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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-18-336

GM ENTERPRISES, LLC	APPELLANT	Opinion Delivered: December 12, 2018 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04CV-16-803]
V.		
HCH TOYOTA, LLC, AND SACHS/HAYNES 503, LLC	APPELLEES	HONORABLE JOHN R. SCOTT, JUDGE REVERSED AND REMANDED

BART F. VIRDEN, Judge

Appellant GM Enterprises, LLC (GM) appeals from the Benton County Circuit Court's order granting summary judgment to appellees HCH Toyota, LLC ("HCH") and Sachs/Haynes 503, LLC ("Sachs") on various claims raised by GM, including breach of contract, conversion, and unjust enrichment. On appeal, GM argues that summary judgment was inappropriate. We agree; therefore, we reverse and remand.

I. *Factual Background*

GM leased property owned by appellees for its car dealerships. HCH owned property that GM used for its new-car facility, and Sachs owned property that GM used for its used-car facility. Two substantially similar lease agreements required GM to pay "base rent":

> **3. Rent.** (a) Base Rent.. . . The Annual Base Rent shall be payable in monthly installments . . . on or before the fifth (5th) day of each calendar month during the term of this Lease. Rental for the first and last months hereof shall be prorated on a daily basis.

GM historically paid the base rent through two automatic transfers from its bank, Arvest, to the accounts of HCH and Sachs on the first day of each month. In the fall of 2015, the parties began negotiations to sell the real estate and car dealerships to a third party. GM agreed to sell the dealerships to LL Ark Northwest, LLC, and appellees agreed to sell the real estate to a related entity called LL Ark Properties, LLC. Two lease-termination agreements (LTAs) were executed and included the following pertinent language:

> 1. **Termination of Lease.** Effective upon the Closing of the Dealership Transaction and Real Estate Transaction and provided that the Lessee has satisfied its obligations to pay Base Rent through the Termination Date to Lessor and has paid, or provided adequate funds for the payment of, 2015 property taxes and prorated 2016 property taxes (through the Termination Date) assessed against the Leased Premises (the **"Termination Date"**), except as provided below, the Lease shall be deemed automatically terminated, null, void, and of no future effect, without any further action required on the part of Lessor or Lessee. From and after the Termination Date, neither Lessee, Lessor, any Guarantor nor any of their respective affiliates shall have any further liability, right, duty or obligation to the other party arising under the Lease. . . .
>
> 2. **Release.** As additional consideration for the termination of the Lease, each party hereby releases and waives any rights, duties, claims, or obligations of the other party arising out of or in connection with the Lease from and after the effective date of this Agreement.

The following footnote is included in the LTAs:

> "Closing" shall mean the date on which the parties to the Dealership Transaction and Real Estate Transaction make effective the conveyance of the respective assets and properties associated with each to LL Ark Properties, LLC and LL Ark

Northwest, LLC and the purchase price for each is paid by LL Ark Properties, LLC and LL Ark Northwest, LLC, respectively.

On January 28, 2016, GM contacted Arvest and attempted to cancel the automatic transfers to appellees for February's rent. On February 1, 2016, the parties executed the LTAs. GM later learned that Arvest had failed to cancel the automatic transfers, so rent of $101,214.92 and $56,745.93 was paid to HCH and Sachs, respectively, on February 1, 2016. Kenrick Morrand, an owner of GM, contacted Hunter Haynes, managing member of HCH and member of Sachs, and requested that he return the money, but Haynes refused.

II. *Procedural History*

On June 10, 2016, GM filed a complaint against HCH, Sachs, Arvest Bank, and Arvest Bank Group, Inc., alleging causes of action for, among other things, breach of contract, conversion, and unjust enrichment.[1] The complaint was later amended to add Haynes as a defendant.

Appellees filed a motion for summary judgment. Attached to their motion were the lease agreements, the LTAs, excerpts from depositions from Carla Capron and Morrand, and an affidavit signed by Haynes. Capron testified that GM had hired Capron Consulting in August 2015. She said that no one had asked her to cancel the automatic transfers to appellees and that she had done that on her own initiative based on closing procedures. Morrand testified that he understood that executing the LTAs was a condition of closing the dealership and real-estate transactions so that the properties would no longer be

[1]Arvest Bank Group, Inc., was voluntarily dismissed without prejudice, and the trial court granted summary judgment to Arvest Bank.

encumbered by the lease agreements. He further testified that GM had longstanding automatic transfers in place for the lease payments to be made directly to appellees' accounts. He disagreed with appellees' characterization that he had paid the rent, closed the deals, and then released appellees from any claims. Haynes attested in his affidavit that HCH and Sachs did not know when the LTAs would be signed or become effective because appellees were not privy to information related to the dealership transaction. He further stated that he understood that February's lease payment would be paid consistent with the terms of the LTAs and the historical practice between the parties and that the rent would therefore be paid before the LTAs were signed. Haynes stated that prior to signing the LTAs, he called his office manager to confirm that GM's lease payments to appellees had been made. He further stated that he did not hear from GM or any of its representatives until approximately a month after the LTAs had been signed. Haynes stated that he placed the funds in dispute in the court's registry pending the outcome of the litigation.

