# STATE OF MICHIGAN

# COURT OF APPEALS

GRIZZLY DEN-COMEDY DEN, INC., a Michigan corporation,

Plaintiff-Appellant,

v

RANDALL J. LEWIS and HELEN REBECCA LEWIS,

Defendants-Appellees.

UNPUBLISHED
July 6, 1999

No. 205713
Kent Circuit Court
LC No. 95 003531 CK

Before: Hoekstra, P. J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals from the final judgment in a six-count action against defendants. The judgment incorporates a jury finding of no cause of action on plaintiff's claim of breach of contract, and the trial court's dismissal of the remaining five counts. Plaintiff does not contest the jury's verdict, but appeals from the court's granting of a directed verdict in defendants' favor on plaintiff's claims of constructive trust, breach of fiduciary duty, unjust enrichment and conversion. Plaintiff also seeks reconsideration of the court's dismissal, on the basis that the jury had found no cause of action under the breach of contract claim, of plaintiffs' demand for an accounting. We affirm.

I.

This case arises from a four-and-a-half year business relationship during which defendant Randall Lewis [hereinafter "defendant"] managed the Comedy Den bar and restaurant. Plaintiff, represented by its president and sole shareholder, Jack Harkness, alleged numerous instances of mismanagement which, it contended, resulted in the accumulation of debts for which defendants should be held liable.

Before entering into their arrangement, the parties were social friends. For the entire period of the relationship, from early 1991 to June 1995, the parties operated only under an oral agreement. The

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

parties disagreed regarding the liability which attached to the managerial

position. Harkness testified that defendant was to manage all aspects of the Comedy Den, pay all bills, and then, if there was money left, could take compensation up to ten percent of the total revenue. Defendant, however, testified that he was to pay himself only up to ten percent of the annual gross revenues and asserted that there was never any discussion that he would be responsible for Harkness' debts for the corporation.

The testimony and trial presentations evidence that despite the parties' different understandings of the expectations and limits of this managerial relationship, from 1991 through 1993 there were no significant problems with this oral arrangement. Plaintiff alleged, however, that in 1994 and 1995, defendant improperly took compensation while the Comedy Den accrued debts that remained unpaid at the time of his firing, sometime in June 1995. Harkness fired defendant following a meeting at which defendants declined to sign a $37,000 promissory note guaranteeing payment of the Comedy Den's purported debts.

Plaintiff alleged that defendants were liable for approximately $70,000 of debt calculated to be owing at the end of June. It was conceded during trial that any compensation before 1994 was legitimate. The basis of the alleged liability was defendant's withdrawal of compensation totaling $52,630 during 1994 and 1995.

At the close of the proofs, the court found that plaintiff failed to establish specific instances where defendant took compensation while the Comedy Den had current liabilities. The court directed a verdict for defendants on four counts, sending only the breach of contract count to the jury, and reserving the demand for accounting for consideration pending the jury's verdict. Plaintiff asserts that the court erred in granting a directed verdict on the counts of conversion, breach of duty and constructive trust, and seeks reconsideration of the demand for accounting.[1]

II.

This Court reviews the grant of a directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). To determine whether a question of fact existed, the evidence presented is viewed in the light most favorable to the nonmoving party, granting him every reasonable inference and resolving any conflict in his favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). However, if the facts as presented fail to establish a prima facie case on the asserted causes of action, a court's duty to direct a verdict as a matter of law is implicated. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994).

Though the record of the testimony presented below is at best unclear, we conclude that while plaintiff certainly presented a host of disputed factual issues, the proofs failed to sufficiently establish prima facie cases. We agree with the trial court that, on the proofs introduced, it was impossible to reasonably instruct the jury on these specific causes of action.

A.

