STATE OF MICHIGAN

COURT OF APPEALS

MID AM CREDIT CORPORATION,

Plaintiff-Appellant,

v

JOINT MILITARY & VETERANS CREDIT UNION,

Defendant-Appellee.

and

DELLOYD T. HILL

Defendant

UNPUBLISHED
November 13, 2001

No. 216508
Oakland Circuit Court
LC No. 97-000070-CK

Before: Talbot, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant Joint Military & Veterans Credit Union's[1] motion for summary disposition and denying plaintiff's motion for summary disposition. We affirm.

I

In September 1997, plaintiff approved a loan in the amount of $158,560, purportedly for the purchase of medical equipment by Pyramid Medical (Pyramid) and Metropolitan Medical and Diagnostic Services (Metropolitan). On September 5, 1997, plaintiff issued a check in the amount of $78,164.40 to Pyramid that Delloyd Hill deposited in one of his accounts with defendant on September 9, 1997. Plaintiff also sent two wire transfers to one of Hill's account with defendant, the first for $13,047.54 on September 12, 1997 and the second for $67,348.16 on September 25, 1997. At the time of the loan approval and fund disbursement, plaintiff was apparently unaware that Pyramid and Metropolitan were fictional corporations created by Hill or that Hill forged the signatures of four physicians on the loan application.

[1] Defendant Delloyd T. Hill is not a party to this appeal. For the purpose of clarity, the term "defendant" will be used to refer to Joint Military & Veterans Credit Union.

On September 25 or 26, 1997, plaintiff's auditors discovered the forged signatures and conducted an investigation that revealed Hill's fraudulent scheme. On the morning of October 1, 1997, plaintiff's employee Don Spiert spoke with Nancy Hartley, an employee of defendant, and allegedly notified her of Hill's fraud. That same day, plaintiff's employee Kay Griffith telephoned Hartley, stating that the funds deposited in Hill's accounts were obtained by fraud and requested that defendant freeze or return the funds in Hill's accounts. Spiert also claimed that he contacted defendant's employee Marilyn Lis in the afternoon of October 1, informed her about the fraud, and requested that she freeze the funds in Hill's account. According to defendant, Hartley never indicated that the transfer would be stopped or canceled.

Apparently, at about the same time that Griffith was talking to Hartley, Hill was at one of defendant's branch offices purchasing two teller's checks in the amounts of $39,106.90 (Check 1) and $96,923.56 (Check 2). Defendant claims that at the time of the purchase of the teller's checks, defendant debited Hill's various accounts leaving a total balance of only $25,954.08. That same day, Hill deposited Check 1 in an account at Michigan National Bank, and that check cleared defendant's account at Corporate Credit Union (CenCorp) on October 2, 1997. CenCorp is a central credit union that defendant uses as a clearinghouse for its checks.

On October 2, 1997, plaintiff's counsel, S. Thomas Padgett, sent Lis and defendant's counsel, Charles Holzman, copies of a Motion for Temporary Restraining Order. According to plaintiff, on October 2, 1997, defendant placed a stop order on Check 2, and then removed the stop order later in the day. Plaintiff filed its motion for the restraining order on October 3, 1997.

Lis claims that she contacted CenCorp by telephone on October 7, 1997, and requested a stop payment on Check 2. Hill deposited Check 2 in an account at Chase Manhattan Bank in New York on October 10, 1997, and CenCorp cleared this check on October 15, 1997. Apparently, CenCorp placed the stop payment on the wrong one of defendant's branches, making the stop payment order ineffective. Defendant did not learn of this mistake until sometime in November 1997.

On October 15, 1997, the trial court held a hearing on plaintiff's motion, and entered a preliminary injunction ordering that the funds in Hill's account be frozen. Plaintiff served defendant with a copy of the injunctive order on October 15, 1997.

Plaintiff filed a complaint on October 3, 1997, alleging numerous claims against defendant. Plaintiff subsequently amended the complaint twice, filing its third amended complaint on October 12, 1998. On October 28, 1998, plaintiff filed a motion seeking summary disposition on its claims of negligence, conversion, indemnity, and constructive trust. Defendant also moved for summary disposition on all of plaintiff's claims. The court held a hearing on both motions on December 10, 1998. At the conclusion of the hearing, the court took the motions under advisement, then issued an opinion later that day denying plaintiff's motion for summary disposition and granting summary disposition to defendant on all of plaintiff's claims.[2]

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[2] Apparently, the trial court filed a Corrected Opinion and Order on December 28, 1998, that was virtually identical to the opinion and order filed on December 10, with the addition of a statement that the order resolved the last pending claim and closed the case.

