrine does not apply to the service agreement between Precision and ADP; therefore, the economic loss doctrine does not bar Precision's claims for breach of fiduciary duty and conversion.

This, however, does not end this Court's analysis. The Court must conduct a "separate-and distinct analysis." In *Bathtub*, the Court of Appeals found that the conversion claim was nevertheless barred because it did not impose duties separate and distinct from the duties existing under the contract. *Bathtub,* supra citing *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, (1997). In doing so, the *Bathtub* Court detailed the law relating to the separate-and-distinct analysis set forth in *Hart v Ludwig*, 347 Mich 550 (1956), that was followed up by the Michigan Supreme Court in *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 83-85 (1997). The *Bathtub* Court explained:

> In *Hart v Ludwig*, 347 Mich at 559, our Supreme Court first addressed whether a plaintiff could maintain an action in tort arising out of a breach of contract. There, an orchard worker (the promisor) agreed to care for an

> orchard under an oral contract, but failed to perform certain care and maintenance that would otherwise amount to negligence. *Id.* at 560. The orchard owner (the promisee) sued alleging negligence, rather than breach of contract. *Id.* Addressing the divide between contract actions and tort actions, the Court relied on the dichotomy between misfeasance (action) and nonfeasance (inaction), to describe the distinction:
>
> If a party undertakes to perform work, and proceeds on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertakes, and does not proceed on the work, no [tort] action will lie against him for the nonfeasance. [*Id.* at 562 (quotation marks and citation omitted; quotation cleaned up).]
>
> In other words, when the cause of action arises from a breach of a promise, it is an action in contract; when the action arises from a defendant's negligence or active misconduct (i.e., more than breach of a promise), the action is in tort. See *id.* at 562-563. Ultimately, the Court held that the orchard worker merely violated his promise to complete his contracted-for performance, so a tort action would not lie. *Id.* at 565-566.

Bathtub, supra at * 7-8.

The *Bathtub* Court then discussed Michigan Supreme Court case of *Rinaldo's Constr Corp v Mich Bell Tel Co* case, which clarified the misfeasance/nonfeasance distinction for determining whether an action sounds in tort or in contract.

> There [in *Rinaldo*], a construction company (and telephone service user) sued its telephone service provider alleging negligence related to a variety of problems with its telephone service. *Rinaldo's Constr*, 454 Mich at 67-69. When considering the viability of the negligence claim, the Court indicated that the threshold question is "whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Id.* at 84. It relied on common-law principles that "'[m]isfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and tangible things.'" *Id.*, quoting Prosser and Keeton, Torts, § 92, pp. 656–657 (emphasis omitted). Generally, there is already a duty to exercise reasonable care to avoid physical harm, and entering a contract does not change that preexisting duty. *Id.* (quotation omitted). The Court concluded, however, that duty "does not extend to intangible economic losses." *Id.* (quotation committed). Rather, for that sort of loss, the parties manifested intent controls the nature and extent of the parties' obligation. *Id.* (quotation omitted). In other words, the claim sounds in contract. See *id.* (noting that the principle dates at least as far back as *Hart*, and more recently was applied in the UCC context under the "economic loss doctrine" in *Neibarger*). Relying on these principles, the

> Court concluded that the defendant telephone service provider failed to perform under the terms of its promise. *Id.* at 85. The plaintiff construction company did not allege physical harm nor "violation of an independent legal duty distinct from the duties arising out of the contractual relationship." *Id.* So, there was no cause of action in tort.

Bathtub, supra at * 8-9.

The *Bathtub* Court recognized that these principles are tricky when applying them to the facts; that the nature of conversion is such that it could be characterized as misfeasance (actively stealing or converting another's property) or nonfeasance (a failure to satisfy contractual obligations); and that there are no published cases applying the separate-and-distinct analysis. Nevertheless, the Court found:

> But here, we find it determinative that no relationship between Bathtub and ReBath existed giving rise of a legal duty separate from the MSA. Bathtub's conversion claim arises from ReBath's failure to abide by the MSA. Further, defendant's failure to perform a contractual duty cannot give rise to a tort action, unless a separate-and-distinct duty exists separate from the contractual obligations. *Smith Living Trust v Erickson Retirement Communities*, 326 Mich App 366, 395; 928 NW2d 227 (2018). As the Supreme Court noted in *Hart*, 347 Mich at 563, while misfeasance is required for a tort action to lie, "[t]here must be some breach of duty distinct from breach of contract." We conclude that there is no duty separate and distinct from the contractual obligation because any alleged duty under the statute—not to convert the [1-800 telephone] number—is the same as the duty under the contract. More fundamentally, ReBath's ability or opportunity to convert the number to its own use only arose through virtue of the contractual relationship between Bathtub and ReBath. Ultimately, because there is no separate duty distinct from that existing under the contractual obligations and because breach of the duty would not have been possible but for the contractual relationship, we conclude that the arbitrator manifestly disregarded the law in concluding that Bathtub's conversion claim could lie. See *Hart*, 347 Mich at 563; *Rinaldo's Constr*, 454 Mich at 83-85. We therefore affirm the circuit court's decision to vacate that portion of the arbitrator's award but on a different basis.

Bathtub, supra at * 7-9.

Similarly, here the Court finds that no relationship between Precision and ADP existed giving rise to a legal duty separate from the parties' Agreement. Precision's claims that ADP failed to timely file Precision's payroll tax returns; failed to timely pay Precision's payroll taxes to the

government; and failed to disclose that it had not filed or paid the payroll taxes and returns, relate to ADP's failure to abide by the terms of that Agreement. Because there is no separate duty distinct from that existing under the Agreement's obligations and because breach of the duty would not have been possible but for the contractual relationship, ADP's motion is GRANTED.

However, Defendant ADP acknowledges that "Plaintiff's Complaint actually relates to a contractual relationship. . . ."[15] Therefore, Plaintiff shall have 14 days from the date of this Opinion to Amend its Complaint to allege a breach of contract claim.

ADP's request for sanctions is respectfully denied.

CONCLUSION

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Defendant ADP'S Motion for Summary Disposition is GRANTED under MCR 2.116(C)(8) and (10).

IT IS FURTHER ORDERED that Plaintiff may amend its complaint.

This is a not final order and does not close out the case.

IT IS SO ORDERED.

/s/Victoria A. Valentine

DATED 8/14/24

[15] Defendant's Brief, p 2.