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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TONIA ANTONACCI, *et al.*,

Plaintiffs,

v.

ROXANNE SPARKS, *et al.*,

Defendants.

Case No. 2:14-cv-01876-LDG (CWH)

ORDER

And Related Counterclaims and Cross-claims.

As alleged in the complaint, Roxanne Sparks worked as a bookkeeper for both plaintiff Tonia Antonacci and defendant Linda Parraguire’s company, defendant Colours, Inc. In April 2014, Antonacci’s American Express account was closed. In May 2014, Parraguire called Antonacci, informed her that Sparks had cleaned out her office and was not answering her phone. Parraguire further informed Antonacci that Parraguire’s American Express account had also been closed.

Antonacci subsequently discovered that, beginning in 2011, Sparks had been transferring money from accounts held by Antonacci (either personally or as Trustee of

1 plaintiff The Toni Antonacci Family Trust) to Colours, Parraguirre, and Sparks. Antonacci
2 brought a claim for unjust enrichment against Colours and Parraguirre, and now seeks
3 partial summary judgment on that claim (ECF No. 48). Colours and Parraguirre oppose the
4 motion and have filed a cross-motion for summary judgment as to that claim (ECF No. 61).
5 They also move to strike declarations and exhibits attached to Antonacci's reply, as well as
6 her supplemental statement of undisputed facts. (ECF No. 69). The Court will grant the
7 motion to strike, but will deny the cross-motions for summary judgment.

8 Motion for Summary Judgment

9 In considering a motion for summary judgment, the court performs "the threshold
10 inquiry of determining whether there is the need for a trial—whether, in other words, there
11 are any genuine factual issues that properly can be resolved only by a finder of fact
12 because they may reasonably be resolved in favor of either party." *Anderson v. Liberty*
13 *Lobby, Inc.*, 477 U.S. 242, 250 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir.
14 2012). To succeed on a motion for summary judgment, the moving party must show (1)
15 the lack of a genuine issue of any material fact, and (2) that the court may grant judgment
16 as a matter of law. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
17 (1986); *Arango*, 670 F.3d at 992.

18 A material fact is one required to prove a basic element of a claim. *Anderson*, 477
19 U.S. at 248. The failure to show a fact essential to one element, however, "necessarily
20 renders all other facts immaterial." *Celotex*, 477 U.S. at 323. Additionally, "[t]he mere
21 existence of a scintilla of evidence in support of the plaintiff's position will be insufficient."
22 *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) (quoting
23 *Anderson*, 477 U.S. at 252).

24 "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after
25 adequate time for discovery and upon motion, against a party who fails to make a showing
26 sufficient to establish the existence of an element essential to that party's case, and on

1 which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “Of
2 course, a party seeking summary judgment always bears the initial responsibility of
3 informing the district court of the basis for its motion, and identifying those portions of ‘the
4 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
5 affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material
6 fact.” *Id.*, at 323. As such, when the non-moving party bears the initial burden of proving,
7 at trial, the claim or defense that the motion for summary judgment places in issue, the
8 moving party can meet its initial burden on summary judgment “by ‘showing’—that is,
9 pointing out to the district court—that there is an absence of evidence to support the
10 nonmoving party’s case.” *Id.*, at 325. Conversely, when the burden of proof at trial rests
11 on the party moving for summary judgment, then in moving for summary judgment the
12 party must establish each element of its case.

13 Once the moving party meets its initial burden on summary judgment, the non-
14 moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro.
15 56(e); *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir.
16 2000). As summary judgment allows a court “to isolate and dispose of factually
17 unsupported claims or defenses,” *Celotex*, 477 U.S. at 323-24, the court construes the
18 evidence before it “in the light most favorable to the opposing party.” *Adickes v. S. H.*
19 *Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however,
20 will not defeat a well-founded motion. Fed. R. Civ. Pro. 56(e); *Matsushita Elec. Indus. Co.*
21 *v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). That is, the opposing party cannot
22 “rest upon the mere allegations or denials of [its] pleading’ but must instead produce
23 evidence that ‘sets forth specific facts showing that there is a genuine issue for trial.’”
24 *Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting Fed.
25 R. Civ. Pro. 56(e)).