II

Plaintiff claims that the trial court made erroneous findings of fact that were either disputed by the parties, or were not supported by the evidence at trial. Specifically, plaintiff cites the following alleged factual errors in the trial court's opinion and order:

(1) Check 2 was cashed on October 10, 1997;

(2) Defendant was not under any duty to freeze the funds in Hill's accounts after plaintiff notified defendant of Hill's fraud;

(3) MCL 487.691 applies to credit unions;

(4) Check 1 cleared before plaintiff notified defendant that Hill obtained the funds in his accounts through fraud;

(5) CenCorp was the party that erred in placing the stop payment order on the wrong branch;

(6) There was no evidence to support a conversion claim because defendant did not exert wrongful action over the funds in Hill's account;

(7) Check 2 had been cashed by the time the injunction was entered on October 15, 1997; and

(8) Defendant was not unjustly enriched by not returning the money in Hill's accounts to plaintiff.

Defendant's contends, and we agree, that not all of plaintiff's alleged factual errors are actually errors of fact. In fact, plaintiff's second and third allegations of error regarding defendant's duty to freeze the funds and the applicability of MCL 487.691 involve the trial court's conclusions of law regarding plaintiff's negligence claim. Therefore, plaintiff's argument fails as to these alleged errors.

Whether plaintiff's remaining alleged findings of fact would constitute error would in part depend on whether the trial court decided plaintiff's and defendant's motions for summary disposition under MCR 2.116(C)(8) or (C)(10). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim by the pleadings alone and may not be supported by documentary evidence. *Kokx v Bylenga*, 241 Mich App 655, 660; 617 NW2d 368 (2000). All factual allegations in the complaint are accepted as true, as well as reasonable inferences and conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable that no factual development could justify recovery. *Id.*

By contrast, a motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The reviewing court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the

nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

It is apparent from the different standards of determining motions for summary disposition that the trial court is entitled to find certain facts in a (C)(8) motion, but not in a (C)(10) motion. In this case, it is not clear on what basis the trial court determined that plaintiff was not and defendant was entitled to summary disposition. However, both parties moved for summary disposition pursuant to MCR 2.116(C)(10)[3], and both attached documentary evidence to their briefs. For these reasons, we presume that the court's decision was reached at least in part based on the standard for summary disposition under MCR 2.116(C)(10). To the extent that the court decided the motions under MCR 2.116(C)(10) and made findings of fact regarding material issues disputed by the parties, we agree that the trial court erred. A trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. *Johnson v Wayne Co*, 213 Mich App 143, 149; 540 NW2d 66 (1995); *In re Peterson*, 193 Mich App 257, 261; 483 NW2d 624 (1992).

However, we disagree with plaintiff's claim that the court impermissibly found facts regarding the following four allegations of error (1) that Check 2 was cashed on October 10, 1997, (6) that there was no evidence to support a conversion claim because defendant did not exert wrongful action over the funds in Hill's account, (7) that Check 2 had been cashed by the time the injunction was entered on October 15, 1997, and (8) that defendant was not unjustly enriched by not returning the money in Hill's accounts to plaintiff.

Regarding the first allegation of error, it appears that the fact that Check 2 was negotiated or deposited in an account at Chase Manhattan Bank on that date was supported by undisputed evidence. The court's use of the term "cashed" as opposed to noting that the check was deposited is merely an issue of semantics. The critical, undisputed fact is that Hill negotiated the check on October 10, 1997, and, the trial court did not err in finding that this fact was not in dispute.

Similarly, the court's finding that Hill "cashed" Check 2 prior to entry of the injunction was supported by evidence that he deposited the check into an account at Chase Manhattan Bank on October 10, 1997. Again, the court's use of the term "cashed" did not detract from the evidence showing that the date that Hill deposited this check was not in dispute, and that the check was clearly deposited before the injunction was entered on October 15, 1997.

It is also apparent that the trial court did not err when it concluded that the evidence did not support a claim of conversion. Specifically, the trial court held that "[t]here is no evidence that [defendant] exerted any wrongful action over the funds." For reasons more fully elaborated below, we would conclude that this finding was not impermissible fact-finding, but an appropriate conclusion that plaintiff failed to present evidence to support its claim.

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[3] Plaintiff also moved for summary disposition pursuant to MCR 2.116(C)(9), and defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (8).

Finally, regarding plaintiff's constructive trust claim, it appears that the trial court did not err in concluding that defendant was not unjustly enriched by Hill's fraud because the funds in question had been paid in October 1997, and were no longer in defendant's possession, an issue that we address more fully below.

