

NOT DESIGNATED FOR PUBLICATION

AAA TIRE FINISHING * **NO. 2000-C-1887**
EQUIPMENT & SUPPLY, INC. *
AND ROY L. WILLIAMS, SR. * **COURT OF APPEAL**

VERSUS * **FOURTH CIRCUIT**

NEW ORLEANS DEPOT * **STATE OF LOUISIANA**
SERVICES, INC. AND KIRK *
WILLIAMS *

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**SUPERVISORY WRIT DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-19682, DIVISION "E"
Honorable Gerald P. Fedoroff, Judge**

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris Sr.,
and
Judge Terri F. Love)

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WRIT GRANTED IN PART AND DENIED IN PART

STATEMENT OF THE CASE

Defendants-Applicants, New Orleans Depot Services and Kirk Williams (alternately, “defendants” and “applicants”) claim that the trial court committed manifest error in rejecting Plaintiffs-Respondents (alternately, “plaintiffs” and “respondents”) motions for summary judgment in this matter. Applicants argue that there were no genuine issues of material fact in the case and that they clearly established their entitlement to summary judgments. For the reasons described below, this Court finds that the trial court committed manifest error in rejecting the applicants’ motions for summary judgment in the matter of the plaintiffs’ proposed stock subscription agreement. Therefore, the applicants’ writ for this judgment is hereby granted.

However, the trial court was well within its discretion in denying the defendants’ motion for summary judgment on their claim in reconvention for conversion against the plaintiffs. Therefore, their writ application with regard to this issue is hereby denied.

FACTS AND PROCEDURAL HISTORY

Roy Williams, one of the plaintiff-respondents in this case, and his

son, Kirk Williams, one of the defendant-applicants, formed New Orleans Depot Services, Inc. (“NODS”) under the corporation laws of the State of Louisiana in August of 1996. Kirk Williams did not have enough capital to open the business, and his Father agreed to invest \$25,000 and become a shareholder in NODS. In addition, Roy Williams signed as Guarantor of a \$150,000 loan that was needed to start the business through Whitney Bank.

Because Kirk Williams had no business experience, he turned to his father (an experienced businessman and former law student) for advice and assistance. His father also offered to draft the Articles for the new company and had them notarized for his son for a fraction of the cost of hiring an outside lawyer. The Articles of Incorporation were recorded in August 1996, and the business was immediately successful. The plaintiffs claim that the relationship between Kirk Williams and his father began to deteriorate shortly afterward. In their action, the plaintiffs claim that: 1) Roy Williams was often intoxicated, and he verbally and sexually harassed NODS employees; 2) Roy Williams began giving vendors and customers inaccurate and unfounded information about NODS and Kirk Williams in order to undermine the company and his son’s credibility; 3) Roy Williams approached a direct competitor of NODS in an effort to assist it in luring business away from NODS; and 4) Roy Williams, aided by AAA Tire,

wrongfully withdrew approximately \$15,000 from the payroll and operating expense account of NODS without prior notice or authorization.

The company's Articles as drafted by Roy Williams are the source of dispute between the parties. Kirk Williams argues that the Articles prepared for him by his father contain nothing to suggest that Roy Williams or AAA Tire (his company and co-defendant) were to have any ownership interest in NODS. Roy Williams, in turn, argues not only that he is entitled to the shares of stock but also that his son attempted to oust him from NODS on or about March 1, 1997, by executing a document entitled "Action Taken by Unanimous Consent of Shareholder in Lieu of a Meeting." In that document, Kirk Williams declared that Roy Williams had violated his agreement to be a shareholder, withdrew from the corporation, and pronounced himself to be the sole shareholder of the corporation. On March 2, 1997, 100 shares of corporate stock were issued to Kirk Williams for \$100.