In responding to appellees' motion for summary judgment, GM attached Haynes's affidavit (same as above), excerpts from depositions from Haynes and Morrand, and affidavits signed by Morrand and Philip Nichols. Haynes testified that Morrand had called him in March but that he had not returned his calls. He said that his understanding was that the closing would take place in the month of February but that he did not know when; therefore, he was paid for February's rent prior to executing the LTAs. He confirmed that he had been paid pursuant to the real-estate transaction on February 1 and that the buyer

had taken possession of the property on February 1. Morrand testified that the dealership's assets were transferred to the buyer on February 1. In his affidavit, Morrand attested that the lease payments owed to appellees were due by the fifth day of each month. He disagreed with appellees' contention that the transactions did not close on February 1, 2016, and he denied that appellees had any right to keep lease payments that were sent to them by mistake. Morrand stated that he would not have signed the LTAs had he known that he would have to make lease payments totaling $157,960.85 for property to which he had no access. Nichols attested that he is an attorney and represented GM with respect to its sale of assets and the termination of its leases. He stated that the initial drafts of the LTAs were prepared by the law firm representing the landlords.

Appellees filed a reply to which they attached excerpts from the depositions of Haynes, Capron, and Morrand. Haynes testified that he understood that he was being paid rent for the month of February "and that was that." Capron testified that GM had recurring monthly transfers to HCH and Sachs and that she had never questioned why they were sent separately. Morrand testified that GM's attorney had reviewed the dealership transactions and the LTAs and had ensured that they were appropriate for GM to sign but that Nichols did not draft them.

The trial court granted summary judgment in part as to the claim for conversion, finding that the lease payments were due pursuant to the LTAs. The trial court granted summary judgment on GM's claim for unjust enrichment because it found that such claims have no application when a written agreement exists. The trial court dismissed all of

GM's claims except breach of contract "because an issue of fact remains concerning whether it is unconscionable to receive one month's rent to lease the premises for one day."

GM filed a motion for reconsideration of the summary judgment as it pertained to HCH and Sachs. The trial court granted GM's motion to reconsider and then granted summary judgment against GM on its claim for breach of contract because it found that the LTAs required GM to "satisf[y] its obligations to pay Base Rent through the Termination Date" and thus no contractual term had been violated by appellees. Also, the trial court found that the LTAs contained a release of liability; thus, after having made the full lease payments to appellees, GM signed the LTAs, which released appellees from any claims GM might have had against them, including a claim for breach of contract. GM filed this timely appeal.

III. *Standard of Review*

Summary judgment is to be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *JMAC Farms, LLC v. G & G Generator, LLC*, 2017 Ark. App. 658, 537 S.W.3d 274. Once the moving party has established prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Lookabaugh v. Hanna Oil & Gas Co.*, 2014 Ark. App. 445, 442 S.W.3d 1. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion

leave a material fact unanswered. *Id.* In a case where the parties agree on the facts, that rule is inapplicable, and we simply determine whether the appellee was entitled to judgment as a matter of law. *Doe v. Cent. Ark. Transit*, 50 Ark. App. 132, 900 S.W.2d 582 (1995). We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* In summary-judgment cases involving the interpretation of a contract, if provisions of the contract are unambiguous, their construction is an issue of law for the trial court. *Cate v. Irvin*, 44 Ark. App. 39, 866 S.W.2d 423 (1993). As to issues of law presented, this court's review is de novo. *Crafton, Tull, Sparks & Assocs., Inc. v. Ruskin Heights, LLC*, 2015 Ark. 1, 453 S.W.3d 667.

IV. *Discussion*

A. Breach of Contract

To succeed on a breach-of-contract claim, the plaintiff must show (1) the existence of a contract, (2) an obligation on the part of the defendant under the contract, (3) a failure to perform the obligation, and (4) resulting damages. *Smith v. Eisen*, 97 Ark. App. 130, 245 S.W.3d 160 (2006). GM argues that it had two breach-of-contract claims in that (1) appellees breached the lease agreements when they refused to prorate February 2016's rent and (2) appellees breached the LTAs when they refused to release GM from its duties and obligations arising under the lease agreements after February 1, 2016.

To the extent that GM argued a breach of the lease agreements below, GM did not obtain a ruling in this regard; therefore, we do not address it. *Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002). We agree, however, that in reviewing the breach-of-contract claim as it relates to the LTAs, we must look to the lease agreements for the meaning of base rent. The LTAs provide that terms not otherwise defined in the LTAs shall have the meaning assigned to them in the lease agreements. Additionally, the lease agreements were attached to the complaint(s) and made a part of the record considered in the summary-judgment proceeding.

The LTAs provide that GM must have "satisfied its obligations to pay Base Rent through the Termination Date." Under "base rent" in the lease agreements, "rental for the first and last months hereof shall be prorated on a daily basis." GM argues that the release in the LTAs created an obligation on the part of appellees to release GM from its duty or obligation to pay rent from and after February 1, 2016. GM maintains that appellees breached the release provision by accepting $157,960.85 for rent for the entire month of February, as opposed to one day of February, given that the lease agreements provide that base rent for the last month shall be prorated on a daily basis. As per the LTAs, GM was required to pay base rent only through the termination date.