Regarding the two remaining alleged factual determinations, we agree with plaintiff that the court went beyond determining the existence of disputed facts when it made the findings that (4) Check 1 cleared before plaintiff notified defendant that Hill obtained the funds in his accounts through fraud and (5) CenCorp was the party that erred in placing the stop payment order on the wrong branch. These factual issues were clearly in dispute, and, although plaintiff's evidence in opposition to the court's findings on these issues may not have been persuasive, the court erred by not holding that there were issues of material fact. A trial court must avoid making findings of fact under the guise of determining that no issue of material fact exists. *Mahaffey v Attorney General*, 222 Mich App 325, 343; 564 NW2d 104 (1997).

Nevertheless, the court's findings that Check 1 cleared before plaintiff notified defendant and that CenCorp was responsible for the mistaken stop payment order were not material to the court's conclusion that defendant was entitled to summary disposition because the court found, as a matter of law, that defendant owed no duty to plaintiff to freeze the funds in Hill's accounts. Therefore, these findings of fact were harmless error and should not result in reversal of the court's decision. MCR 2.613(A).

In conclusion, most of plaintiff's claimed factual errors were either errors of law or proper findings that no issue of material fact existed. Although it appears that the court did err in finding facts on two issues, these errors were harmless, and reversal is not required.

III

Plaintiff next argues that the trial court erred when it concluded that plaintiff was not entitled to summary disposition on the claim of negligence, and granted summary disposition to defendant. We review de novo a trial court's decision to grant a motion for summary disposition. *Smith*, *supra* at 454; *Beaty v Hertzberg & Golden, P.C.*, 456 Mich 247, 253; 571 NW2d 716 (1997).

To state a prima facie claim of negligence, plaintiff must prove the following elements: (1) a duty defendant owed to plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000). In this case, the court concluded that plaintiff failed to establish that defendant owed a duty to plaintiff. Plaintiff cited several cases from other jurisdictions that it claimed established defendant's duty to plaintiff. The trial court rejected this "foreign authority" because the cases involved did not address claims of negligence. Regardless whether the trial court correctly concluded that all of this authority was irrelevant to the issue of defendant's negligence, the court was free to reject the cases as merely persuasive authority and not binding. See *People v Jamieson*, 436 Mich 61, 86-87; 461 NW2d 884 (1990).

Plaintiff also cites several Michigan cases which it claims establishes defendant's duty.[4] Contrary to plaintiff's assertion, none of these cases establishes a specific duty of a credit union or other financial institution to freeze funds where a third party notifies the institution of its claim on the funds. Not only are the facts of these cases distinguishable from the instant case, the cases cited by plaintiff do not hold that mere verbal notification of an alleged claim on the funds in a depositor's account requires a financial institution to freeze those funds. It is apparent that plaintiff failed to present controlling authority establishing defendant's duty to freeze the funds in Hill's accounts after plaintiff verbally notified defendant of the alleged fraud.

In contrast to the authority cited by plaintiff, defendant argues that MCL 487.691 is applicable to this case, or at least demonstrates the public policy of this jurisdiction on the issue. This statute states, in pertinent part, that

> [n]otice to any bank or trust company doing business in this state of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank to recognize said adverse claimant unless said adverse claimant shall also either procure a restraining order, injunction or other appropriate process against said bank from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons, or shall execute to said bank, in form and with sureties acceptable to it a bond, indemnifying said bank from any and all liability, loss, damage, costs and expenses for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit the deposit stands on the books of said bank.

The language of the statute, which clearly requires a claimant to obtain an injunction or similar court process to pursue a claim against funds deposited in another party's account, appears to negate plaintiff's claim that a financial institution is under a duty to freeze funds or stop payment on a depositor's check through mere verbal notification. Further, this Court has held that a bank deposit is prima facie property of the depositor until an adverse claimant establishes clear legal title to the funds. *Muskegon Lumber & Fuel Co v Johnson*, 338 Mich 655, 661; 62 NW2d 619 (1954).

Plaintiff argues that the trial court erred when it concluded that MCL 487.691 applied to credit unions. Contrary to plaintiff's assertion, the trial court never found that the statute applied to credit unions. The court's language in its order is as follows:

> Furthermore, the Defendant cites MCL 487.691 which provides that notice to a bank or trust company of an adverse claim to a deposit does not require that the bank recognize such claim absent a restraining order, injunction or other appropriate process from a court of competent jurisdiction. . . . While the statute refers to banks and trust companies (and not specifically to credit unions), Plaintiff has not presented authority nor any persuasive argument as to why this

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[4] *Nurrie v Fitzgerald*, 222 Mich 326; 192 NW 573 (1923); *Patek v Patek*, 166 Mich 446; 131 NW 1101 (1911); *McIntosh v Detroit Savings Bank*, 247 Mich 10; 225 NW 628 (1929).