26

1 Motion to Strike

2 Pursuant to Fed. R. Civ. Proc. 56, and Local Rule 56-1, when a moving party bears
3 the burden of proof, the burden rests on the movant to set forth each fact material to the
4 disposition of a summary judgment motion, and to cite to the particular part of the record
5 supporting the assertion that the fact cannot be disputed. Such material must be
6 presented with the moving papers, and not presented in the first instance on reply.

7 Antonacci argues that it is appropriate, in this instance, to allow her to supplement
8 her motion with additional evidence and statements of fact because she did not have any
9 reason to anticipate that the defendants would contest certain issues. Antonacci's failure
10 to anticipate the defendants' defenses to her claim does not excuse her failure to submit all
11 evidence material to her claim in support of her moving papers, rather than in her reply.

12 The Court will strike all exhibits attached to Antonacci's reply. Further, the Court will
13 not consider any argument raised in the reply that relies upon the exhibits.

14 Background

15 As established by admissible evidence, beginning in November 2011, Sparks began
16 executing the transfer of money from an account held and controlled by Antonacci to
17 accounts opened in the name of Colours and Parraguirre. She did so without the
18 authorization of Antonacci or the knowledge of Parraguirre. Antonacci has requested that
19 Parraguirre and Colours repay the money to her, but they have refused.

20 Analysis

21 Both parties agree that under Nevada law, to prevail on a claim of Unjust
22 Enrichment the plaintiff must establish: (1) a benefit was conferred on the defendants by
23 the plaintiff; (2) the defendants appreciated that benefit; and (3) the defendants accepted
24 and retained that benefit under circumstances such that it would be inequitable for
25 defendants to retain the benefit without payment of the value thereof to plaintiff. See,
26 *Certified Fire Prot. Inc. v. Precision Constr.*, 283 P.3d 250, 257 (Nev. 2012). When sitting

1 in equity, courts must consider the entirety of the circumstances that bear upon the
2 equities. See *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1114-1115
3 (Nev. 2016).

4 Antonacci argues that “money is a straightforward benefit.” In this matter, Sparks
5 deposited money that came from Antonacci into the accounts of Parraguirre and Colours.
6 As such, Antonacci asserts that she conferred a benefit on the defendants.

7 While Antonacci has established that Sparks embezzled money from her, she has
8 not shown that, in considering the totality of the circumstances that bear upon the equities,
9 a benefit was conferred on the defendants. Antonacci’s argument rests upon the incorrect
10 premise that the totality of circumstances, in this case, is limited to the initial transactions
11 from her accounts (executed by Sparks without her authorization) to the defendants’
12 accounts.

13 Initially, the Court must note the absence of evidence that the defendants had
14 control of the accounts. The absence is of particular importance in this matter, as the
15 central figure in the circumstances is Sparks. As Antonacci acknowledges, Sparks
16 engaged in transactions without her authorization. In light of this circumstance, evidence
17 that Sparks deposited money into an account does not establish, as an undisputed fact,
18 that the account was in the control of the company or person named on the account.

19 However, even if the Court were to assume that the defendants had control of the
20 accounts, such assumption does not establish, as a matter of law, that a benefit was
21 conferred upon the defendants. Antonacci had control of her accounts. Such control,
22 however, did not preclude Sparks from taking money from Antonacci’s accounts without
23 her authorization. While Antonacci has presented evidence that Sparks deposited the
24 money into accounts in the name of the defendants, she has also alleged that Sparks
25 drafted checks from Antonacci’s accounts payable to Sparks. Antonacci has not presented
26 any evidence (much less undisputed evidence) that Sparks’ faithless conduct was limited to

1 her improper use of Antonacci's accounts. Rather, the defendants have presented
2 evidence that, in connection with leaving the employment of the defendants, Sparks did so
3 in a manner that left the defendants' financial status in disarray. The defendants have also
4 presented some evidence that Sparks created accounts in their names without
5 authorization. While Sparks testified, in her deposition, that the transfers were solely for
6 the benefit of the defendants, the issue remains in dispute. Rather, the totality of the
7 circumstances precludes a determination, as an undisputed fact, that Sparks' conduct
8 (transferring funds from Antonacci to accounts held by the defendants) was for the benefit
9 of the defendants rather than an additional step in a process that Sparks used to obtain a
10 financial benefit for herself.

