

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1175

CORNETT'S HEATING & AIR, L.L.C.

VERSUS

KIMBERLY T. CORNETT

**Judgment rendered March 6, 2015.**

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Appealed from the  
21<sup>st</sup> Judicial District Court  
in and for the Parish of Livingston, Louisiana  
Trial Court No. 139369  
Honorable Brenda Bedsole Ricks, Judge

\*\*\*\*\*

SCOTT H. NETTLES  
DENHAM SPRINGS, LA  
AND  
WAYNE STEWART  
LIVINGSTON, LA

SHERMAN Q. MACK  
MATTHEW H. TODD  
ALBANY, LA

ATTORNEYS FOR  
PLAINTIFF-APPELLANT  
CORNETT'S HEATING & AIR,  
LLC

ATTORNEYS FOR  
DEFENDANT-APPELLEE  
KIMBERLY T. CORNETT

\*\*\*\*\*

**BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.**

**PETTIGREW, J.**

This appeal is from an August 7, 2014 district court judgment that granted summary judgment in favor of the defendant, Kimberly T. Cornett, hereinafter referred to as "Kimberly," and denied the corresponding motion for summary judgment filed by the plaintiff, Cornett's Heating and Air, LLC., hereinafter referred to as "Cornett's," dismissing all claims by Cornett's against Kimberly. Neither in its appeal, nor by a separate writ application, did Cornett's raise the issue of the denial of its corresponding motion for summary judgment; therefore, that issue is not before us at this time. After a thorough, *de novo* review of the record,<sup>1</sup> we find genuine issues of material fact remain, and accordingly, reverse the district court judgment dated August 7, 2014, in favor of Kimberly, and remand for further proceedings.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Cornett's is a limited liability company licensed to do and doing business in Livingston Parish, Louisiana, since its formation in 2005 by Avery Cornett, Jr. and his wife, Cindy Cornett. On November 16, 2012, Cornett's filed a petition to recover funds against Kimberly, alleging she made unauthorized withdrawals from Cornett's checking account at Regions bank in the total amount of \$53,900.00, and that she, also without authority, changed the "set-up" of the account so that the bank statements would not be mailed to Cornett's, in attempts to "cover up her unauthorized withdrawals."<sup>2</sup>

On November 25, 2013, and on January 9, 2014, Cornett's and Kimberly, respectively, filed motions for summary judgment, each asserting that there are no genuine issues of material fact and that each is entitled to judgment as a matter of law. Following a hearing on March 24, 2014, on both motions for summary judgment, the district court issued written reasons on April 7, 2014, which state that it "adopts the arguments of the defendant (Kimberly)," and granted summary judgment in her favor.

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<sup>1</sup> Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Louisiana Hospital Association v. State**, 2013-0579, p. 6 (La. App. 1 Cir. 12/30/2014), \_\_\_ So.3d \_\_\_.

<sup>2</sup> Specifically, Cornett's alleges Kimberly withdrew \$31,000.00 on July 16, 2012; \$7,000.00 on August 1, 2102; \$8,900.00 on August 21, 2012; and, \$7,000.00 on September 12, 2012, all without the proper authority to do so.

The district court also denied the motion filed by Cornett's, dismissing all of its claims in a judgment signed on August 7, 2014. This appeal by Cornett's followed.

### **ASSIGNMENTS OF ERROR**

Cornett's assigns error to (1) the district court's granting Kimberly's motion for summary judgment when material facts are still in dispute; and (2) the district court's granting Kimberly's motion for summary judgment when the facts do not show that she had a membership interest in Cornett's.

### **DISCUSSION AND ANALYSIS**

For the following reasons, our *de novo* review yields the existence of genuine issues of material fact; *i.e.*, whether any ownership interest was conveyed to Kimberly such that she had authority to withdraw the funds withdrawn from Cornett's checking account at Regions bank, and therefore, the district court erred in granting summary judgment in her favor and dismissing all the claims of Cornett's. Accordingly, we reverse that judgment and remand for further proceedings.

The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. La. C.C.P. art. 966(A)(2). Its purpose is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. **Hines v. Garrett**, 2004-0806 (La. 6/25/04), 876 So.2d 764, 769 (*per curiam*). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to

establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. Code Civ. P. art. 966(C)(2); **Woosley v. Parish of East Baton Rouge**, 2012 WL 6677899, 2012-0422, p. 3 (La. App. 1 Cir. 2012) (unpublished), writ denied, 2013-0441 (La. 4/5/13), 110 So.3d 594; see also **Robertson v. AXA Equitable Life and Annuity Co. Affinion Benefits Group, LLC**, 2013 WL 4106964, 2012-1134, p. 4 (La. App. 1 Cir. 8/14/13) (unpublished). An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether the mover is entitled to judgment as a matter of law. **Woosley v. Parish of East Baton Rouge**, 2012-1422 at p. 3.

In support of her motion for summary judgment, Kimberly submitted her sworn affidavit, attesting to the following: (1) that she married Avery Cornett, III on December 17, 1994; she filed a petition for divorce from him on January 25, 2012, and a judgment of divorce was signed on May 6, 2013; (2) that "in approximately 2010," she and Avery Cornett, III "acquired" Cornett's, and the business became part of their community property; (3) that on July 1, 2010, Avery Cornett, III, "as owner of" Cornett's, signed a union contract (a copy of which was attached to her affidavit); (4) that in early 2011, she and Avery Cornett, III "were added to" Cornett's bank account; (5) that on April 4, 2012, Avery Cornett, III filed his income tax return "as the proprietor" of Cornett's (a copy of the tax return and the deposition testimony of the tax preparer were attached to her affidavit); (6) that on September 6, 2012, two checks were executed, one to the Louisiana Department of Revenue (in the amount of \$400.00) and the other to the U.S. Internal Revenue Service (in the amount of \$4,000.00), in the name of "Avery Cornett, III, Cornett's Heating, A/C, and Ref." (copies of both checks were attached to her affidavit); (7) that at all relevant times, Cornett's was not in good standing and was operated as a sole proprietorship (an undated copy of the Louisiana Secretary of State, Commercial Division's status report on Cornett's, indicating that the LLC was not in good standing for failure to file an annual report -- the last annual report having been filed on October 8, 2010, was attached to her affidavit); (8) that Cornett's was the community

property of herself and Avery Cornett, III, of which she was co-owner; and (9) that as a co-owner of Cornett's, she had the right to use the property of, and the right to withdraw funds from the account of, Cornett's.

In opposition to the motion for summary judgment filed by Kimberly, Cornett's submitted the sworn affidavit of Cindy Cornett (Mrs. Cornett), in which she attested that she and her husband, Avery Cornett, Jr., formed Cornett's as an LLC in August 2005, for the purpose of engaging in air conditioning installation, repair, and business. She further attested that in December 2011, their son, Avery Cornett, III and Kimberly, who was their son's wife at the time, both were placed on the signature card of Cornett's checking account at Region's bank "for the purpose of signing checks for [Cornett's] if and when the circumstances required or dictated that they do so." Mrs. Cornett additionally attested that during that period of time, there was "talk, thought, and consideration and planning done for the purpose of transferring [Cornett's] to Avery Cornett, III and his spouse." Mrs. Cornett, however, also attested *that such transfer never took place.*

Mrs. Cornett also attested that in January 2012, Avery Cornett, III and Kimberly separated and filed a petition for divorce. She attested that Kimberly subsequently made the unauthorized withdrawals from Cornett's operating business checking account, as detailed in the petition; and, she alleged that those withdrawals constituted conversion of \$53,900.00, because neither Kimberly nor Avery Cornett, III ever owned any portion of the company, and the funds wrongfully withdrawn by Kimberly belonged only to Cornett's.

Thus, the salient issue presented is whether Kimberly had an ownership interest in Cornett's such that the withdrawals at issue were not unauthorized or unlawful. This is a question of material fact, for which genuine issues remain. Simply put, Kimberly has not supported her defense with sufficient competent evidence to prove the withdrawals were authorized as a result of her having an ownership interest in Cornett's.

The affidavits offer directly conflicting accounts as to whether a transfer of ownership interest in Cornett's occurred from Avery Cornett, Jr. and/or Cindy Cornett to their son, Avery Cornett, III, and his former spouse, Kimberly. Mrs. Cornett, on one

hand, attested no transfer of ownership ever occurred and that Kimberly had neither their consent, nor the authority, to make the withdrawals. Kimberly, on the other hand, attests that in 2010, she and Avery Cornett, III "acquired" Cornett's and that by virtue of her co-ownership in Cornett's, she had the right to withdraw monies from the checking account at issue.

Notably, the remaining evidence presented submitted by Kimberly constitutes, at best, *circumstantial indicia of possible ownership*, and viewed, either alone, or cumulatively, is insufficient to prove Kimberly's claim of ownership interest in Cornett's; thus, this genuine issue of this material fact remains, rendering summary judgment improper.

The mere fact that a person is added as a signatory to a bank account is insufficient indicia of ownership of those funds. Indeed, Mrs. Cornett attested that Kimberly and Avery Cornett, III were added as permitted signatories for the limited purpose of signing checks in the course of Cornett's business, but only if and when the circumstances dictated that they do so. Kimberly offered no evidence to contradict that her being added as a signatory to the checking account was for any other purpose than that stated by Mrs. Cornett. Likewise, Kimberly presented no argument or legal authority to support the fact that Avery Cornett, III's actions in entering into a union contract on behalf of Cornett's was direct proof of his (or her) ownership thereof. Indeed, this too, is insufficient indicia of ownership of a company to support Kimberly's claim. The same can be said of Cornett's tax returns being filed by Avery Cornett, III; the checks executed in connection therewith; and, the legal standing of Cornett's company status according to state records. And perhaps most significant, is the complete absence of a sale document or any other written documentary evidence of a transfer of any part of Cornett's to Kimberly. The evidence being insufficient to prove the pivotal fact underlying the genuine issue of ownership in this matter, summary judgment is not warranted.

### **CONCLUSION**

Accordingly, we reverse the August 7, 2014 district court judgment that granted summary judgment in favor of Kimberly T. Cornett and dismissed all claims of Cornett's

Heating & Air, L.L.C., and remand to the district court for further proceedings. All costs of this appeal are assessed to Kimberly T. Cornett.

**REVERSED AND REMANDED.**