

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Cashlink, LLC,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-395
Mosin, Inc. et al.,	:	(C.P.C. No. 11CVC03-3790)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 13, 2012

Law Offices of Marcell Rose Anthony, and Marcell Rose Anthony, J.D., LL.M, for appellant.

Abraham Law Offices, and Rachel A. Spitzen, for appellees.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Plaintiff-appellant, Cashlink, LLC, appeals from a judgment of the Franklin County Court of Common Pleas denying its motion for partial summary judgment and granting summary judgment in favor of defendants-appellees, Mosin, Inc. and South Livingston, Inc. For the following reasons, we affirm in part and reverse in part.

I. BACKGROUND

{¶ 2} Due to the limited evidentiary record presented in this case, our factual summarization is taken from the statements of fact presented in the parties' respective appellate briefs. On February 22, 2010, each appellee entered into separate contracts with D-Mobile, LLC ("D-Mobile") for the purchase and processing of ATM machines. The contract executed between D-Mobile and appellee Mosin, Inc., d.b.a. Mobile Mart ("Mosin" or "Mobile Mart") purports to be signed by Faisal Ilyas. Ilyas is the full-time manager of Mobile Mart and is also a 50 percent shareholder of appellee South Livingston, Inc., d.b.a. Livingston Shell ("S. Livingston" or "Livingston Shell"). The contract executed between D-Mobile and S. Livingston purports to be signed by Ilyas's wife, Suman Zia. In accordance with the contract, ATM machines were placed in Mobile Mart and Livingston Shell. On March 10, 2010, appellant purchased all of D-Mobile's assets, including its contracts for ATM machines and accounts receivables.

{¶ 3} Appellant contends the contracts provide that a specific price would be paid for each ATM machine. Appellant also contends the contracts provide that both the ATM operator and the merchant would receive \$2 per transaction. According to appellant, its managing member, Dr. Hasem Amer, requested the monies owed under the contract from Ilyas, but payment of any kind was refused. Having received neither the transaction fees nor the fee for each ATM machine, appellant filed the instant litigation.

{¶ 4} In contrast, appellees collectively assert that after one month of operation, the ATM machines stopped processing transactions. Therefore, appellees attempted to contact D-Mobile, but such attempts were futile. Because the ATM machines were left inoperable, appellees assert they had to contact their prior ATM processor to process and repair the ATM machines. According to appellees, one year later in March 2011, appellant's representative demanded the full price of each ATM machine and one half of the profits from the prior year. Appellees refused to pay, but told appellant's

representative to take back the ATM machines. Appellees contend they heard nothing additional until receiving the complaint that prompted this litigation.

{¶ 5} In the complaint filed March 24, 2011, appellant asserted claims for: (1) breach of contract; (2) unjust enrichment and promissory estoppel; (3) fraud, conversion and intentional misrepresentation; and (4) piercing the corporate veil. Attached to the complaint were two contracts alleged to support appellant's claims. Thereafter, appellant filed an amended complaint on June 28, 2011. Though making limited alterations to the asserted facts, the amended complaint did not assert any new causes of action.¹

{¶ 6} On February 16, 2012, appellant filed a motion for partial summary judgment as to the issue of liability on the claims for breach of contract and conversion. One week later, appellees filed a joint motion for summary judgment as to all the claims asserted by appellant. After the matter was fully briefed by the parties, appellant filed a motion to strike the affidavit attached to appellees' reply brief. By decision filed April 11, 2012, the trial court denied appellant's motion to strike, denied appellant's motion for partial summary judgment, and granted appellees' motion for summary judgment. A judgment entry reflecting such action was filed on April 18, 2012.

II. ASSIGNMENTS OF ERROR

{¶ 7} This appeal followed, and appellant asserts the following five assignments of error for our review:

I. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS ON DEFENDANTS'-APPELLEES' MOTION FOR SUMMARY JUDGMENT.

