

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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COMERICA BANK,

Plaintiff/Counter-Defendant/Appellant,

v

ALLIED COMMUNICATIONS,  
INCORPORATED, and MICHAEL J. HOWARD,

Defendants/Counter-Plaintiffs/Appellees.

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UNPUBLISHED

March 14, 1997

No. 185571

Oakland Circuit Court

LC No. 93-455881-PD

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,\* JJ.

PER CURIAM.

Plaintiff/counter-defendant Comerica Bank appeals by right the order granting summary disposition to defendants/counter-plaintiffs Allied Communications, Incorporated and Michael J. Howard<sup>1</sup> on their claims of illegal setoff and conversion of bank account funds. We reverse and remand for proceedings consistent with this opinion.

In 1988, defendant Howard, president of defendant Allied, opened retail and checking accounts for himself and Allied at plaintiff bank. Defendants agreed to be bound by plaintiff's then-existing rules and regulations and by any amended rules and regulations. In 1992, plaintiff amended its rules and regulations to include the following: "You agree that Bank may, at any time and without prior notice, set-off funds in any Account in which you have the right to withdraw for any debt you owe bank. . . . (Set-off is when Bank withdraws funds from an Account to pay debts you owe Bank.)"

In 1991, defendants leased equipment from Hart Leasing; defendant Howard was guarantor. In October 1992, Hart Leasing assigned the lease to plaintiff to support a loan from plaintiff to it. In December 1992, defendant Allied defaulted on the lease and plaintiff demanded payment from defendants. When defendants failed to pay, plaintiff: (1) terminated the lease, (2) called due the entire balance owed, (3) demanded that defendants return the equipment, and (4) set off defendants' banking

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\* Circuit judge, sitting on the Court of Appeals by assignment.

accounts. Plaintiff set off \$11,446 against defendant Allied's accounts and \$841.83<sup>2</sup> against defendant Howard's accounts.<sup>3</sup>

Plaintiff later sued defendants for the balance owed and for delivery of the equipment. Defendants filed a counter-claim alleging conversion and other issues. Both parties then moved for summary disposition. In its order, the circuit court granted plaintiff's motion for summary disposition on liability because defendants admitted that they owed a balance to plaintiff. The court ruled that the amount of damages, however, was a question of fact.<sup>4</sup> Applying principles of assignment law, the court granted defendants' motion for summary disposition on the setoff and conversion issues.<sup>5</sup>

Plaintiff asserts on appeal that the circuit court erred in finding that the setoff was unlawful and that the setoff amounted to conversion of defendants' funds. We agree.

This Court reviews a lower court's ruling on a motion for summary disposition under a *de novo* standard of review. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993). Under MCR 2.116(C)(9), a plaintiff must demonstrate that the defense offered by the defendant is so clearly untenable as a matter of law that no factual development could possibly deny the party's right to recover. *Norgan v American Way Life Ins Co*, 188 Mich App 158, 160; 469 NW2d 23 (1991). Under MCR 2.116(C)(10), the party opposing such a motion must set forth specific facts to show that a genuine issue of material fact exists for trial. *Patterson, supra*, 447 Mich at 432. After reviewing the circuit court's ruling under these standards, we conclude that the court erred in granting defendants' motion for summary disposition.

Plaintiff avers that it lawfully set off defendants' funds because defendant owed the balance of the lease to plaintiff.

It is a general rule that when a depositor is indebted to a bank, and the debts are mutual – that is, between the same parties and in the same right – the bank may apply the deposit, or such portion thereof as may be necessary, to the payment of the debt due it by the depositor, provided there is no express agreement to the contrary and the deposit is not specifically applicable to some other particular purpose. [10 AM Jur 2d, Banks, § 666, pp 635-636.]

Defendants contend, and the circuit court agreed, that plaintiff's setoff constituted an illegal conversion. Conversion has been defined as “any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.” *Citizens Ins Co of America v Delcamp Truck Center, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989) (citation omitted). An action cannot be maintained for conversion of money unless the money was obtained without the owner's consent to the creation of a debtor and creditor relationship. *Id.*

Our Supreme Court previously has noted that a debtor-creditor relationship arises between a bank and its depositor:

The relationship between the bank and its checking account depositor is that of debtor and creditor, the deposit being a loan to the bank without interest, and the money so deposited belongs to the bank. It is therefore somewhat fallacious to speak in terms of the bank paying its money or the depositor's money, all the money as such belongs to the bank and the bank is merely discharging its debt to the depositor, pro tanto, by payment of the depositor's checks. [*Riverview Cooperative, Inc v First Nat'l Bank & Trust Co of Michigan*, 417 Mich 307, 319; 337 NW2d 225 (1983) (citations omitted).]

Because defendants deposited money with plaintiff, the parties have a debtor-creditor relationship. Plaintiff's actions thus may not be deemed an act of conversion because defendants consented to the creation of a debtor-creditor relationship. *Citizens Ins Co of America, supra*, 178 Mich App at 575.

Further, under an express contract theory, plaintiff has asserted a valid defense to the improper setoff claim. A contractual relationship exists between a bank and its depositors. *Alden State Bank v Old Kent Bank-Grand Traverse*, 180 Mich App 40, 44; 446 NW2d 599 (1989). Indeed, defendants admit that as a result of the lease assignment from Hart Leasing to plaintiff, they owed the outstanding balance to plaintiff. Therefore, the clear and unambiguous language of the rules and regulations governing defendants' retail savings and checking accounts gave plaintiff express consent to set off defendants' accounts for the debt owed to plaintiff under the lease agreement. We therefore reverse the order granting summary disposition to defendants and remand this case to the circuit court for further proceedings consistent with this opinion.

Because plaintiff prevails under a contractual theory of setoff, we decline to review plaintiff's assertions that setoff also was proper under a common law theory. Additionally, we need not apply principles of assignment law because the debtor-creditor relationship governs the conversion issue and contract principles decide the setoff issue.

Reversed and remanded for a judgment consistent with this opinion. We do not retain jurisdiction. No taxable costs under MCR 7.219 because neither party prevailed in full.

/s/ Maura D. Corrigan  
/s/ Martin M. Doctoroff  
/s/ Richard Ryan Lamb

<sup>1</sup> For ease of reference in this opinion, plaintiff/counter-defendant Comerica Bank will be referred to as "plaintiff," and defendants/counter-plaintiffs Allied Communications and Michael J. Howard will be referred to as "defendants."

<sup>2</sup> The record reflects that \$814.83 is the correct figure, although plaintiff's brief on appeal states that this total was \$341.83.

<sup>3</sup> As a result, seventy of defendant Allied's checks were not honored due to insufficient funds. Allied was forced to pay \$1,925 in penalties.

<sup>4</sup> The court also granted plaintiff's motion for summary disposition on defendants' claims of breach of fiduciary duty and tortious interference with a business relationship.

<sup>5</sup> The court denied defendants' request for treble damages and denied summary disposition on the defamation issue. The court later dismissed without prejudice the defamation issue.