

STATE OF MICHIGAN
COURT OF APPEALS

GALLANT TRANSPORT, INC.,

Plaintiff-Appellee/Cross-Appellant,

v

CTX, INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

February 23, 1999

No. 204011

Jackson Circuit Court

LC No. 96-076238 CK

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

PER CURIAM.

Plaintiff's complaint alleged that defendant converted funds by wrongfully withholding payments due on certain invoices. The trial court found that no conversion occurred, allowed plaintiff to amend its complaint during closing argument to add a breach of contract claim, and entered judgment against defendant for breach of contract. Defendant appeals from the judgment and the trial court's order for costs assessed after it rejected an offer of judgment under MCR 2.405. Plaintiff cross appeals from the trial court's finding that defendant did not convert its funds. We reverse in part and affirm in part.

First, defendant contends that the trial court abused its discretion in allowing plaintiff to amend its complaint during closing argument to add a count for breach of contract. We agree. This Court reviews a grant or denial of a motion for leave to amend pleadings for abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). MCR 2.118(C)(1) allows a party to amend its pleadings to conform to the evidence, at any time, provided that the issues not raised by the pleadings "are tried by express or implied consent of the parties." However, if a party objects to evidence at trial because it is not within the issues raised by the pleadings, the trial court shall not allow an amendment conforming to the proofs at trial "unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits." MCR 2.118(C)(2).

Defendant neither expressly nor impliedly consented to litigate the alleged breach of contract under MCR 2.118(C)(1). Plaintiff presented no evidence that defendant agreed to litigate the contract claim. On the contrary, defendant objected to plaintiff's proposed amendment. While defendant did not object to evidence that it withheld payments due on plaintiff's invoices, defendant's failure to object

to this evidence which supported plaintiff's unpled breach of contract claim did not necessarily establish that plaintiff's contract claim was tried by implied consent of the parties. *Leavenworth v Michigan Nat'l Bank*, 59 Mich App 309, 314; 229 NW2d 429 (1975). Plaintiff introduced the invoices to prove its conversion claim as opposed to its contract claim. The introduction of evidence for a purpose unrelated to a claim which the plaintiff does not plead does not constitute implied consent to litigate an unpleaded claim. See *Harvey v Security Services, Inc*, 148 Mich App 260, 267-268; 384 NW2d 414 (1986). Accordingly, we hold that the trial court abused its discretion when it allowed plaintiff to amend its complaint in contravention of the provisions of MCR 2.118(C)(1).

Second, defendant contends that the trial court abused its discretion in awarding costs to plaintiff for defendant's rejection of an offer of judgment under MCR 2.405. We agree. This Court reviews a grant or denial of a motion for a trial court's award of costs and attorney fees pursuant to MCR 2.405 for abuse of discretion. *Luidens v 63rd Dist Court*, 219 Mich App 24, 31, 37; 555 NW2d 709 (1996). The trial court found that no conversion occurred. Because defendant prevailed on the conversion issue at trial, and plaintiff prevailed on a breach of contract count improperly added to the complaint, we conclude that the trial court abused its discretion in awarding costs under MCR 2.405.

Third, defendant contends that the trial court's judgment was clearly erroneous in finding that defendant did not incur damages as a result of plaintiff's actions. We find it unnecessary to address this issue because we agree with the trial court's finding that no conversion occurred. See *infra*.

Plaintiff raises two issues on cross appeal. First, plaintiff contends that it proved its claim for conversion against defendant. We disagree. A conversion is an intentional tort, consisting of any distinct act of dominion wrongfully exerted over the personal property of another. *Citizens Ins Co of America v Delcamp Truck Center, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989); *Attorney General v Hermes*, 127 Mich App 777, 786; 339 NW2d 545 (1983). A plaintiff cannot maintain an action for conversion of money unless there is an obligation or duty on the defendant's part to return the specific money entrusted to the defendant's care. *Garras v Bekiares*, 315 Mich 141, 148; 23 NW2d 239 (1946); *Warren Tool Co v Stephenson*, 11 Mich App 274, 299; 161 NW2d 133 (1968).

Whether a party exercised an act of dominion over another person's property so as to constitute a conversion is a question of fact. See *Citizens Ins Co, supra* at 575; *Tuuk v Andersen*, 21 Mich App 1, 13; 175 NW2d 322 (1969). This Court reviews a trial court's finding of fact for clear error. MCR 2.613(C); *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995). A finding is clearly erroneous only if there is no evidence to support it or if this Court is left with a firm and definite conviction that a mistake has been made after reviewing the entire record. *Id.*

In the present case, plaintiff failed to show that defendant was entrusted with specific funds which belonged to plaintiff and that defendant breached its duty to transfer those funds to plaintiff. Although plaintiff may have been entitled to payment for its invoices, its claim would be for a breach of contract rather than a conversion. Accordingly, we conclude that the trial court did not err in finding that defendant did not convert plaintiff's funds.

Plaintiff's second issue on cross appeal is whether the penalty provisions of MCL 600.2919a; MSA 27A.2919(1) apply to the present case. This issue is moot because we agree with the trial court's finding that no conversion occurred.

Reversed in part, affirmed in part. The trial court's order assessing costs and attorney fees pursuant to MCR 2.405 is vacated. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Richard Allen Griffin