11 The Court acknowledges Antonacci's evidence suggesting that Sparks' unauthorized
12 transfer of funds sometimes occurred as the balance of defendants' accounts approached
13 zero and shortly before a required expenditure. If the totality of circumstances could be
14 limited to these several transactions, the Court would agree that the defendants received a
15 benefit. Given that this matter involves a faithless bookkeeper, however, requires that the
16 circumstances be considered in a broader context. That broader context requires evidence
17 as to the reasons that the accounts lacked sufficient funds. It may well be that the lack of
18 sufficient funds was due solely to the defendants' business being operated without
19 sufficient income to offset expenses. However, the evidence also establishes that the
20 defendants were employing a bookkeeper willing to take funds for personal use from an
21 employer without authorization.

22 In short, the evidence establishes that a faithless bookkeeper took money from
23 Antonacci and deposited that money into accounts in the names of the defendants. The
24 evidence does not establish, as an undisputed fact, that the bookkeeper did so for the
25 benefit of the defendants.

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1 Antonacci's argument that the defendants appreciated and retained the benefits
2 similarly fail. That Antonnaci informed the defendants that Sparks had transferred money
3 into accounts held in their name, *after* Sparks had left the defendants' employment, leaving
4 the defendants' financial records in disarray, does not establish that the defendants
5 appreciated a benefit. Rather, such evidence establishes only that Antonnaci informed the
6 defendants of Sparks' conduct of which Antonnaci was aware. Antonacci did not, and
7 could not, inform the defendants that they received a benefit, which they could then
8 appreciate. Rather, she provided information that notified the defendants only that Sparks
9 had deposited money into accounts held in their names, and that Antonacci had not
10 authorized the transfer of money.

11 In short, the totality of the circumstances requires consideration of Sparks' use of
12 the accounts of the defendants. Those circumstances include, however, evidence that
13 Sparks terminated her employment and left the defendants' finances in disarray. The
14 circumstances further include some evidence that Sparks created accounts in the names of
15 the defendants without their authorization. In light of these circumstances, Antonacci has
16 not met her burden of showing undisputed facts supporting a finding the defendants
17 received and appreciated a benefit from Antonacci.

18 For similar reasons, however, the defendants are not entitled to summary judgment
19 on Antonacci's unjust enrichment claim. Their argument rests solely¹ on the assertion that,
20 because they were unaware that Sparks was transferring money into their accounts at the
21 time she was doing so, Antonacci cannot establish that they appreciated the benefit
22 conferred from Antonacci.

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25 ¹ For purposes of their motion, the defendants have not argued that Antonacci
26 cannot meet her burden of showing the first and third elements of an unjust enrichment
claim, and have limited their argument to the second element that they did not appreciate
the benefit.

1 The Court disagrees. The lack of appreciation of a benefit at the time first
2 conferred, or even shortly after first conferred, does not establish that the recipient can
3 never appreciate the benefit. The defendants have shown, at most, that they did not
4 appreciate the benefit at the time it was conferred. The only inference permitted from this
5 evidence is that Antonacci cannot show the defendants appreciated the benefit at the time
6 it occurred. This evidence does not establish that Antonacci cannot meet her burden of
7 showing that, at some time subsequent to the transfer of the money into their accounts, the
8 defendants appreciated the benefit that was conferred on them.


9 Accordingly, for good cause shown,

10 THE COURT **ORDERS** that Defendants' Motion to Strike (ECF No. 69) is
11 GRANTED. The Clerk of the Court shall STRIKE all attachments to Plaintiffs' Reply to
12 Motion for Partial Summary Judgment (Exhibits to ECF No. 65). Further, the Court has not
13 considered the Plaintiffs' Reply to the extent it relies upon the attachments to the Reply.

14 THE COURT FURTHER **ORDERS** that Plaintiffs' Motion for Partial Summary
15 Judgment (#48) is DENIED.

16 THE COURT FURTHER **ORDERS** that Defendants' Counter-Motion for Partial
17 Summary Judgment (#61) is DENIED.

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20 DATED this 29 day of March, 2017.

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23 Lloyd D. George
24 United States District Judge
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