¹ Appellant sought leave to file a second amended complaint to add a specific phrase to two separate paragraphs of the first amended complaint. However, appellant requested that leave be granted without the actual physical filing of a second amended complaint. The trial court granted appellant leave to file the second amended complaint, but required that appellant actually file same. The trial court ordered that the second amended complaint be filed within 14 days of its decision granting leave. Though having leave to do so, appellant did not file a second amended complaint; therefore, we consider only the first amended complaint filed on June 28, 2011.

II. THE TRIAL COURT ERRED WHEN IT DENIED SUMMARY JUDGMENT ON PLAINTIFF'S-APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON TWO CLAIMS ON LIABILITY ONLY.

III. THERE WERE QUESTIONS OF MATERIAL FACT THEREBY MANDATING A TRIAL ON ONE OR MORE CLAIMS.

IV. THE TRIAL COURT ERRED WHEN [IT] DENIED PLAINTIFF'S-APPELLANT'S MOTION TO STRIKE AFFIDAVITS ATTACHED TO DEFENDANTS'-APPELLEES' REPLY MEMO.

V. THE TRIAL COURT DENIED DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

III. DISCUSSION

{¶ 8} According to the table of contents contained in appellant's appellate brief, Exhibit C attached to the appellate brief consists of a document providing: "Examples of Transaction Accounts of ATM machines." (Appellant's Table of Contents.) This document, however, is not part of the record in this matter. App.R. 9(A)(1) provides that the record on appeal, in all cases, constitutes "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court." An exhibit merely appended to an appellate brief is not part of the record, and we may not consider it in determining the appeal. *Jefferson Golf & Country Club v. Leonard*, 10th Dist. No. 11AP-434, 2011-Ohio-6829, ¶ 10. Accordingly, for purposes of determining the merits of this appeal, we will not consider the new exhibit appellant attached to its brief.

A. Appellant's Fourth Assignment of Error

{¶ 9} For ease of discussion, we first address appellant's fourth assignment of error that challenges the trial court's decision denying its motion to strike. The decision to admit or exclude evidence, including affidavit testimony, is subject to review under an abuse of discretion standard, and absent a clear showing that the court abused its discretion in a manner that materially prejudices a party, we will not disturb the trial court's ruling. *Boggs v. The Scotts Co.*, 10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶ 35, citing *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 158 Ohio App.3d 356, 2004-Ohio-4653, ¶ 23 (10th Dist.), and *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 65 (1991). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} According to appellant, Ilyas's affidavit attached to appellees' reply brief should have been stricken because it contains statements that are different from those made in his first affidavit filed with appellees' motion for summary judgment. It is appellant's position that the trial court's refusal to strike Ilyas's second affidavit prejudiced appellant and denied it due process. We do not find appellant's position well-taken.

{¶ 11} The affidavit attached to appellees' reply brief does not raise any new grounds and was submitted in an attempt to counter Dr. Amer's affidavit testimony. There is no general prohibition against affidavits being timely submitted with reply briefs, but instead, is a practice that has been utilized in other cases. *See e.g., Ohio Cent. RR. Sys. v. Mason Law Firm Co., L.P.A.*, 182 Ohio App.3d 814, 2009-Ohio-3238 (10th Dist.) (court considered affidavit attached to reply brief filed in support of motion for summary judgment); *Link v. Matthews*, 3d Dist. No. 1-08-61, 2009-Ohio-1920 (affidavit attached

to reply brief properly considered by trial court); *Cincinnati Ins. Co. v. Quikrete Cos.*, 10th Dist. No. 96APE04-424 (Sept. 17, 1996) (same).

{¶ 12} Upon review, we conclude that the trial court did not abuse its discretion in denying appellant's motion to strike the affidavit attached to appellees' reply brief. Accordingly, we overrule appellant's fourth assignment of error.

B. Appellant's First, Second, Third, and Fifth Assignments of Error

{¶ 13} Appellant's first, second, third, and fifth assignments of error are interrelated and, together, challenge the trial court's disposition of the competing motions for summary judgment.

