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IN THE COURT OF APPEALS OF INDIANA

PROTECT-ALL INSURANCE AGENCY, INC., ROBERT H. DRAKE, JR., and KEVIN SURFACE,

Appellants/Defendants/Counterclaimants/ Third-party Plaintiffs,

vs.

JAMES E. SURFACE, SR.,

Appellee/Plaintiff/Counterclaim Defendant,

and

ALLIED KITCHEN EQUIPMENT SALES, INC.,

Appellee/Third-party Defendant.

No. 49A02-1102-PL-136

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-0706-PL-24513

October 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

This is an appeal, pursuant to Indiana Trial Rule 54(B), of the trial court's grant of partial summary judgment in favor of Appellee/Plaintiff/Counterclaim Defendant James Surface, Sr., ("Surface") and Appellee/Third-Party Defendant Allied Kitchen Equipment Sales ("Allied") on certain counterclaims and a third-party complaint raised by Appellants/Defendants/Counterclaimants/Third-Party Plaintiffs Protect-All Insurance Agency ("Protect All"); Robert Drake, Jr. ("Drake"); and Kevin Surface ("Kevin") (collectively, "Appellants") in Surface's action against them for, *inter alia*, breach of contract. Upon appeal, Appellants challenge the trial court's entry of summary judgment on their counterclaims and third-party complaint. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

In 1990 Surface was the sole shareholder of Allied, an insurance company. On December 31, 1991, Allied sold certain of its assets to a new corporation, "Protect-All." As of its formation, Protect-All had three shareholders: Appellants Kevin and Drake, each of whom owned forty-five percent of the stock; and Surface, who owned ten percent.[1] According to the Appellants, the parties' intent was to sell Allied for the sum of 1.5 times its gross revenues. Also according to Appellants, Surface repeatedly represented Allied's gross

[1] According to Kevin and Drake, Surface's ten-percent ownership in Protect-All was to serve as "added security" that monthly payments to him be made. Appellant's Br. p. 5.

revenues in 1990 to be $750,000 when they were in fact $627,717. Appellants agreed to pay Surface $1,125,000 for Allied, payable in 180 monthly installments of $6250. The day of the sale, the parties also entered into a shareholder agreement and a pledge agreement. One provision of the shareholder agreement dictated that Surface would sell his shares of Protect-All at book value to the remaining shareholders on or before January 31, 2005. The pledge agreement granted Surface a security interest in ninety shares of Protect-All, which would immediately become Surface's property in the event of default of payment or performance of secured obligations. As an additional term of the sale, Protect-All agreed to assume all of Allied's liabilities.

On January 1, 1991, Protect-All and Surface entered into an employment agreement in which Surface would be paid $75,000 per year plus the "original standard commission" earned on new accounts "solicited, negotiated or procured by him." Appellant's App. p. 137. Surface was not entitled, however, to any further commissions on such accounts, or to "renewal commissions." Appellant's App. p. 137. As an additional term of Surface's employment, on January 1, 1992, the parties entered into a severance agreement detailing various benefits for Surface in the event of termination of his employment with Protect-All.

The employment agreement was to terminate no later than December 31, 1995. According to Surface, his employment with Protect-All terminated soon after January 1, 1992. Yet, according to Appellants, Surface continued to use Protect-All funds to pay his health insurance premiums until 2001 and his and his spouse's cell phone charges until 2003, totaling $150,456 in unauthorized expenses.

On June 17, 2003, Surface and Protect-All entered into a lease agreement, with Surface as lessor and Protect-All lessee of 1381 North Shadeland Avenue in Indianapolis. According to Appellants, on approximately April 29, 2006, Surface entered the property without authorization and used Protect-All's property to copy and remove files. Apparently Surface entered the property again on May 2, 2006 and threatened Kevin and Drake, causing them ultimately to vacate the premises in May of 2006.

In 2006, Appellants learned that Allied's gross revenues, upon which the sale price was based, were less than Surface had represented them to be. According to Appellants' accountant, Monica Surface, Allied's revenues in 1990 were $627,717 rather than $750,000. By that point, according to Appellants, Surface had been paid in full, which constituted an overpayment of $122,000.