The trial court further erred when it ruled that, as a matter of law, GM released appellees from any claims GM might have had against them, including breach of contract. The release in the LTAs only purported to release claims arising out of or in connection with the original lease agreements. Here, however, we have said that the only breach-of-

contract claim that GM properly has before this court is one for breach of the LTAs. The LTAs, by their own language, provide that they represent the entire agreement between the parties and supersede any prior agreements, except to the extent they provide that undefined terms have the meaning given to them in the lease agreements. The LTAs were effectively new agreements requiring GM to satisfy its obligation to pay February 2016 base rent, which could only be determined by referring back to the lease agreements. It cannot be said that the release in the LTAs released appellees as a matter of law from a claim for breach of the LTAs themselves.

Viewing the evidence in the light most favorable to GM as the party resisting the motion for summary judgment, we cannot say that appellees were entitled to judgment as a matter of law. GM's interpretation of the LTAs is reasonable. Summary judgment was improper under these circumstances.

B. Conversion

Conversion is a common-law tort action for the wrongful possession or disposition of another's property. *BBAS, Inc. v. Marlin Leasing Corp.*, 104 Ark. App. 63, 289 S.W.3d 153 (2008). The tort of conversion is committed when a party wrongfully commits a distinct act of dominion over the property of another that is inconsistent with the owner's rights. *Id.* The intent required is not conscious wrongdoing but rather an intent to exercise dominion or control over the goods. *Id.*

GM argues that appellees received $157,960.85 for an entire month's rent and refused to return the money that was delivered to them by mistake. According to GM, appellees' refusal to return the money to its rightful owner amounts to conversion for which it is entitled to punitive damages to be determined by a jury. Because we reverse the summary judgment on GM's breach-of-contract claim, we will not foreclose GM's right to pursue the remedy of conversion.[2] The doctrine of election of remedies bars more than one recovery on inconsistent remedies, but the doctrine does not limit the number of causes of action asserted by a plaintiff to be submitted to the jury. *Crawford Cty. v. Jones*, 91 Ark. App. 161, 209 S.W.3d 381 (2005).

C. Unjust Enrichment

To find unjust enrichment, a party must have received something of value to which he or she is not entitled and which he or she must restore. *Hatchell v. Wren*, 363 Ark. 107, 211 S.W.3d 516 (2005). There must also be some operative act, intent, or situation to make the enrichment unjust and compensable. *Id.* One who is free from fault cannot be held to be unjustly enriched merely because he or she has chosen to exercise a legal or contractual right. *Id.* An action based on unjust enrichment is maintainable when a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain. *Id.*

[2]The release provision in the LTAs does not serve to release appellees from GM's claim for conversion for the same reasons set forth in the breach-of-contract section of this opinion.

In granting summary judgment on GM's unjust-enrichment claim, the trial court quoted the general rule that there can be no unjust enrichment in contract cases; however, there are exceptions to that general rule. Although an express contract cannot be circumvented by unjust enrichment, a court of equity may impose the remedy of unjust enrichment to further the ends of justice when the express contract does not exist, is void, does not provide an answer, or does not fully address a subject. *Deutsche Bank Nat'l Tr. Co. v. Austin*, 2011 Ark. App. 531, 385 S.W.3d 381. Here, GM argues that the existence of a contract does not preclude equitable relief that is not inconsistent with the contract. According to GM, the lease agreements and the LTAs do not address what happens in the event appellees receive overpayments for rent that is not due.

The mere existence of a contract between the parties does not automatically foreclose a claim of unjust enrichment. *Campbell v. Asbury Auto., Inc.*, 2011 Ark. 157, 381 S.W.3d 21 (reversing and remanding where the trial court granted summary judgment on unjust enrichment based solely on the fact that a contract existed between the parties). *See also Chesapeake Exploration, LLC v. Whillock*, 2014 Ark. App. 55, 432 S.W.3d 61 (reversing summary judgment as to unjust enrichment because, although a release precluded Chesapeake from suing for breach of contract because it had rescinded the lease, the release did not affect Chesapeake's right to pursue other, extra-contractual remedies, e.g., unjust enrichment).

Because the trial court granted summary judgment based solely on the existence of a written contract without considering whether an exception applied to the general rule,

appellees were not entitled to judgment as a matter of law. Summary judgment was inappropriate under these circumstances.

V. *Conclusion*

We reverse the trial court's order of summary judgment, reinstate GM's complaint as to the causes of action on appeal, and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

ABRAMSON and HIXSON, JJ., agree.

Doss Law Firm, P.A., by: *D. Westbrook Doss, Jr.*, and *Alex T. Shirley*, for appellant.

Friday, Eldredge & Clark, LLP, by: *Clifford W. Plunkett*, *Kael K. Bowling*, and *Joshua C. Ashley*, for appellees.