In May 1997, the plaintiffs filed suit in Jefferson Parish. The suit was subsequently transferred to Orleans Parish and consolidated with a second suit. In their consolidated action, the plaintiffs seek specific performance of an oral pre-incorporation subscription of NODS stock and damages against Kirk Williams for breach of fiduciary duties owed by him to the plaintiff

NODS shareholders. In response, the defendants asserted numerous exceptions and reconvened against the plaintiffs for breach of fiduciary duties, defamation, unfair trade practices, tortious interference with contract and business relations, and conversion. In April 1998, the defendants filed the first of two summary judgment motions with the court, seeking the dismissal of plaintiffs' claims of an enforceable subscription agreement in the consolidated action.

Before the motion could be heard, the plaintiffs' attorney of record withdrew from the case. The plaintiffs' current attorney of record enrolled as counsel eight months later in April 1999. After another thirteen months of dormancy, the defendants filed a second motion for summary judgment in May 2000 on their reconventional claim against the plaintiffs for conversion. On August 1, 2000, the trial court denied both of the defendants' motions. It is from this decision that the defendant-applicants are seeking supervisory writs from this Court.

LAW AND DISCUSSION

Since the adoption of Article 966 of the Louisiana Code of Civil Procedure in 1996, the summary judgment procedure is now favored. State trial courts are now to render summary judgment "forthwith" when the

record before the court reveals that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. La. C.C.P. Art. 966(B). In a summary judgment proceeding, the burden of proof remains on the mover to 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(C). Once the moving party has produced evidence to the court demonstrating that no genuine issue of material fact exists, the burden then shifts to the non-moving party to “produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial.” *Cressionie v. Liberty Mut. Ins. Co.*, 98-0534 (La.App. 4 Cir. 4/8/98), 711 So.2d 364. If the non-moving party is unable to satisfy this burden, then the moving party is entitled to judgment as a matter of law. However, if the non-moving party is able to show that there are genuine issues of material fact in the record before this court, summary judgment would be improper notwithstanding its favored status in Louisiana’s trial courts.

The plaintiffs claim they are entitled to specific performance of an oral pre-incorporation agreement concerning the issuance of stock in the new company to the plaintiffs. Summary judgment in favor of the defendants on this claim would only be proper if the record shows that there are no genuine issues of material fact regarding this claim. To defeat the

defendants' motion for summary judgment, the plaintiffs would have to come forward with probative evidence establishing the existence of a valid subscription agreement for the stock in question. *Phillips v. Insilco Sports Network, Inc.*, 429 So.2d 447, 449 (La.App. 4th Cir. 1983).

Louisiana Revised Statute §12:71(A) provides that “[s]ubscriptions for shares, whether made before or after the formation of a corporation should be in writing.” In addition, this Court has explained that a subscription agreement shall indicate, at least generally, the nature and main purposes of the corporation to be formed, the amount of authorized capital, the kind and number of shares authorized, and the number of shares for which there has been a subscription. *See Ashley v. Coleman*, 219 So.2d 574 (La.App. 4th Cir. 1969). Article 1832 of the Louisiana Civil Code provides that when the law requires a contract to be in written form, the contract *may not* be proven by testimony or presumption. Therefore, without some evidence of the existence of a valid written subscription agreement, the plaintiffs (non-moving party) would not be able to carry their burden, and summary judgment on this issue would be proper.

In his deposition, Roy Williams admitted that there was no written agreement between his son and him concerning a 50/50 split of the shares of NODS. In their case, the plaintiffs rely exclusively on an oral agreement

concerning the stock that took place in an unwitnessed conversation between Roy and Kirk Williams. In an effort to provide some concrete evidence of this agreement, the plaintiffs point to the “Proposed Business Plan” executed by Kirk Williams in his effort to get financing for the new corporation.

In their brief to this Court, the plaintiffs claim that the proposed business plan embodies the requisite written agreement concerning the distribution of stock. The plan provides that “The Corporation will commence with \$50,000.00 in cash investment contributed by two stock holders: Kirk Williams, President and General Manager- \$25,000 and Roy Williams, V.P. & Business Consultant - \$25,000.” The plaintiffs claim that Roy Williams had fulfilled his obligations under this agreement by paying for the stock as provided by the business plan (and included a cancelled check for \$25,000 in their list of exhibits to the brief to prove it). There is no doubt that Roy Williams provided necessary start-up capital and the collateral for a large loan from Whitney Bank for his son’s company.