{¶ 14} We review a summary judgment motion de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103, 107 (10th Dist.1992); *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 15} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds

can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 16} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). "The requirement that a party seeking summary judgment disclose the basis for the motion and support the motion with evidence is well founded in Ohio law." *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997), quoting *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 17} Thus, the moving party may not fulfill its initial burden simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. *Dresher* at 293. Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims. *Id.* Bare allegations by the moving party are insufficient to satisfy the party's initial burden. *Vahila* at 430. The evidence upon which the moving party relies must be in the record, or the motion cannot succeed. *Dresher* at 293. If the moving party fails to sustain its initial burden, the court must deny the motion for summary judgment. *Id.*

C. Analysis

{¶ 18} Appellant's amended complaint asserted claims for: (1) breach of contract; (2) unjust enrichment and promissory estoppel; (3) fraud, conversion and intentional misrepresentation; and (4) piercing the corporate veil. Though appellees were granted summary judgment on all the claims asserted by appellant, on appeal, appellant challenges only the trial court's disposition of appellant's claims for: (1) breach of contract; (2) unjust enrichment; and (3) conversion. Therefore, we address only these three claims and do so in turn.

1. Breach of Contract

{¶ 19} To establish breach of contract, a plaintiff must demonstrate: (1) the existence of a contract, whether express or implied; (2) plaintiff's performance; (3) defendant's breach; and (4) plaintiff's damage or loss. *Gruger v. Diversified Air Sys., Inc.*, 7th Dist. No. 07-MA-52, 2008-Ohio-3403, ¶ 42, citing *Doner v. Snapp*, 98 Ohio App.3d 597, 600 (2d Dist.1994).

{¶ 20} In granting appellees' motion for summary judgment, the trial court stated it did so because (1) it is "clear" appellant initially breached the contract by not properly servicing the machines, and (2) the contract language does not provide that appellant was entitled to payment of any of the processing fees. We find the record contains no evidence to support the trial court's conclusions.

{¶ 21} The evidence contained in this record is limited in nature and consists solely of the contracts, appellees' answers to appellant's interrogatories, three affidavits submitted by appellees, and one affidavit submitted by appellant. A review of this evidence demonstrates the existence of genuine issues of material fact regarding appellant's claim for breach of contract.

{¶ 22} It is important to first note that appellant's breach of contract claim has two aspects. The first aspect of appellant's claim for breach of contract seeks damages pursuant to the contractual provisions providing for the cost of the ATM machines as follows. The contract with S. Livingston provides the ATM machines would be installed for \$4,395, and the contract with Mosin provides the ATM machine would be installed for \$3,495. The second aspect of appellant's claim for breach of contract concerns the contractual provisions providing for fees. Each contract provides the "transaction Surcharge for the use of the ATM machine for withdrawal shall be \$2.00," and the "Merchant Commission will be \$2.00 per transaction for the first 150 transactions per

month and \$2.00 per transaction for any more transactions per month." (Complaint, exhibit A.)

{¶ 23} In response to appellant's interrogatories, appellees concede the ATM machines were received from D-Mobile, but deny the existence of a contract concerning their "purchase." Appellees further deny any monies are due appellant under the terms of the contracts.

{¶ 24} In support of its motion for partial summary judgment, appellant attached Dr. Amer's affidavit. Dr. Amer averred, in relevant part, that appellees continually promised to pay in accordance with the contract terms, but failed to pay either the installation fees or the requisite percentage of ATM proceeds.

{¶ 25} In contrast, appellees attached three affidavits to their motion for summary judgment. Appellees submitted the affidavits of Ilyas, Zia, and Mohamed Choudry, 50 percent shareholder of S. Livingston and full-time manager of Livingston Shell. Ilyas's affidavit states that he called Dr. Amer at the time the ATM machines stopped working in March 2010, but Dr. Amer did nothing. Therefore, in the spring 2011, Ilyas told Dr. Amer to take the machines back, but Dr. Amer refused. Choudry averred the ATM machine placed in Livingston Shell stopped accepting transactions at some time in March 2010. Choudry further averred he did not prevent appellant from processing the ATM machine inside of Livingston Shell and that he signed a contract with a new ATM processor on April 1, 2010. Zia averred she witnessed a conversation between Ilyas and appellant's representative wherein Ilyas offered to return the machines but the representative refused. Zia further denied that she signed any documents with D-Mobile or appellant.

