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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001314-MR

CATHERINE BAER

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT JOHNSON, JUDGE
ACTION NO. 04-CI-00638

FIFTH THIRD BANCORP

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR JUDGE.
LAMBERT, SENIOR JUDGE: Catherine Baer appeals from the trial court's

summary judgment against her for conversion and unjust enrichment in the amount
of \$116,299.50. Upon review, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Michael Byars set up a series of companies to manage the assets of various homeowner associations. He collected funds from homeowners for the benefit of their respective associations and disbursed those funds to pay the bills. Catherine Baer was hired as a bookkeeper to manage the accounts and reports for those companies. Sometime in December of 2003, Baer became aware that Byars was embezzling money from the association accounts. She agreed to assist him by concealing the thefts. By May 2004, Byars had managed to steal over \$139,000 from the homeowner association accounts he was managing. Those accounts were all held by U.S. Bank in Lexington, Kentucky.

In June 2004, Byars closed forty-five accounts for different homeowner associations at U.S. Bank. He then opened a commercial checking account at the Fifth Third Bank in Georgetown, Kentucky, in the name of Association Management, Inc., using articles of incorporation from a defunct corporation that had been dissolved on November 1, 2002. Under the instruction of Byars, Baer opened a commercial account under the name of Association Management and Consulting Services of Ohio, L.L.C., along with fourteen other accounts for different associations. She did this at the Fifth Third Bank branch in Florence, Kentucky, and she was listed as the sole signatory and account holder on the fourteen homeowner association accounts.

Byars then began kiting checks by depositing checks from the closed U.S. Bank accounts into his Fifth Third account in Georgetown. By September 2004, Fifth Third fraud control employees learned of the check kiting scheme. At

that time the bank records showed a loss of \$201,447.56. Of that amount, somewhere between \$116,299.50 and \$117, 738.46 of the funds obtained by the check kiting scheme had been diverted from the Fifth Third account in Georgetown into some of the homeowner accounts controlled by Baer in Florence. Records from those accounts show that Baer withdrew cash, wrote checks to herself, to her creditors and to her husband and family members.

Byars was indicted and entered a plea of guilty to the federal crimes of wire fraud and bank fraud. He was ordered to pay \$133,737.66 to Fifth Third as restitution. Baer also entered a plea of guilty to the federal charge of wire fraud but was not ordered to pay any restitution. The trial court in the civil case against Baer granted summary judgment for unjust enrichment and conversion and rendered judgment against her for \$116,299.50. This appeal followed.

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is “proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate when a right to judgment is “shown with such clarity that there is no room left for controversy.” *Id.* at 482. Summary judgment is a correct decision “when it appears impossible for the

nonmoving party to produce evidence at trial warranting a judgment in his favor.”

Huddleston v. Hughes, 843 S.W.2d 901, 903 (Ky.App. 1992).

Baer argues that summary judgment was premature because discovery was not complete. This Court has held that six months is a sufficient time for a party to at least initiate some discovery prior to a grant of summary judgment. “It is not necessary to show that the respondent has actually completed discovery, but only that respondent had the opportunity to do so.” *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky.App. 1979). Baer had ample time and received sufficient discovery to successfully defend against the motion for summary judgment if any defense was available. Her admissions at depositions provided the testimony sufficient for summary judgment. We view the record in a light most favorable to the party opposing the motion for summary judgment resolving all doubts in that party’s favor. *Barnette v. Hospital of Louisa, Inc.*, 64 S.W.3d 828, 829 (Ky. App. 2002). “The party opposing a properly presented summary judgment motion cannot defeat it without at least presenting some affirmative evidence showing the existence of a genuine issue of material fact for trial.” *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). However, Baer’s admitted wrong-doing removed any doubt that she converted the bank’s money for her own use.

Conversion is “the deceitful, intentional appropriation of the money without the right or without belief of right[.]” *Brundage v. Commonwealth of Kentucky*, 416 S.W.2d 728 (1987). “[O]n a claim of unjust enrichment the claimant must only show the

other party has received benefit but that it has been at claimant's expense." *Bogan v. Finn*, 298 S.W.2d 311, 313-14 (Ky. 1957). When those decisions are made, the only thing left for the trial court to decide is the amount due.

In its order overruling Baer's motion to reconsider, the trial court properly analyzed the case as follows. We quote at length from the trial court's order:

In response to the summary judgment motion, Baer stated that she disputed the \$116,299.50 figure as accurate and that the Plaintiff had refused to turn over the deposit slips substantiating this amount. The Plaintiff denied that it has refused to turn over the discovery, stated that Baer did have the opportunity to review the deposit slips, and pointed out that Baer admitted to the \$116,299.50 figure of stolen funds deposited into her homeowner association accounts by Byars in her Verified Answer at paragraph two. The record demonstrates that the Plaintiff is accurate.

The main argument Baer presents to the Court regarding her Motion to Reconsider is that the case of Urban v. Lansing's Adm'r., 239 Ky. 218, 39 S.W.2d 219 (Ky. 1931) does not apply to her. The Court finds that this argument lacks merit. The fact that she paid vendors with these funds and these funds were commingled with other genuine homeowner association funds is irrelevant. In reality, Urban does apply to Baer because she received stolen funds, exercised total control and possession over the funds, acknowledges the amount of the stolen funds that were placed in her care, and never returned this amount to the Plaintiff. The case of State Auto Mut. Ins. Co. v. Chrysler Credit Corp., 792 S.W.2d 626 (Ky.App. 1990) sets out the claim of conversion and the case of Haeberle v. St. Paul Fire and Marine Ins. Co., 769 S.W.2d 64 (Ky.App. 1989) sets out the claim for unjust enrichment. Therefore, Baer converted these funds and was unjustly enriched by them. The Court correctly entered judgment for the Plaintiff on these grounds.

The judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Patrick E. Moeves
Fort Wright, Kentucky

BRIEF FOR APPELLEE:

Eric Wade Richardson,
Anthony Lynn Osterlund and
Victor Allen Walton, Jr.
Cincinnati, Ohio