

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

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JOHNSON CARPET, INC.,

Plaintiff-Appellant,

v

WILLIAM CAREY and CAREY & ASSOCIATES,  
P.C.,

Defendants-Appellees.

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UNPUBLISHED

January 28, 2000

No. 210945

Kent Circuit Court

LC No. 97-005309-CK

Before: Fitzgerald P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff Johnson Carpet, Inc., appeals as of right the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of defendants William Carey and Carey & Associates, P.C. We affirm.

This appeal arises from matters which occurred in a garnishment proceeding in Kent Circuit Court Docket No. 93-83306-CK.<sup>1</sup> Plaintiff obtained a judgment against Rex Headapohl for approximately \$22,000. At some point, plaintiff became aware that Headapohl and his family had filed a wrongful death action in Kalkaska County following the death of Headapohl's son, Robert. Defendants in the present case represented members of the Headapohl family in the Kalkaska County action. Plaintiff attempted unsuccessfully to intervene in the wrongful death suit. Thereafter, plaintiff requested and received writs of garnishment against the personal representative of Robert's estate and the insurers for the named defendants in the wrongful death suit.

A settlement agreement was reached in the wrongful death suit on June 5, 1995. To facilitate the distribution of funds in that suit, the trial court before which the garnishment actions were pending entered a stipulated order on August 16, 1995, providing that the proceeds in dispute, which included all proceeds payable in part to Headapohl, be deposited in a joint account in the name of counsel for plaintiff, Donald Visser, and counsel for Headapohl, defendant William Carey. Two checks were received. One, for \$12,500 and payable to Carey and four members of the Headapohl family, was received by defendants on or about August 24, 1995 and circulated to the Headapohls for their signature. It was deposited in Carey & Associates' trust account on September 19, 1995. A second

check, for \$37,500 and payable to Carey & Associates trust account for the benefit of the Headapohls, was received on or about October 18, 1995.

Meanwhile, on September 14, 1995, the trial court held a hearing on objections to the writs of garnishment. Following argument of counsel, the court announced it would quash the writs; however, it did not enter a written order until October 13, 1995. The October 13 order not only quashed the writs, but vacated the August 16, 1995 stipulated order as well. On October 19, 1995, defendants distributed the funds they had received to the Headapohls. Plaintiff filed a motion for reconsideration on October 27, 1995, which was later denied.

Plaintiff filed a complaint in the present case alleging that defendants were liable for breach of contract, fraud, conversion, and breach of fiduciary duty, all arising from their conduct in the garnishment action, and further claiming that because defendants had retained some of the disputed funds, a constructive trust should be declared by the court. Defendants moved for summary disposition under MCR 2.116(C)(10); their motion was granted.

Plaintiff contends that the court erred in granting summary disposition on its claim for breach of contract. We disagree. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Russell v Dep't of Corrections*, 234 Mich App 135, 136; 592 NW2d 125 (1999). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Where the evidence proffered fails to establish a genuine issue of material fact, the movant is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

In this case, the only contract between the parties was the August 16, 1995 stipulation and order providing for the deposit of the disputed sums into a joint account. A stipulation is a type of contract and contract principles govern its interpretation. See *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 394; 573 NW2d 336 (1997); *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 379-380; 521 NW2d 847 (1994). Generally, a consent judgment may not be vacated absent evidence of fraud, mistake, or unconscionable advantage. *Greaves v Greaves*, 148 Mich App 643, 646; 384 NW2d 830 (1986). However, a temporary order may be vacated when the underlying action has been determined. See *Thelen v Ducharme*, 151 Mich App 441, 451; 390 NW2d 264 (1986).

Here, the stipulation and order provided that certain funds were to be deposited in an account in the joint control of Visser and Carey. The court announced on September 14, 1995 that it would quash the writs of garnishment that formed the basis for the stipulation. The check for \$12,500 was deposited on September 19, 1995 in defendants' trust account, not in the joint account. A written order quashing the garnishments and vacating the stipulation and order was not entered until twenty-four days later, on October 13, 1995.

A court acts through its written orders. MCR 2.602(A). Although the court's intention may have been clear by September 14, it did not enter an order until October 13. Thus, on September 19, 1995, when defendants deposited the \$12,500 check in their own account, the stipulation and order was still in effect and defendants failed to perform their obligations under the stipulation and order. In other words, they breached the agreement. However, we cannot see how plaintiff was harmed by this technical breach. The stipulation and order were vacated twenty-four days after the breach. During the time between the breach and the vacating of the stipulation and order, the only thing that plaintiff lost was its attorney's ability to block the distribution of the funds. The funds were not distributed until October 19, 1995, six days after the order had been vacated. "Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Farm Credit Services v Weldon*, 232 Mich App 662, 678-679; 591 NW2d 438 (1998). Because the funds were not distributed until after the stipulation and order were vacated, plaintiff could not show any harm from this breach. Further, plaintiff made no argument in its response to the motion for summary disposition as to how, if at all, it was harmed.