In mid to late 2006, Surface allegedly made statements to Protect-All's customers that the company was bankrupt and going out of business, that it was made up of "liars," and that customers' premium payments were being used for personal benefit. According to Monica, Protect-All subsequently lost at least one account.

On June 13, 2007, Surface filed a complaint for damages against Appellants alleging that he had not been paid his due distributions as a ten-percent shareholder of Protect-All; that his employment with Protect-All had been terminated and his entitlements under the severance agreement and to certain commissions had been withheld; that Protect-All had failed to pay certain rents, expenses, and damages pursuant to their lease agreement; that Kevin and Drake had failed to purchase his shares pursuant to the shareholder agreement and

had violated their fiduciary duties by terminating his ownership in Protect-All; and that Kevin and Drake had failed to observe their duties under the pledge agreement, justifying foreclosure of certain shares of stock in Protect-All.

On August 24, 2007, Appellants filed their answer in which they alleged as counterclaims that Surface had received certain unauthorized commissions under the terms of the employment agreement (Count I); that Surface had committed trespass and conversion on Protect-All's property (Count II); that Allied's sale price was based on misrepresentations of revenue by Surface, resulting in overpayment and constituting fraud in the inducement (Count III); that Surface had continued to receive health and cell phone benefits from Protect-All for personal use after the termination of his employment, constituting theft (Count IV); that Surface, with malicious intent, had made slanderous and defamatory statements which interfered with its business relationships (Count V); and that Surface's entry on the leased property resulted in Protect-All's vacation of the property, constituting constructive eviction (Count VI). In addition, Appellants alleged as a third-party complaint[2] against Allied and its "alter ego" Surface that they had been paid in full, and overpaid, for the sale of Allied. Appellants also alleged the affirmative defenses of estoppel, fraud, laches, statute of limitations, statute of frauds, failure to state a claim upon which relief can be granted, set off, and constructive eviction.

On August 24, 2010, Surface moved for partial summary judgment against the Appellants on their counterclaims and third-party claim and their affirmative defenses. In

addition, Surface requested summary judgment in his favor on the issue of liability relating to Kevin's and Drake's failure to purchase his shares pursuant to the terms of the shareholder agreement.

On August 30, 2010, the trial court set the matter for hearing on October 8. On September 24, 2010, the Appellants moved for an enlargement of time to respond to the summary judgment motion, as well as to reset the hearing, claiming that prior counsel had withdrawn. The trial court granted the motions and reset the hearing for November 5, 2010. On October 26, 2010, Appellants again moved for an enlargement of time to respond, which the trial court denied.

Neither Appellants nor their attorney attended the November 5, 2010 hearing.[3] Following the hearing, the trial court granted Surface's motion for partial summary judgment on Appellants' counterclaims, third-party claim, and the affirmative defenses of set off, fraud, estoppel, statute of frauds, and failure to state a claim upon which relief may be granted. In addition, the trial court granted summary judgment regarding the Appellants' liability for failing to purchase Surface's shares pursuant to the terms of the shareholder agreement. On December 1, 2010, Surface moved, pursuant to Trial Rules 54(B) and 56(C), to make final that portion of the summary judgment relating to the counterclaims and third-

[2] This claim was originally termed a "cross-claim," but Appellants now term it a "third party complaint." Appellant's Br. p. 1 n.2.

[3] An attorney was present on their behalf but was not prepared to argue and did not enter an appearance.

party claim. The trial court granted the motion, entering final judgment on the counterclaims and third-party complaint on January 26, 2011. This appeal follows.

DISCUSSION AND DECISION

On appeal, Appellants contend that genuine issues of material fact exist, and that the trial court therefore erred in granting summary judgment in favor of Surface on their counterclaims and third-party claim.

I. Standard of Review

Under Indiana Trial Rule 56(C) summary judgment is appropriate when the designated evidentiary matter shows 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. In reviewing summary judgment, this court applies the same standard as the trial court and construes all facts and reasonable inferences to be drawn from those facts in favor of the non-moving party. *Payton v. Hadley*, 819 N.E.2d 432, 437 (Ind. Ct. App. 2004). Where material facts conflict, or undisputed facts lead to conflicting material inferences, summary judgment is inappropriate. *Id*. at 438. The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. *Id*. While we are not bound by findings and conclusions entered by the trial court, they aid our review by providing reasons for its decision. *See id*. This court will affirm a grant of summary judgment if it can be sustained on any theory or basis in the record. *Id*.

II. Analysis

A. Count I

Appellants' first counterclaim alleged that Surface received certain unauthorized commissions, in violation of the employment agreement, from approximately 1991 to 1997. According to Appellants, this constituted overpayment and theft and/or conversion. The trial court entered summary judgment on the grounds that (1) Protect-All had waived this challenge by making knowing and repeated payments to Surface over many years, and (2) this claim fell outside the applicable statue of limitations. Appellants contend that a genuine issue of material fact exists regarding each of these grounds.

Indiana Code section 34-11-2-11 (2007) provides that an action upon contracts in writing must be commenced within ten years after the cause of action accrues. Appellants' counterclaim was based upon the employment agreement, which terminated, at the latest, on December 31, 1995. Yet Appellants' brought their counterclaim in 2007, approximately twelve years after the contract terminated, and well outside the ten-year statute of limitations for such a claim.

Appellants argue that Surface continued to receive improper commissions until 1997. Appellants point to this fact and the continuing wrong doctrine to claim that the statue of limitations did not expire until ten years after this final commission payment, or 2007, when they filed what they allege was a timely counterclaim.

The continuing wrong doctrine is applicable when an entire course of conduct combines to produce an injury. *Meisenhelder v. Zipp. Exp., Inc.*,788 N.E.2d 924, 931 (Ind.

Ct. App. 2003). When conduct is determined to constitute a continuing wrong, the statute of limitations is tolled so that it does not commence running until the wrongful act ceases. *Id.* Appellants present no authority, and we find none, to suggest that the misdirection of funds, if it spans a lengthy time period, somehow does not produce an injury until the entire amount has been misdirected. To the contrary, where an obligation is payable in installments, as the commissions at issue allegedly were, the statute of limitations runs as to each installment as it becomes due. *Smith v. Beasley*, 504 N.E.2d 1028, 1029 (Ind. Ct. App. 1987). Appellants fail to explain how the mere receipt of at least one commission within the statutory period somehow resurrects all claims relating to all commissions otherwise falling outside that period. To the extent it could be argued that certain commissions are grounds for a timely claim while others are not, Appellants fail to distinguish among them. In any event, of course, any claims that were "timely" because they were based upon commissions earned within ten years of the counterclaim no longer fell under the employment contract upon which the counterclaim was based. We find no error on this ground.

B. Count II

Appellants' second counterclaim alleged trespass and conversion based upon Surface's claimed entry into Protect-All's offices on April 29, 2006,[4] for the illegal purposes of using its equipment to copy and remove its files and documents. The trial court granted summary judgment on the grounds that (1) there were no damages from Surface's entry; that

[4] The counterclaim alleges the date is April 29, *2007*, but the Appellants' Brief and their references to this date in Count VI of the counterclaim indicate the date is April 29, *2006*.

(2) Surface was entitled to enter pursuant to the lease; and (3) Surface did not take or remove any files or documents.

1. Trespass

It is a general rule of tort law that

> [o]ne who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or [to] a thing or a third person in whose security the possessor has a legally protected interest.

Lever Bros. Co. v. Langdoc, 655 N.E.2d 577, 582 (Ind. Ct. App. 1995) (quoting RESTATEMENT (SECOND) of TORTS § 165 (1965)). A plaintiff in a trespass action must prove that he was in possession of the land and that "the defendant entered the land without right." *Ind. Mich. Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999) (quotation omitted). "'If the plaintiff proves both elements he is entitled to nominal damages without proof of injury.'" *Id.* (quoting *Sigsbee v. Swathwood*, 419 N.E.2d 789, 799 (Ind. Ct. App. 1981)). If the plaintiff proves any additional injury, proximately resulting from the trespass, the plaintiff is entitled to compensatory damages. *Sigsbee*, 419 N.E.2d at 799.

With regard to trespass, the designated evidence showed that Surface, who was the landlord, had a key to the premises and was entitled, pursuant to the lease agreement, to enter for purposes of inspection and repair. But the Appellants' allegation is that Surface entered the property for illegal purposes. Therefore, the fact that Surface had a key and was entitled to enter the premises for certain agreed-upon purposes does not dispense with the Appellants' trespass claim; a genuine issue of material fact remains regarding Surface's intent. While

Surface rests upon his status as Protect-All officer or shareholder to justify his entry, Monica's deposition testimony indicates he was no longer an officer or shareholder by that point. Further, regarding the question of damages, Monica's testimony that she did not know "how you put a dollar amount on loss of information" suggests that there might be damages if proven at trial. Appellant's App. p. 186. In any event, a plaintiff in a trespass action is entitled to nominal damages without proof of injury. *See Ind. Mich. Power Co.*, 717 N.E.2d at 227. We must conclude that genuine issues of material fact exist on the trespass counterclaim, making summary judgment improper.

2. Conversion

Conversion, as a tort, consists either in the appropriation of the personal property of another to the party's own use and benefit, or in its destruction, or in exercising dominion over it, in exclusion and defiance of the rights of the owner or lawful possessor, or in withholding it from his possession, under a claim and title inconsistent with the owner's. *Computers Unltd., Inc. v. Midwest Data Sys., Inc.*, 657 N.E. 2d 165, 171 (Ind. Ct. App. 1995).

While there is designated evidence, namely Surface's affidavit, indicating that he did not remove any files or documents, Monica's deposition testimony indicates that he did take files and/or documents, including several years' worth of financial statements. As for damages, it is true that Monica was unable to pinpoint a specific document the loss of which was particularly harmful. But she also stated, as indicated above, that she did not know how to place a dollar amount on loss of information, suggesting that the loss caused measurable

hardship. In any event, like in trespass actions, nominal damages are available in conversion actions. *See* 18 AM. JUR. 2D *Conversion* § 126 (2011). Accordingly, the absence of actual damages does not defeat the Appellants' conversion claim. We must similarly conclude that summary judgment was improper on this ground.

C. Count III

Appellants' third counterclaim alleged that Surface had fraudulently misrepresented the gross revenues of Allied, resulting in Kevin's and Drake's agreement to pay $1.125 million for Allied, which Appellants allege exceeded Allied's worth by $122,000. Appellants acknowledge that the sale occurred in 1991 but argue that they did not discover this misrepresentation until 2006, when Monica discovered 1990 financial records. In granting summary judgment, the trial court concluded that the statute of limitations barred the claim. The trial court additionally concluded that Appellants had shown no reasonable reliance on Surface's alleged misrepresentations and that, in any event, their conduct constituted waiver.

Appellants do not dispute that the statute of limitations for an action based on fraud is six years, *see* Ind. Code § 34-11-2-7 (2007), but they rely upon the discovery rule to preserve their claim. "The discovery rule provides that a cause of action accrues when a party knows or in the exercise of ordinary diligence could discover, that the contract has been breached or that an injury had been sustained as a result of the tortious act of another." *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 687-88 (Ind. Ct. App. 2006). The law does not

require a smoking gun in order for the statute of limitations to commence. *Id.* To the contrary,

> the exercise of reasonable diligence means simply that an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed.

Id. (quoting *Mitchell v. Holler*, 429 S.E.2d 793, 795 (1993)).

Appellants claim they did not actually discover the alleged misrepresentation until 2006. While Monica testified that the 1990 financial statement was apparently undiscovered until then, she also equivocated on this point, indicating that the shortfall in revenue may have been discovered as early as 1995, well within the six-year statute of limitations. According to Monica, she simply did not know, because she was not at the company at the time. Monica did opine, however, that she "would have thought" that materials available to the company in 1995, including financial materials, monthly statements, annual statements, and tax returns, would have made it possible to discover the financial shortfall then. Appellee's App. p. 11. While the 1990 financial statement at issue was ultimately found in Surface's desk, there was no testimony indicating that the information it contained was purposefully obfuscated or unavailable. Indeed, readily available tax returns for 1990 and the next four years would have demonstrated revenue less than $750,000, presumably placing the Appellants on notice that a 1990 shortfall might exist. Given the general availability of relevant financial documents and Monica's equivocation regarding the alleged late discovery,

we cannot say that the discovery rule should apply to toll the statue of limitations here. Accordingly, the trial court did not err in granting summary judgment on this claim.

D. Count IV

Appellants' fourth counterclaim alleges that Surface committed breach of fiduciary duty and theft by directing Protect-All's bookkeepers to pay his health benefits and cell phone bills, totaling $150,456, after his employment with Protect-All had terminated. According to Appellants, Surface received unauthorized health benefits until 2001, and he and his wife received unauthorized cell phone benefits until 2003. In granting summary judgment, the trial court concluded that Appellants' conduct constituted waiver and that the claim was barred by the statute of limitations.

Appellants argue that the statute of limitations raised by Surface in his motion for summary judgment, specifically Indiana Code section 34-11-2-1 (2007), is inapplicable. Section 34-11-2-1 provides for a two-year statute of limitations for an action relating to the terms of employment, with certain exceptions. Appellants argue that their claim is a "combined breach of fiduciary duty and tort action" but do not propose an alternative statute of limitations to be applicable. Appellant's Br. p. 22.

"'[T]he applicable statute of limitations is ascertained by identifying the nature or substance of the cause of action.'" *Shriner v. Sheehan*, 773 N.E.2d 833, 845-46 (Ind. Ct. App. 2002) (quoting *Whitehouse v. Quinn*, 477 N.E.2d 270, 274 (Ind. 1985)), *trans. denied*. Appellants argue that their claim is a "combined breach of fiduciary duty and tort action."

Appellant's Br. p. 22. In cases where, as here, breaches of fiduciary duty are construed to be tort claims, a two-year statute of limitations is applicable. *See id.* at 846.

Appellants contend that Surface received improper benefits as late as 2003, but they did not raise the instant counterclaim until 2007, well beyond the two-year statute of limitations. To the extent they invoke the continuing wrong doctrine, they fail to explain how it could toll the statue of limitations at least four years beyond the date upon which Surface allegedly wrongfully received his last benefit. Summary judgment on this ground was proper.

E. Count V

Appellants' fifth counterclaim alleges slander, defamation, and intentional interference with business relationships based upon Surface's alleged statements to Protect-All customers that Protect-All was "going out of business"; "bankrupt"; made up of "liars"; and "using [customers'] premium payments for [Protect-All officers'] personal benefit." Appellant's App. p. 122. The Appellants contend Surface made these statements with malicious intent to induce the customers to cease their business with Protect-All and do business with him instead. In granting summary judgment, the trial court concluded that there were no damages and that Surface had a right to call on Protect-All's customers.

Appellants' challenge on appeal only raises the claim of defamation per se. A defamatory communication is one that tends to harm a person's reputation by lowering the person in the community's estimation or deterring third persons from dealing or associating with the person. *Baker v. Tremco, Inc.*, 917 N.E.2d 650, 657 (Ind. 2009) Whether a

communication is defamatory is a question of law for the court, unless the communication is susceptible to either a defamatory or non-defamatory interpretation—in which case the matter may be submitted to the jury. *Id*. "'A communication is defamatory per se if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct.'" *Id.* (quoting *Kelley v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007)). To maintain an action for defamation per se, the plaintiff must demonstrate (1) a communication with defamatory imputation; (2) malice; (3) publication; and (4) damages. *Id.* In a defamation per se action, the plaintiff is "entitled to presumed damages 'as a natural and probable consequence' of the per se defamation." *Id.* (quoting *Kelley*, 865 N.E.2d at 597) (internal quotation omitted)).

According to Monica's deposition testimony, Surface made the statements at issue to certain of Protect-All's customers, requiring Protect-All to take efforts to mend a relationship on one occasion and causing it to lose customer accounts, including an account of the husband of a woman to whom Surface made such statements. This is evidence of damage. We cannot endorse the trial court's grant of summary judgment on the ground that there was no evidence of resulting damage.

The trial court also granted summary judgment on the grounds that Surface had "a right" to call on Protect-All's customers. The designated evidence indicates that Surface was entitled to solicit accounts, but there is nothing in the designated evidence indicating Surface was entitled to make defamatory statements during such solicitations. In the absence evidence to the contrary, it is unreasonable to infer from the permitted solicitation of

accounts that such solicitations may be based upon otherwise actionable misconduct. We must therefore conclude that summary judgment was similarly improper on the ground that Surface somehow had the "right" to make the alleged injurious statements.

F. Count VI

Appellants' sixth counterclaim alleged that Surface's April 29 and May 2, 2006, entries onto the Shadeland Avenue property leased to Protect-All, and his subsequent alleged removal of Protect-All's furniture from the premises, constituted constructive eviction. In granting summary judgment, the trial court concluded that Surface had a right to enter the premises.

Constructive eviction occurs when the lessor, without intending to oust the lessee, commits an act depriving the lessee of the beneficial enjoyment of some part of the premises. *Village Commons LLC v. Marion Cnty Prosecutor's Office*, 882 N.E.2d 210, 216 (Ind. Ct. App. 2008) (citing *Talbott v. English*, 156 Ind. 299, 307-08, 59 N.E. 857, 860 (1901)). In such a case, "'the tenant has his right of election, to quit, and avoid the lease and rent, or abide the wrong and seek his remedy in an action for the trespass.'" *Id.* (quoting *Talbott*, 156 Ind. at 307-08, 59 N.E. at 860). "'[I]n every case of constructive eviction, the tenant must quit the premises if he would relieve himself from liability to pay rent; and whether or not he is justifiable in so quitting is a question for the jury.'" *Id.* (quoting *Talbott*, 156 Ind. at 307-08, 59 N.E. at 860).

As we observed under the Trespass discussion in subsection B1 above, Surface's entitlement to enter the property for repair or other authorized purposes under the lease does

not resolve the claim that he entered the property for illegal or unauthorized purposes; at the very least, a genuine issue of material fact remains regarding Surface's intent. To the extent it is argued that Surface was entitled to copy and/or remove files pursuant to his roles as officer and shareholder, there is designated evidence, specifically Monica's deposition testimony, indicating that he had been removed from his roles as officer and shareholder by that point. Surface does not dispute that he entered Protect-All's premises and that the Appellants vacated the premises shortly afterward. A genuine issue of material fact exists regarding Surface's intention in entering and his removal of documents while there. We must conclude that this claim is not properly subject to summary judgment.

G. Third-party Complaint

According to the Appellants, the third-party complaint is identical to Count I[5] but names Allied rather than Surface. The trial court concluded this claim was barred by the statute of limitations.

Appellants incorporate their arguments under Count I to argue that the trial court erred in applying the statute of limitations to bar this claim. Having rejected those arguments in Count I, we similarly reject them now.

III. Conclusion

We have concluded that genuine issues of material fact exist, and summary judgment is therefore improper, with respect to Counts II, V, and VI of Appellants' counterclaim.

[5] It appears that the third-party complaint is more akin to Count III than Count I. In any event, we have affirmed the trial court's summary judgment on statute of limitations grounds on both counts.

Accordingly, we reverse the trial court's grant of summary judgment on those counts. In all other respects, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed in part, reversed in part, and the cause is remanded.

ROBB, C.J., and BARNES, J., concur.