

STATE OF MICHIGAN
COURT OF APPEALS

1-800 BATHTUB, LLC,

Plaintiff/Counterdefendant-
Appellant/Cross-Appellee,

v

REBATH, LLC,

Defendant/Counterplaintiff-
Appellee/Cross-Appellant.

UNPUBLISHED

April 18, 2024

No. 357932

Wayne Circuit Court

LC No. 20-004432-CB

Before: HOOD, P.J., and CAMERON and GARRETT, JJ.

CAMERON, J. (*concurring*).

I agree that this Court should affirm the circuit court’s order regarding 1-800 Bathtub, LLC’s (Bathtub) motion to confirm an arbitration award. The majority opines the separate-and-distinct doctrine bars Bathtub’s conversion claim against ReBath, LLC (ReBath). I agree with the majority’s conclusions, but for different reasons.

The starting place for issues involving a contract is the terms of the contract. See, e.g., *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009) (“If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties’ intent as a matter of law.”). In my view, the conversion issue is resolved by simply looking at the contractual obligations outlined in the Marketing Services Agreement (MSA), which states, in relevant part:

[A]ll contact with any telephone carrier for the Number shall be the responsibility of Bathtub and Rebath [sic] acknowledges and agrees that it has no right or authority to contact, nor will it attempt to contact, any such carrier or to take any action aimed at transferring the Number to another carrier or effecting changes in the routing of calls originating from the Telephone Exchanges.

Because the contract explicitly prohibited ReBath from affirmatively “attempt[ing] to contact” or “tak[ing] any action aimed at transferring the number,” plaintiff’s conversion claim is not separate and distinct from the claim for breach of contract. Therefore, it is barred.

This case is different from the factual scenario presented in our Supreme Court's opinion, *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956), which also involved companion tort and breach-of-contract claims. In *Hart*, our Supreme Court explained that the failure to act (nonfeasance) sounds in breach of contract, *id.* at 562, while active efforts beyond the mere breach of a promise (malfeasance) sound in tort. *Id.* at 563. But unlike the oral agreement in *Hart*, the written contract in this case included a provision that explicitly accounted for ReBath's potential malfeasance. When ReBath engaged in this prohibited conduct, it unquestionably violated the contract. I would therefore affirm the trial court under principles of contract law only.

/s/ Thomas C. Cameron