STATE OF MICHIGAN

COURT OF APPEALS

ARTHUR MICHALIK,

Plaintiff-Appellant,

v

JP MORGAN CHASE BANK, d/b/a CHASE BANK,

Defendant-Appellee,

and

WENDY PALUMBO-GARWOOD and SANDRA PALUMBO,

Defendants.

UNPUBLISHED
October 9, 2012

No. 305073
Wayne Circuit Court
LC No. 09-013382-CB

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right from a default judgment entered against defendant Wendy Palumbo-Garwood (defendant Garwood) in this action for breach of fiduciary duty against defendant Garwood, conspiracy to defraud and conversion against defendant Garwood and defendant Sandra Palumbo, and conversion, breach of contract, and negligence against defendant JP Morgan Chase Bank (defendant Bank). On appeal, plaintiff challenges an earlier order granting defendant Bank's motion for summary disposition that it brought pursuant to MCR 2.116(C)(8) and (C)(10). We reverse the grant of summary disposition and remand for further proceedings.

Plaintiff argues that the trial court erred by granting defendant Bank's motion for summary disposition because defendant Bank was strictly liable to plaintiff in connection with payment on a check made payable to plaintiff that was endorsed by defendant Garwood with plaintiff's forged signature.

This Court reviews de novo a trial court's granting of summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999), superseded by statute on other grounds as stated in *McLiechey v Bristol West Ins Co*, 408 F Supp 2d 516 (WD Mich, 2006). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of

the claim.[1] *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The party moving for summary disposition must specifically identify the matters that have no issues of disputed fact. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Then, the party opposing the motion has the burden of showing, through documentary evidence, that a genuine issue of disputed fact exits. *Smith*, 460 Mich at 455. This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). We must review a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule [(C)(10)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

On November 29, 2007, defendant Garwood deposited a check for $19,962.19, payable to the order of plaintiff, from Detroit Laborers' Defined Contribution Plan, into her joint account with plaintiff (the Account) at defendant Bank. The check was plaintiff's payout from his retirement annuity fund. Defendant Garwood deposited the check into the Account and immediately withdrew $5,000 in cash. The check was endorsed by plaintiff's signature, which defendant Garwood allegedly forged, and defendant Garwood's signature.

The trial court ruled as follows regarding defendant Bank's motion for summary disposition:

> The [c]ourt finds that under the circumstances here the plaintiff did receive the proceeds of the check and looking at plaintiff's complaint and I know it was prepared by prior counsel but, none the less [sic], you're charged with notice of the pleadings that were filed and prepared by prior counsel and in looking at plaintiff's complaint the plaintiff states that the account was his jointly with the defendant and that's at paragraph 12. In the same paragraph, plaintiff states that Garwood was his agent and was authorized to use the account for bill paying. Further, under these circumstances and in light of the code Article 3 Section 307 we think that would probably apply here. That section provides that an agent that signs the plaintiff's name creates a presumption that a signature was

[1] The trial court did not specify under which rule, MCR 2.116(C)(8) or (C)(10), it granted defendant Bank's motion for summary disposition. However, plaintiff and defendant Bank both referenced and relied on documentary evidence to support their positions with regard to the motion. Therefore, the trial court seemingly granted summary disposition pursuant to MCR 2.116(C)(10). Cf. *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 3 n 2; 772 NW2d 827 (2009).

> authorized. Under these circumstances we believe that the bank's motion should be granted and the plaintiff's motion denied. That's my ruling.

"A check is considered the personal property of the designated payee." *Pamar Enterprises, Inc v Huntington Banks of Mich*, 228 Mich App 727, 734; 580 NW2d 11 (1998). Furthermore, the Uniform Commercial Code (UCC) provides:

> The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (*i*) the issuer or acceptor of the instrument or (*ii*) a payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee. [MCL 440.3420(1).]

"A conversion action may be brought by the intended payee against either the depositary bank or the drawee bank." *Pamar Enterprises, Inc*, 228 Mich App at 734.

To establish liability for conversion on the part of a defendant bank, the plaintiff is required to prove that the instrument at issue was paid on a forged endorsement. *Grosberg v Mich Nat'l Bank-Oakland*, 420 Mich 707, 714; 362 NW2d 715 (1984). Even if such a showing is made, the defendant bank will not be liable beyond the proceeds from the instrument remaining in its hands, if the bank has dealt with the instrument in good faith and in accordance with reasonable commercial standards. *Id*.