Plaintiff argues, without citation to authority, that summary disposition was improper because the order vacating the stipulation did not mean that the funds could be delivered to the Headapohls. It is not this Court's job to search for authority favorable to plaintiff's position. *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 425; 576 NW2d 667 (1998). Further, plaintiff's argument is without merit. The checks were either payable to the Headapohls or for the benefit of the Headapohls. A check is generally payable to the person the drawer intends to have receive the funds. MCL 440.3110(1); MSA 19.3110(1).

Plaintiff further argues that even if the order was vacated, the stipulation still constituted an enforceable contract. Again, we disagree. The stipulation expressly provided that it remained in full force and effect until a court order modified or dissolved the stipulation. The October 13, 1995 order dissolved the stipulation.

Plaintiff also argues that the trial court had no power to vacate the order because it was without jurisdiction over the case. Plaintiff misconstrues the trial court's ruling. As this Court noted in *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 707-708; 575 NW2d 68 (1997):

A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint. *Grubb Creek Action Committee v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996). If it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists. *Id.*

In the present case, the trial court did not rule that it had no subject matter jurisdiction; it ruled that it could not determine Rex Headapohl's share of the proceeds from the wrongful death suit in Kalkaska. The trial court clearly retained jurisdiction over the case, and had the power to enter and vacate orders, including consent orders. When the trial court found that the garnishment could not stand, it necessarily followed that the stipulation and order should be vacated. *Thelen, supra* at 451. At that point,

plaintiff's remedy was to appeal the order and request a stay from this Court. *Id.* Summary disposition was proper.

Next, plaintiff contends that the trial court erred in failing to address the question of whether correspondence between the parties gave rise to contractual liability. We disagree. Although plaintiff alluded to oral agreements in its response to plaintiff's motion for summary disposition, it produced no evidence on this matter. A party opposing summary disposition must offer evidence to show that a fact issue exists. *Maiden, supra* at 120-121. Further, because plaintiff did not reference the correspondence that it attached to its response to defendants' motion for summary disposition or make any argument with regard to such, plaintiff failed to properly raise this argument. Thus, the trial court did not err in not addressing this argument, and this issue is not properly before us for review. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997).

Plaintiff next contends that the trial court erred in failing to address its non-contractual causes of action. Plaintiff's contention is not supported by the record. The trial court noted at the beginning of its analysis that defendants, as counsel for the Headapohls, had no duty to plaintiff other than that arising from the stipulation and order. This was a ruling on the non-contractual causes of action. Moreover, the court's conclusion was correct. A cause of action may lie for a tort arising out of a contractual promise if there is some active negligence or misfeasance. *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 83; 559 NW2d 647 (1997). The threshold inquiry in determining whether an action in tort can be maintained is whether the plaintiff has alleged violation of a legal duty separate and distinct from the contractual obligation. *Id.* at 84. An attorney owes no duty of care to an adverse party in litigation. *Friedman v Dozor*, 412 Mich 1, 16; 312 NW2d 585 (1981). This rule clearly applies in negligence-based claims. In addition, our Supreme Court has applied *Friedman* in the context of breach of fiduciary duty, stating that it is unreasonable for a party to place trust in counsel for an adversary. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997). Thus, plaintiff's breach of fiduciary claim must fail.

We also conclude that the fraud and conversion claims must fail. Plaintiff argues that the alleged fraud in this case arose from Carey's failure to inform it that the funds were not deposited in the joint account. This is an allegation of "silent fraud," which is actionable only if there is a legally cognizable duty to disclose. *M & D, Inc v McConkey*, 231 Mich App 22, 29; 585 NW2d 33 (1998). Plaintiff argues that defendants did not act honorably and ethically; however, it identifies no legal obligation to disclose. As for the conversion claim, plaintiff must be able to show that it had a property right in the chattel and the right to immediate possession of the chattel. *Michigan National Bank v Michigan Livestock Exchange*, 432 Mich 277, 296; 439 NW2d 884 (1989). The stipulation and order did not confer any property right in the checks or the right to immediate possession. Moreover, the funds were not disbursed until after the garnishment had been extinguished and the stipulation and order had been vacated. At that point, plaintiff did not have even an arguable property interest. The funds were properly distributed to the Headapohls.

We further find that a constructive trust was not required. Although equity may impose a constructive trust, it must be based upon a breach of a fiduciary or confidential relationship, misrepresentation, concealment, mistake, undue influence, duress, or fraud. *Reed & Noyce, Inc v*

*Municipal Contractors, Inc.*, 106 Mich App 113, 120; 308 NW2d 445 (1981). Plaintiff failed to establish the conditions precedent to the imposition of a constructive trust. *Id.*; see *Rinaldo's, supra*; *Friedman, supra*. We conclude that summary disposition was proper on the non-contract causes of action.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

<sup>1</sup> The garnishment proceedings which underlie the actions in the present appeal have been appealed to this Court in Docket No. 204120.