A conversion is any distinct act of dominion wrongfully exerted over another person's personal property. *Pamar Enterprises v Huntington Banks*, 228 Mich App 727, 734; 580 NW2d 11 (1998). In general, it is viewed as an intentional tort in the sense that the converter's actions are wilful, although the tort can be committed unwittingly if unaware of the plaintiff's outstanding property interest. *Foremost Ins v Allstate Ins*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Plaintiff alleged conversion based on the existence of outstanding 1994 and 1995 debts at the time of defendant's dismissal and a showing that defendant took compensation during that eighteen-month period. Even if the jury had found plaintiff's understanding of the agreement to be correct, that defendant was not to take compensation until all Comedy Den expenses were paid, the proofs failed to demonstrate the time periods on which the evaluation was to be based. We find no evidence suggesting whether the determination was to be made monthly, quarterly or annually. Nor was there any attempt to relate specific compensation draws to identifiable periods in which the relevant unpaid bills were shown to be either currently due or anticipated to come due. The only outstanding debt connected to a specific date was a $5,000 tax bill owed to the IRS from June 1994. This debt was explained by defendants as the remainder of a greater obligation to the IRS that, since the end of 1994, had been gradually repaid in addition to regular tax payments. Testimony demonstrated that Harkness was aware of both the reason for this debt and the repayment plan. Plaintiff's presentation failed to establish any instance in which defendant took compensation in the face of overdue bills. Thus, it was impossible to determine whether defendant's withdrawal of compensation was a wrongful act of dominion. Therefore, we find that the trial court properly directed a verdict on the count of conversion.

B.

A fiduciary duty arises out of the relation subsisting between two persons of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith. *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981). A fiduciary owes a duty of good faith to his principal and is not permitted to act for his private advantage or otherwise contrary to the interests of his beneficiary or principal in matters affecting the fiduciary relationship. *Central Cartage v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998); *MS Development, Inc v Auto Plaza of Woodhaven (After Remand)*, 220 Mich App 540, 547, n 3: 560 NW2d 62 (1996).

Plaintiff alleged that defendants' purchase of a condominium constituted a breach of fiduciary duty. We find that plaintiff's proofs failed to establish a prima facie case of breach of fiduciary duty. Plaintiff asserted that after Harkness expressed to defendant his interest in the Comedy Den purchasing a condominium for the purpose of housing entertainers, defendants privately bought a condo which they proceeded to rent to the Comedy Den for that very purpose. However, the testimony and documentation demonstrated that defendants initiated this transaction before the discussion date alleged by plaintiff. Consequently, plaintiff's key assertion, that defendant acted contrary to Harkness' instruction, cannot be sustained. In addition, plaintiff failed to support its contention that defendants

financed the purchase and mortgage payments with money improperly taken as compensation, at the expense of Comedy Den bills. A directed verdict on this count was, therefore, also proper.

C.

In *Kammer Asphalt v East China Twp*, 443 Mich 176, 188; 504 NW2d 635 (1993), the Court set forth the law as to a constructive trust:

> A constructive trust may be imposed "where such trust is necessary to do equity or to prevent unjust enrichment . . . . " *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955). Hence, such a trust may be imposed when property "'has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property . . . . '" *Potter v Lindsay*, 337 Mich 404, 411; 60 NW2d 133 (1953), quoting *Racho v Beach*, 254 Mich 600, 606-607; 236 NW 875 (1931). Accordingly, it may not be imposed upon parties "who have in no way contributed to the reasons for imposing a constructive trust." *Ooley, supra* at 158. The burden of proof is upon the person seeking the imposition of such a trust. *MacKenzie v Fritzinger*, 370 Mich 284; 121 NW2d 410 (1963). [Footnotes omitted.]

Because the constructive trust count is predicated on the breach of fiduciary duty count, our conclusion that plaintiff failed to demonstrate breach also compels denial of this alleged claim of error. We note, however, that we additionally agree with the trial court's independent ruling on this count. Relevant financial records were never admitted and no reasonable jury could be expected to impose a constructive trust faced with the dearth of evidence specifying the movement of money.

III.

We find that the evidence presented, viewed in the light most favorable to plaintiff, insufficiently established prima facie cases on these three counts. *Locke, supra* at 223. Therefore, we conclude that in light of the evidentiary deficiencies, the trial court's action of directing a verdict on these counts was appropriate. This conclusion necessarily renders moot plaintiff's demand for an accounting.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns

[1] Plaintiff additionally claims error in the court's decision to permit defendants to introduce the testimony of a witness from the Michigan Liquor Control Commission. Because, as presented, plaintiff's allegation is devoid of relevant authority and cogent argument, we need not consider this claim. Nevertheless, having thoroughly reviewed the record in connection with plaintiff's primary claims, we

conclude that the court's decision to allow this evidence was not an abuse of discretion. See *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).