{¶ 26} Regarding the trial court's first conclusion that it is "clear" appellant initially breached the contract by failing to properly service the ATM machines, the evidence, as outlined above, demonstrates the existence of genuine issues of material fact. Factual questions remain regarding the payment, or lack thereof, for the machines installation

and whether this would constitute an initial breach of the contract. Further, factual questions remain regarding whether appellant breached the contract by failing to properly service the machines as contended by appellees. Thus, while both appellant and appellees argue in their respective briefs, in this court and in the trial court, that the other is to blame, such cannot be determined from the evidence currently in the record. A party moving for summary judgment may not fulfill its burden on summary judgment simply by making conclusory assertions. *Dresher*. Here, neither party met their initial burden, as the affidavits do not establish if and when either party breached the contractual terms of the contract.

{¶ 27} Similarly, we find the trial court's second conclusion, that the contract language does not demonstrate appellant is entitled to payment of processing fees, is equally unsupported by the evidence. As previously stated, the contracts provide for a "transaction surcharge" of \$2 per transaction and a "merchant commission" of \$2 per transaction. According to appellant, these are two separate \$2 charges, and while the merchant was entitled to the \$2 merchant commission, appellant was entitled to the \$2 transaction surcharge. The trial court, however, surmised as follows:

Pursuant to [the contract's] language, Plaintiff is entitled to absolutely nothing from Defendants. The surcharge, which would be levied upon the ATM user at the time of transaction and not on Defendants, was \$2. Defendants would then get \$2 per transaction. Therefore, assuming that Plaintiff was actually servicing the ATM machines and collecting the \$2 surcharge, it would have then had to turn around and give that money to Defendants.

Decision, at 4.

{¶ 28} The predicament again is that this record lacks any evidence to support the assumptions made by the trial court. Neither the contracts nor the affidavits indicate there is only one \$2 surcharge levied upon the "ATM user" that gets collected by appellant

and then paid to appellees as the trial court assumed. Rather, the contracts state only that there will be a "transaction surcharge" and a "merchant commission" and that each is set at \$2 per transaction. The contracts provide no indication of who collects and retains the \$2 transaction surcharge or whether this charge is the same as or is in addition to the merchant commission of \$2 per transaction.

{¶ 29} Moreover, the trial court seemingly disregarded the aspect of appellant's claim for breach of contract seeking damages for appellees' failure to pay the requisite installation charges. Regarding this issue, Dr. Amer averred the money was owed, but not paid, and Ilyas averred no such monies were owed. This conflicting evidence clearly creates a genuine issue of material fact. *Pate v. Quick Solutions, Inc.*, 10th Dist. No. 10AP-767, 2011-Ohio-3925 (where plaintiff's affidavit testimony conflicts with affidavit testimony of defendant on the question of parties' intent, summary judgment inappropriate); *Stone v. Cazeau*, 9th Dist. No. 07CA009164, 2007-Ohio-6213 (reversing grant of summary judgment when the testimony on the affidavits of the opposing parties conflicted).

{¶ 30} Contrary to the trial court's finding, the contract's language is not explicit enough to indicate that appellant "is entitled to absolutely nothing," as stated by the trial court. (Decision, at 4.) Rather, as evidenced by the parties' affidavits, the dispute herein centers on the meaning of the contractual language that establishes the parties' contractual obligations. Because genuine issues of material fact exist regarding the breach of contract claim asserted by appellant, the trial court correctly denied appellant's motion for partial summary judgment as to said claim, but erred in granting appellees' motion for summary judgment on said claim.

2. Unjust Enrichment

{¶ 31} Though Ilyas does not deny he signed the contract on behalf of Mosin, Zia states in her affidavit that she "never signed any documents with D-Mobile, LLC or from

Cashlink, LLC." (Appellees' Motion for Summary Judgment, exhibit No. 5, at ¶ 3.) Thus, even if the trier of fact concludes one or both appellees did not enter into contracts with appellant, the trier of fact nonetheless will have to determine whether, as appellant contends, appellant conferred a benefit on appellees so as to establish a claim for unjust enrichment. The same evidence appellant cites to support its breach of contract claim is implicated in its unjust enrichment claim.