> Court should not apply the statute to a credit union. In the absence of Michigan law imposing a duty as argued by the plaintiff, this Court finds Defendant, JMVCU, owed no duty to Plaintiff.

A trial court's interpretation of a statute is a question of law that we review de novo. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Assn*, 456 Mich 590, 610; NW2d (1998). The purpose of statutory interpretation is to determine and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Home, Inc*, 456 Mich 511, 515; NW2d (1998). Where a statute is clear and unambiguous, judicial interpretation is precluded. *Id*. The Legislature is presumed to have intended the meaning it plainly expressed, and courts should not speculate about the intent of the Legislature beyond the language of the statute. *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997); *Cherry Growers, Inc v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153, 173; 610 NW2d 613 (2000).

We conclude that the statutory language of MCL 487.691 is clear and unambiguous and that it applies only to banks or trust companies, not credit unions. It is not apparent from the language of the trial court's opinion whether the court decided to apply the statute to this case, or whether it merely relied on the statute as persuasive support for its conclusion that defendant owed no duty to plaintiff to freeze the funds in Hill's accounts. To the extent that the trial court determined that the statute should apply to the instant case, this conclusion would appear to be in error.

Although the trial court may have erroneously concluded that MCL 487.691 applies to credit unions, this error is harmless where the trial court correctly concluded that plaintiff failed to establish that defendant owed a duty to freeze the funds in Hill's accounts. An error in a ruling or order is not ground for vacating, modifying, or otherwise disturbing a judgment unless refusal to do so would be inconsistent with substantial justice. MCR 2.613(A); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

Plaintiff's final argument on this issue is that defendant's assertion that it would place a stop payment on the teller's checks created an affirmative duty to exercise reasonable care and skill in placing the stop payment order, citing *Lindsley v Burke*, 189 Mich App 700; NW2d (1991) as support for this proposition. Typically, there is no duty to act in the absence of a special relationship requiring such assistance. *Id*. at 704. This Court in *Lindsley* held that where a party, in the absence of a specific duty, gratuitously assists another, the law imposes a duty to act with reasonable care and skill in the performance of that duty. *Id*. at 704.

We disagree with plaintiff's conclusion that *Lindsley* establishes a duty on the part of defendant. First, the facts of this case are completely distinguishable from *Lindsley*, which involved an automobile driver who made hand signals to another driver, inducing the other driver to pull into the path of an oncoming vehicle. Plaintiff did not cite any cases holding that a voluntary offer to assist in obtaining misappropriated funds creates a duty in the offeror. For lack of more persuasive authority on the issue, we conclude that defendant's decision to place the stop payment did not create a duty where no obligation previously existed.

Further, even if we were to find that defendant was under a duty to act with reasonable care in placing the stop payment order on Hill's account, we would agree with the trial court that there is no genuine dispute that defendant acted with reasonable care. Defendant's employee

Marilyn Lis testified that she was certain she communicated the correct information to CenCorp in order to properly place the stop payment order. Plaintiff did not present any evidence to contradict this statement. In the absence of any evidence that Lis or another agent of defendant placed an erroneous stop payment order, the trial court did not err in its conclusion that no genuine issue of material fact existed regarding whether defendant acted with reasonable care, and summary disposition was proper under MCR 2.116(C)(10).

IV

Plaintiff also argues that the trial court erred when it concluded that the evidence did not support plaintiff's conversion claim. We disagree.

The tort of conversion is defined as a "distinct act of dominion wrongfully exerted over another person's personal property." *Pamar Enterprises, Inc v Huntington Banks of Michigan*, 228 Mich App 717, 734; 580 NW2d 11 (1998). An action for conversion of funds in a financial institution can only be maintained if there was an obligation on the defendant's part to return or deliver the money. *Check Reporting Services, Inc v Michigan National Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991).

In this case, the trial court properly found that plaintiff's verbal notice of Hill's alleged fraud did not obligate defendant to freeze the funds in Hill's accounts. Therefore, the first instance under which defendant was obligated to freeze the funds in Hill's account was after it received notice of the trial court injunction on October 15, 1997. Undisputed evidence indicated that Hill purchased two teller's checks on October 1, 1997, Check 1 cleared CenCorp on October 2, 1997, and Check 2 cleared CenCorp on October 15, 1997. Further undisputed evidence indicated that defendant placed a stop payment order on Check 2 on October 7, 1997; however, this stop payment order was not properly applied by CenCorp and did not prevent Check 2 from clearing. Plaintiff did not present any evidence showing that defendant was aware that the stop payment order was improperly entered. In fact, evidence presented by defendant showed that the first knowledge it had that Check 2 had been erroneously cleared was in November 1997. This undisputed evidence establishes that, at the time that defendant had official notice of its obligation to freeze the funds in Hill's account on October 15, it had no reason to believe that it had not fulfilled its obligation by stopping payment on Check 2.

In addition, it was undisputed that after the injunction was entered, defendant returned all remaining funds in Hill's account to plaintiff. Plaintiff cannot prove that defendant converted the funds in Hill's account if defendant was not obligated to return the funds. *Check Reporting Services, supra* at 626. The trial court did not err in its conclusion that no evidence supported plaintiff's conversion claim.

V

Plaintiff next argues that the trial court erred in granting summary disposition to defendant on its indemnification claim. Plaintiff asserts that the clearance of Check 2 on October 15, 1997, was a violation of the trial court's injunction entered on October 15, 1997, and defendant should be required to indemnify plaintiff for losses resulting from that violation. Circuit courts are authorized to punish certain misconduct, including a party's violation of the court's lawful orders. MCL 600.1701(g); *Kirby v Michigan High School Athletic Assn*, 459

Mich 23, 32 n 8; 585 NW2d 290 (1998). If the misconduct or violation caused an actual loss or injury, the court may order the violating party to indemnify the party who suffered a loss. MCL 600.1721; *In re United Stationers Supply Co*, 239 Mich App 496, 500, 608 NW2d 105 (2000). Proof of civil contempt must be clear and unequivocal, however, no willful disobedience of the court's order need be shown. *Id*. at 501; *In re Calcutt*, 184 Mich App 749, 757; 458 NW2d 919 (1990).

In this case, the injunction required defendant to:

> maintain, keep, and hold any and all funds on deposit in any credit union account or certificate of deposit on which any Defendant has signing or withdrawing authority and/or which is in the name of any Defendant to this action, whether the account or certificate of deposit is joint or individual, including account number 9257786. Defendant . . . shall not allow or process any withdrawals or checks drawn on or against such accounts or certificates.

Plaintiff claims that defendant violated this provision of the injunction by allowing Check 2 to clear on October 15, 1997. However, defendant presented evidence that the funds used to clear this check were no longer in Hill's accounts on that date. Instead, the check was cleared and paid by CenCorp, who is not a party to this claim. Defendant also presented evidence that, despite the fact that it debited Hill's account for the amount of the Check 2 several days before the injunction was entered, it took reasonable measures to prevent the check from clearing by instructing CenCorp to place a stop payment order on the check. Plaintiff presented no evidence to dispute these facts.

The trial court concluded that defendant did not violate the injunction because no funds were withdrawn from Hill's account on or after October 15, 1997. Given the undisputed evidence supporting this fact, the trial court correctly concluded that no genuine issue of material fact existed regarding whether defendant allowed funds to be withdrawn from Hill's account after entry of the injunction, and summary disposition was properly granted on this issue.

VI

In its final assertion of error, plaintiff argues that the trial court erred when it determined that defendant was entitled to summary disposition on plaintiff's constructive trust claim. A trial court may impose a constructive trust where the trust is necessary to do equity or to prevent unjust enrichment. *Kammer Asphalt Paving Co v East China Township School*, 443 Mich 176, 188; 504 NW2d 635 (1993). The trust may be imposed when property was obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or any other similar circumstances that render it unconscionable for the holder of the legal title to retain and enjoy the property. *Id*.

In this case, the trial court concluded that no constructive trust should be imposed because defendant had not been unjustly enriched by Hill's fraud and was no longer in possession of the funds Hill obtained from plaintiff. We find no error in this conclusion. Defendant presented unrefuted evidence that the funds Hill fraudulently obtained from plaintiff had been paid out in October 1997, and there were no funds remaining in Hill's account.

Further, plaintiff did not dispute that defendant never had legal title to the funds in Hill's account. In addition, there was no evidence that defendant assisted Hill in perpetrating the fraud against plaintiff. A constructive trust should not be imposed on a party who in no way contributed to the reasons for imposing the trust. *Id*. The trial court correctly concluded that plaintiff failed to state a claim warranting imposition of a constructive trust, and properly granted summary disposition to defendant.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael J. Talbot