However, the proposed business plan simply cannot suffice as a subscription agreement under the law. If the defendant’s claim that the plan actually is a written subscription agreement between the parties, it simply does not suffice under the law. In order to be sufficient under the law, the agreement generally needs to include more than merely the names of the parties and the

amount of capital to be contributed by each of them. Even if this Court were to allow the agreement to slide on certain flaws, it remains a fact that the agreement is missing any reference to the nature of the company to be formed, the kind and number of shares to be authorized, or their par value. *See Ashley, supra.*

From the parties' briefs, it is also apparent that the proposed business agreement was not followed by the parties. The corporation required extra capitalization (provided by Roy Williams). In addition, the plaintiffs now claim that AAA Tire, rather than Roy Williams, subscribed for the stock in the new company. The defendants carried their burden as the moving party in a summary judgment motion, and the plaintiffs have not carried theirs as the non-moving party. After reviewing the briefs and submitted evidence, we find that there are no genuine issues of material fact with regard to the stock subscription agreement. Simply put, there is just not enough evidence for this Court (or the trial court) to determine that there was a valid, enforceable subscription agreement between the parties. Therefore, the application for a supervisory writ for this issue is hereby **granted** by this Court.

In their second motion for summary judgment, the defendants claim that NODS is entitled to summary judgment on its claim in reconvention for

conversion against the plaintiffs. Roy Williams admitted in his deposition to purposefully taking and retaining \$14,582.63 that he knew belonged to the NODS payroll account without the authorization of the company, but he argues that he took this money as repayment of a debt owed by NODS to Roy Williams' company, AAA Tire.

Conversion is defined as “any action in derogation of a person’s possessory rights.” *See Quealy v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So.2d 756, 760 (La. 1985). Any wrongful exercise of authority over someone else’s goods, depriving that person of possession, permanently or for an indefinite time, is a conversion. *See Id.* NODS was the rightful owner of the money contained in its payroll and operating/expense account, and Roy Williams took this money. By taking the money, Roy Williams denied NODS of the benefit and/or enjoyment of its property. This is a conversion if, in fact, it was a *wrongful* act.

The plaintiffs argue that debts were owed to AAA Tire Company by NODS and that Roy Williams had check writing authority with the bank over this account. There are open issues as to whether this account was a payroll account or an operating account, and whether Roy Williams took this money without the authorization of NODS. The defendants argue that Roy Williams had already been ousted from the company when he wrote this

check. Because Roy Williams wrote this check on February 28, 1997, and because the papers stripping him of his position were written on March 1, 1997, he may have known something adverse to his position in the company was happening. The knowledge and intent of the parties is not absolutely clear from the briefs. Since there are genuine issues of material fact as to whether this was in fact a wrongful act on the part of Roy Williams, the moving party has not sustained its burden, and summary judgment on this issue is therefore inappropriate. Therefore, the trial court was well within its discretion in denying the defendants' second summary judgment motion. The defendants' application for the second supervisory writ is therefore hereby **denied**.

CONCLUSION

In the instant case, the defendants allege that the trial court committed manifest error in denying their two separate motions for summary judgment and are applying for supervisory writs from this Court. It is clear from the parties' briefs that the trial court did in fact commit manifest error by concluding that there were issues of material fact in regard to the plaintiffs' claim for enforcement of the stock subscription agreement. There was no enforceable agreement between the parties, and the defendants' application

for a supervisory writ for this issue is therefore **granted**.

The trial court did not, however, commit manifest error in finding that there were genuine issues of material fact in relation to the defendants' claim of conversion against the plaintiffs. For this reason, the trial court was fully within its discretion to deny the defendants' second motion for summary judgment. Therefore, this Court **denies** the defendants' application for a second supervisory writ.

WRIT GRANTED IN PART AND DENIED IN PART