{¶ 32} To succeed in an action for unjust enrichment, plaintiff must prove: (1) a benefit the plaintiff conferred upon the defendant; (2) the defendant's knowledge of the benefit; and (3) the impropriety of defendant's retaining the benefit conferred without rendering payment to plaintiff for same. *Metz v. Am. Elec. Power Co., Inc.*, 10th Dist. No. 06AP-1161, 2007-Ohio-3325, ¶ 43, citing *Hummel v. Hummel*, 133 Ohio St. 520, 527 (1938). "[R]ecovery under an unjust enrichment claim is unavailable where the matters in dispute are governed by the terms of an express contract." *Id.* at ¶ 45, citing *Kucan v. Gen. Am. Life Ins. Co.*, 10th Dist. No. 01AP-1099, 2002-Ohio-4290, ¶ 39.

{¶ 33} The trial court concluded no benefit was conferred upon appellees because "[appellant] placed the ATM machines in [appellees'] stores and essentially disappeared; making the ATM machines dead weight. Having useless ATM machines is by no means a benefit." (Decision, at 4-5.) The trial court proceeded to find that appellant received a benefit of "free storage" of the ATM machines. This conclusion not only ignores what little evidence is contained in the record, but also disregards appellant's claim that it was owed a fee for installing the ATM machines. Further, in granting appellees' motion for summary judgment on this claim, the trial court again accepts appellees' version of events even though it is either unsupported by evidence or is contradicted by the evidence submitted by appellant. The credibility issues inherent in resolving the parties' differing factual assertions are not properly resolved on summary judgment.

{¶ 34} Because genuine issues of material fact remain regarding appellant's claim for unjust enrichment, we find the trial court erred in granting summary judgment in favor of appellees on said claim.

3. Conversion

{¶ 35} Conversion "is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96 (1990). This definition can be broken down into three basic elements: (1) a defendant's exercise of dominion or control; (2) over a plaintiff's property; and (3) in a manner inconsistent with the plaintiff's rights of ownership. *Cozmyk Ent., Inc. v. Hoy*, 10th Dist. No. 96APE10-1380 (June 30, 1997). If a defendant comes into possession of property lawfully, a plaintiff must prove two additional elements to establish conversion: (1) that it demanded the return of the property after the defendant exercised dominion or control over the property, and (2) that the defendant refused to deliver the property to the plaintiff. *Tolson v. Triangle Real Estate*, 10th Dist. No. 03AP-715, 2004-Ohio-2640, ¶ 17, citing *Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co.*, 24 Ohio App.3d 91, 93 (10th Dist.1985); see also *Kitchen v. Welsh Ohio, LLC*, 10th Dist. No. 00AP-1256 (June 12, 2001).

{¶ 36} It is undisputed that appellees came into possession of the ATM machines lawfully, therefore, to establish its claim for conversion, appellant has to prove it demanded the return of the property after appellees exercised dominion or control over the property, and that appellees refused to deliver the property to appellant. Ilyas stated in his affidavit that Dr. Amer "never demanded the machines back." (Appellees' motion for Summary Judgment, exhibit No. 6, at ¶ 5.) There is no evidence to the contrary presented in the record.

{¶ 37} Therefore, we find appellees established there is an absence of a genuine issue of material fact regarding appellant's claim for conversion, and appellant failed to

meet its reciprocal burden to show summary judgment should not be granted to appellees on this claim. Accordingly, the trial court did not err in denying appellant's motion for partial summary judgment on the claim for conversion, and the trial court did not err in granting summary judgment in favor of appellees on the claim for conversion.

IV. CONCLUSION

{¶ 38} In conclusion, appellant's second, fourth and fifth assignments of error are overruled, and appellant's first and third assignments of error are sustained in part and overruled in part. Consequently, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with this decision.

*Judgment affirmed in part and reversed
in part; remanded for further proceedings.*

TYACK and FRENCH, JJ., concur.