A forged endorsement is a form of unauthorized signature. *Id*. at 714. However, under the UCC:

> If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument. [MCL 440.3402(1).]

"Usually and ordinarily the nature and extent of the authority of an agent and whether the act or contract in controversy was within the scope of his authority are, under the evidence, questions of fact to be determined by the jury or other trier of facts . . . ." *Renda v Int'l Union, United Auto, Aircraft & Agricultural Implement Workers of America*, 366 Mich 58, 95; 114 NW2d 343 (1962) (internal quotation marks and citation omitted). "Agents have the implied power to carry out all acts necessary in executing [the principal's] expressly conferred authority. . . . Whether the act in question is within the authority granted depends upon the act's usual or necessary connection to accomplishing the purpose of the agency." *Slocum v Littlefield Pub Sch, Bd of Ed*, 127 Mich App 183, 194; 338 NW2d 907 (1983) (internal quotation marks and citations

omitted). "The power of an agent to [e]ndorse cannot be implied from the fact that the agent, without the knowledge or consent of his principal, [e]ndorsed checks in the principal's name and misapplied the proceeds." *Kay v Wayne Co*, 274 Mich 90, 95; 264 NW 300 (1936). "[T]he principal is not bound where the agent exceeds the scope of his apparent authority. . . ." *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 667; 66 NW2d 92 (1954) (internal quotation marks and citation omitted).

The parties do not dispute that defendant Garwood was plaintiff's "bill paying agent." Plaintiff referred to defendant Garwood as his "bill paying agent" in his complaint. In lieu of paying plaintiff rent, defendant Garwood was supposed to pay plaintiff's utility and cable bills. Defendant Garwood paid some of plaintiff's bills online, from the Account. The evidence that defendant Garwood was plaintiff's "bill paying agent," however, does not automatically imply that endorsing plaintiff's signature to checks made payable solely to him was within the scope of defendant Garwood's authority as plaintiff's "bill paying agent."

Additionally, defendant Bank's Account Rules and Regulations, in relevant part, provide:

> Each joint owner appoints each of the others as his/her agent and attorney in fact with power to endorse and deposit items payable to him/her in the joint account. If you establish a joint account without the signature of the other joint owner, you agree to hold us harmless for our reliance upon your designation of the other as joint owner.
>
> If you have opened the account as a Representative Payee for receipt of federal benefits on behalf of a beneficiary, you agree that you will cause to be deposited into the Account only those benefits payable to the beneficiary.

Although the parties did not dispute in the trial court that the Account was a "joint account," there was evidence that it was a representative-payee account. In August 2007, plaintiff opened the Account with defendant Garwood at defendant Bank for the sole benefit of defendant Garwood, in order for defendant Garwood to deposit her Social Security Income checks. Plaintiff was the representative payee for defendant Garwood on the Account. The Account was titled "Wendy R. Garwood By Arthur Michalik Rep Payee." Plaintiff also filled out paperwork with the Social Security Administration to be defendant Garwood's representative payee for her benefits.

Defendant Bank's Account Rules and Regulations appear to differentiate between traditional joint accounts and representative-payee accounts. The rules do not indicate that for representative-payee accounts the payee appoints the beneficiary as his or her agent and attorney in fact with power to endorse and deposit into the account items payable to the payee. On the contrary, under defendant Bank's rules, representative payees agree to cause only benefits payable to the beneficiary to be deposited into representative-payee accounts. There are genuine questions of fact regarding whether the Account was a traditional joint account or a representative-payee "joint account" and whether plaintiff appointed defendant Garwood his agent with authority to endorse his name on checks payable to him pursuant to defendant Bank's Rules and Regulations.

"The mitigation of damages defense provides that the liability of a drawee or depositary bank in a conversion action brought by an intended payee is reduced to the extent the intended payee receives the proceeds of the check applied to the specific obligation the check was intended to discharge. The defense is intended to prevent the unjust enrichment of the intended payee." *Pamar Enterprises, Inc*, 228 Mich App at 736-737 (internal citations omitted).

Genuine questions of fact exist with regard to whether plaintiff actually received the entire proceeds from the check. Although defendant Garwood deposited the $19,962.19 check into the Account, she immediately withdrew $5,000 in cash. Also, while the check was deposited into the Account, there are questions of fact regarding the proper characterization of the Account and regarding plaintiff's interests in the Account. If the Account was established for the sole benefit of defendant Garwood, plaintiff arguably did not receive the funds from the check merely because the check was deposited into the Account.

The grant of summary disposition to defendant Bank is reversed and this case is remanded for further proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray