# STATE OF MICHIGAN

# COURT OF APPEALS

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NEWBERRY STATE BANK,

Plaintiff-Appellee/Cross-Appellant,

v

NORTHERN MICROSYSTEMS, INC., NORTHERN MEDICAL SYSTEMS, INC., BRENDA J. HAMEL, GENE A. HAMEL, STEPHEN RANZINI, JOSEPH L. RANZINI, ARETE MANAGEMENT, and NEWBERRY BANCORP,

Defendants,

and

FRANCIS ALBERT, JIM ETTA ALBERT, and J. MATTHEW ALBERT,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
June 2, 1998

No. 193110
Chippewa Circuit Court
LC No. 93-000716 CZ

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Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Plaintiff Newberry State Bank brought this conversion action against defendants Matthew Albert, Jim Etta Albert, and Francis J. Albert for the wrongful retention of property in which plaintiff alleged it had a superior secured interest. The trial court granted plaintiff's motion for summary disposition, finding all three defendants liable for conversion. Following a hearing on damages, the trial court entered judgment against Matthew Albert for $8,400 plus statutory interest, and against Jim Etta Albert and Francis J. Albert, jointly and severally, for $3,900 plus statutory interest. Defendants appeal as of right, and plaintiff cross appeals.

I

Defendants first argue that the trial court abused its discretion in denying their motion to strike the conversion count of plaintiff's complaint where plaintiff continually violated the trial court's order compelling plaintiff to produce certain bank records. Defendants' claims of prejudice are unpersuasive, given that none were outcome determinative. After viewing the record as a whole, we find no abuse of discretion by the trial court in denying defendants' motion to strike. MCR 2.313(B)(2); *Contel Systems Corp v Gores*, 183 Mich App 706, 709; 455 NW2d 398 (1990).

II

Defendants next argue that the trial court's finding of liability for conversion was not supported by fact or law. We disagree.

In Michigan, conversion is defined generally as any distinct act of dominion wrongfully exerted over the personal property of another. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992); *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 468; 350 NW2d 280 (1984). Conversion may be committed by the refusal to surrender personal property on demand where the person demanding possession has a priority interest in the property. See *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960). The issue of defendants' conversion liability in this case requires a determination whether plaintiff had a superior security interest to that of defendants; therefore, article 9 of the Uniform Commercial Code (UCC), MCL 440.9101 *et seq.*; MSA 19.9101 *et seq.*, governs. We consider the liability of defendants Matthew Albert and Jim Etta Albert and Francis J. Albert in turn.

A

Conversion Liability of Matthew Albert

Pursuant to MCL 440.9201; MSA 19.9201 and MCL 440.9306(2); MSA 19.9306(2), plaintiff's security interest continued in the equipment of its debtor, Northern Microsystems, notwithstanding transfer to Matthew Albert as consideration for the stock purchase agreement, unless the disposition was expressly authorized by plaintiff in the security agreement or otherwise. Here, the security agreement granted plaintiff a "continuing security interest" in all collateral and was otherwise silent regarding authorization for Northern Microsystems to dispose of the collateral. Thus, we turn to MCL 440.9307(1); MSA 19.9307(1) and MCL 440.1201(9); MSA 19.1201(9) to determine whether Matthew Albert was entitled to take free of plaintiff's security interest as a "buyer in ordinary course of business." The test for protection under § 9307(1) has been stated as whether industry custom makes it reasonable to expect the sale. White & Summers, Uniform Commercial Code (3d ed), § 24-13, pp 1166-1167. We find no basis for drawing such a conclusion in this case. Plaintiff's security interest was not cut off under § 9307(1) because Matthew Albert was not a buyer in the ordinary course of business.

Defendant argues that (1) plaintiff lacked standing to assert a claim of conversion because it did not have an ownership interest in the equipment as of November 2, 1990, when the stock purchase

agreement was executed, (2) no conversion liability could be established where the stock purchase agreement was a legal and valid transaction drafted by a company attorney, and (3) the equipment listed in the stock purchase agreement could not be identified as secured collateral. These arguments are based on the premise, apparently accepted by the trial court, that the conversion by Matthew Albert occurred at the time of the November 1990 stock purchase agreement. However, we believe the better reasoned conclusion is that the conversion did not occur until plaintiff actually demanded possession of the equipment in the agreement, which must be deemed to have occurred only after this lawsuit was filed and discovery revealed the transfer of equipment to Matthew Albert in 1990. *Thoma, supra*. However, the fact that plaintiff did not demand possession earlier of the specific equipment listed in the stock purchase agreement does not shield Matthew Albert from liability for conversion. It merely alters the date that conversion liability attached.

Accordingly, we conclude that the finding of conversion against Matthew Albert was supported by law and fact, but a conversion *date* of November 2, 1990, was not. For purposes of this appeal, we deem the date of entry of judgment, February 14, 1996, to be the date of conversion with respect to defendant Matthew Albert. The trial court's error in this respect, however, has particular import only as to the issue of damages, given that plaintiff is entitled to damages from the date of conversion. See III, *infra*.

B

Conversion Liability of Jim Etta Albert and Francis J. Albert

Defendants Jim Etta Albert and Francis J. Albert argue that their landlord lien, which was subject to article 9 of the UCC, *Shurlow v Bonthuis*, 456 Mich 730, 734-738; ___ NW2d ___ (1998), vested in them a superior interest in the abandoned equipment to that of plaintiff's interest. We disagree.

Under MCL 440.9312(5); MSA 19.9312(5), the general rule gives priority to the secured party who is first to file or perfect. The key events with respect to these defendants unfolded as follows: April 2, 1990, plaintiff perfected its security interest; September 1, 1991, the Alberts took possession of the equipment; May 6, 1992, plaintiff and Northern Microsystems (by Gene Hamel) executed the equipment lease/purchase agreements; and February 9, 1993, plaintiff demanded possession of the equipment. If viewed from September 1991, when defendants took possession, plaintiff's interest was superior to that of defendants because plaintiff had filed a financing statement on April 2, 1990, which continued to be in effect regarding the subject equipment at least through 1991, thereby perfecting its security interest in the property before the Alberts took possession. If viewed from February 9, 1993, when plaintiff demanded possession, plaintiff's interest again was superior to that of defendants whether based on the continuously effective financing statements (filed on April 2, 1990, and February 8, 1993,) or on the equipment leases (under which plaintiff purported to retain *ownership* of the equipment). Thus, at all times relevant, plaintiff had a priority secured interest in the subject equipment.

Pursuant to MCL 440.9503; MSA 19.9503, a secured party is entitled to take possession of the collateral upon default by the debtor, provided that the parties have not agreed otherwise. Where possession of collateral can be obtained through self-help measures without breach of the peace, the

secured party may seize it without judicial process. Contrary to defendants' claim, no magic words must be recited to make a proper demand for possession of secured collateral, nor must such demand be made in writing. Here, plaintiff's representatives attempted to obtain peaceful repossession of the equipment, but these attempts were blocked by defendants. Accordingly, the refusal of Jim Etta Albert and Francis J. Albert to turn over the equipment on plaintiff's demand constituted conversion. *Thoma, supra*.

III

Defendants next argue that the trial court's damage awards were unsupported by the evidence. We again disagree. The measure of damages for conversion is the fair market value at the time of conversion. *Baxter v Woodward,* 191 Mich 379; 158 NW 137 (1916); *Ehman v Libralter Plastics, Inc,* 207 Mich App 43, 45; 523 NW2d 639 (1994). Here, even were we to agree with defendants that the values stated in the November 1990 stock purchase agreement and the May 1992 leases were inflated given the dates of conversion, i.e., February 14, 1996, as to Matthew Albert and February 9, 1993, as to Jim Etta Albert and Francis J. Albert, we nonetheless affirm the base awards of compensatory damages because defendants failed to present competent evidence at the hearing on damages to rebut plaintiff's evidence. Uncertainty as to the fact of damage may bar recovery of damages, but where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. See *Purcell v Keegan,* 359 Mich 571, 576-577; 103 NW2d 494 (1960); *Triple E Produce Corp v Mastronardi Produce, Ltd,* 209 Mich App 165, 175-176; 530 NW2d 772 (1995). Thus, we find no clear error by the trial court in relying on the evidence submitted by plaintiff.

On cross appeal, plaintiff argues that it was entitled to an award of treble damages, costs, and attorney fees, pursuant to MCL 600.2919a; MSA 27A.2919(1). We find no error by the trial court in denying plaintiff's request. See *Hovanesian v Nam,* 213 Mich App 231, 237; 539 NW2d 557 (1995).

Plaintiff also argues that it was entitled to interest from the date of conversion. We agree. In a conversion action, interest from the date of conversion to the date of entry of judgment is to be included in the damages calculation. See *Holcomb v Bullock,* 353 Mich 514, 525; 91 NW2d 869 (1958). The concept of common-law interest as an element of damages is distinct from an award of statutory prejudgment interest. See MCL 600.6013; MSA 27A.6013. However, common-law interest as damages and statutory prejudgment interest share the same goal of fully compensating the prevailing party for the lost use of its funds or property. See *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 499, n 9; 475 NW2d 704 (1991); *SSC Associates Ltd Partnership v General Retirement System of the City of Detroit,* 210 Mich App 449, 453-454; 534 NW2d 160 (1995). Here, the trial court awarded statutory interest on the judgments, but erred in failing to consider an award of interest as an element of damages to compensate plaintiff for the lost use of its property. Accordingly, on remand, this Court directs the trial court to calculate an award of interest as damages as to defendants Jim Etta Albert and Francis J. Albert from the conversion date of February 9, 1993, to the date of entry of judgment, February 14, 1996. No interest as damages shall be awarded as to the judgment against defendant Matthew Albert. Plaintiff is also entitled to statutory interest pursuant to

MCL 600.6013; MSA 27A.6013, as to both judgments, but only to the extent that it does not result in a double recovery for plaintiff.

Affirmed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs are awarded.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck