STATE OF MICHIGAN

COURT OF APPEALS

BUCKEYE RETIREMENT CO., LLC, LTD, Plaintiff-Appellant,	UNPUBLISHED September 18, 2008
v	No. 279625 Kent Circuit Court
MEIJER, INC., Defendant-Appellee.	LC No. 06-012747-CK

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Plaintiff Buckeye Retirement Co. appeals as of right from an order granting summary disposition to defendant Meijer, Inc. The case arose from Buckeye's attempt to hold Meijer liable for a portion of a debt owned to Buckeye from Pells, Inc. We affirm.

Pells was a shoe repair and supply business that, until the summer of 2006, leased space and operated near the checkout area of Meijer stores. Customers could pay for Pells' products at either Pells' or Meijer's checkout counters. According to the "Master In-Store License" agreement, at the end of each business day Pells would deliver all receipts and cash from the day's sale of merchandise to Meijer. Each week, Meijer would total all receipts and subtract its licensing fee of 9% before remitting the remainder to Pells.

In the 1990s, Pells obtained a loan from Old Kent Bank, now known as Fifth Third Bank; Pells borrowed over $900,000. As security, Pells granted Old Kent Bank first priority security interests and liens in all its "personal property, e.g. accounts, contract rights, chattel paper, general intangibles, inventory, equipment and fixtures," in addition to real property owned by Paul Pell individually and a life insurance policy. Buckeye, a purchaser of bad debt, later acquired rights to the loan from the bank. By July 2005, Pells was in default on the loan, and Buckeye brought suit in the Kent County Circuit Court to enforce Pells' obligations.

Buckeye's claim against Meijer arose from two incidents. On the evening of September 4, 2005, Buckeye representative John Benitis, along with an associate, entered the Meijer store in Westerville, Ohio, and attempted to gain entry to Pells' leased space in order "to execute on the collateral" located there. From there, accounts of the event differ.

Meijer claims that Pells' space was secured by a gate and padlock, that Benitis showed the manager on duty a document that allegedly allowed Buckeye to seize Pells' equipment, and

that Buckeye requested access to Pells' area. The Meijer manager refused and instead called the police, with the intent that if the police instructed her to do so, she would grant Benitis access to Pells' area. The police stated that Benitis' documentation was not sufficient to allow him to break into Pells' store and declined to intervene.

Buckeye, on the other hand, declares that there was no barrier denying access to Pells' area from the rest of the store and that, in fact, Pells' inventory was accessible to the public to be taken off the shelves and purchased at Meijer's register. Instead, claims Buckeye, the manager on duty refused to allow Buckeye to seize Pells' property. Buckeye claims that the police were called and declared Buckeye's paperwork to be in order, but the manager still refused to allow Benitis to continue, rendering any further effort to seize Pells' property futile. Later, Benitis was informed by other representatives of Meijer that attempts to seize property from Pells at other Meijer locations would be similarly rebuffed.

The second incident occurred on May 10, 2006, when an attorney for Buckeye sent a letter to Meijer, addressed to "Meyer Real Estate," claiming it was owed and had the right to collect a debt from Pells. The letter requested that Meijer "hold all future receivable amounts due to Pells, Inc. in escrow until there is a resolution of the current litigation between Buckeye and Pells, Inc."[1] Attached to the letter were numerous notes, a contract, and other documents governing Pells' indebtedness. Meijer notified Pells of Buckeye's request and sought clarification regarding whether Pells was in agreement with Buckeye's legal position concerning Buckeye's right to receivables. On May 17, 2006, Pells' attorney sent a letter to Meijer indicating that Pells' stance was that Buckeye was not entitled to any payment from Meijer from any amounts owed by Meijer to Pells under the Master In-Store License. Further, Pells' letter stressed that none of the documents Buckeye had provided Meijer referenced any assignment of monies held by Meijer on behalf of Pells to Buckeye. That same day, Meijer sent a fax to Buckeye's counsel, with Pells' response attached, requesting Buckeye's legal basis for its claims to the Pells' proceeds held by Meijer as well as its disagreement with Pells' position. On June 1, 2006, Buckeye's counsel sent a fax to Meijer expressing disagreement with Pells' position and promising to send the full legal basis for its own views on the matter later. However, on June 7, Buckeye stated in an email that they would not be providing any further information and that "the documentation originally sent to Meijer Stores [was] sufficient to demonstrate a legitimate debt and our security interest in that debt." During this time, Meijer continued to fulfill its obligations to Pells as provided in the Master In-Store License. On August 1, 2006, Pells ceased its operations.

On December 21, 2006, Buckeye sued Meijer. Buckeye's complaint alleged three causes of action. Count I claimed that Meijer committed statutory conversion of income, receivables, inventory, and other secured assets by refusing to pay a valid obligation and by exercising dominion over Pells' property, despite Buckeye's claims of entitlement and demands for the property. Count II alleged that Meijer violated MCL 440.9607, a provision of the Uniform

[1] The reference to "current litigation" refers to the lawsuit initiated in the Kent County Circuit Court by Buckeye on July 11, 2005.

Commercial Code (UCC), MCL 440.9101 *et seq*., by failing to follow Buckeye's request in its May 10, 2006, letter and continuing to make payments to Pells. Count III alleged "constructive trust," indicating that Meijer unjustly enriched itself at Buckeye's expense by retaining money and collateral that belonged to Buckeye under security agreements.

The lawsuit entered discovery, but no depositions were taken. Meijer moved for summary disposition under MCL 2.116(C)(10) on May 11, 2007. The summary disposition hearing occurred on June 18, 2007. The lower court found that Buckeye's claims incorrectly relied on MCL 400.9607 because subsection 5 of that statute states, "This section does not determine whether an account debtor, bank or other person obligated on collateral owes a duty to a secured party." The court ruled that, instead, Buckeye should have brought its claim under MCL 440.9406. The court stated:

> This section points out that an account debtor on an account (Meijer) may discharge its obligation by paying the assignor (Pells) until, but not after, the account debtor receives a notification authenticated by the assignor (Pells) or the assignee (Buckeye), that the amount due or to become due has been assigned and that the payment is to be paid to the assignee (Buckeye).

The court emphasized that the notification must identify the rights assigned and the assignee must provide reasonable proof that the assignment has been made, upon request of the account debtor. The court went on to note that, if the assignee does not comply with a reasonable request for proof, then the account debtor may continue to pay the assignor.

The court found that none of the documents that Buckeye provided to Meijer furnished sufficient notice of the assignment of Pells' debt, making Meijer's request for proof reasonable. Then, because Buckeye did not provide reasonable proof of assignment, Meijer was correct in continuing to pay Pells under the Master In-Store License. Ultimately, the trial court granted Meijer summary disposition on all counts.

On appeal, Buckeye first argues that the trial court improperly treated the three counts of the complaint as one count governed by the UCC.

We review a lower court's summary disposition ruling de novo. *West v General Motors Corp*., 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is appropriate under MCR 2.166(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, *supra* at 183.

We find no error requiring reversal in the trial court's analysis of Buckeye's complaint because findings under the UCC were related to all three counts alleged by Buckeye.

The trial court's opinion focused on Count II, which alleged a violation of MCL 440.9607. That statute outlines the actions a holder of a secured interest may take in the event of a default. The court noted that MCL 440.0607(5) precludes Buckeye from taking any action under the statute against Meijer. The court deduced that Buckeye meant to bring suit under MCL 440.9406, which states that Meijer would have to pay any obligations it had to Pells to Buckeye, on receipt of authenticated notice. The trial court determined that the notice that

Buckeye provided Meijer in order to demonstrate its secured interest in Pells' collateral did not fulfill the notification requirement of MCL 440.9406. After determining that there was no claim under the UCC, the lower court granted summary disposition on all counts.

We conclude that the trial court acted properly in granting summary disposition on all claims after considering the claim brought in Count II under the UCC. The trial court essentially determined that Buckeye had not provided appropriate notification of its secured interest to Meijer. The court found this dispositive with regard to the remaining counts of conversion and constructive trust, and we agree. If Meijer did not receive proper notice, then Counts I and III of the complaint were unavailing; the conversion and constructive trust counts clearly required knowledge on the part of Meijer. We find no basis for reversal with respect to this issue.

Buckeye next claims that the trial court erred in dismissing the statutory conversion claim. It first contends that, under MCL 440.9609, it was entitled to take inventory during the September 2005 incident. Buckeye cites the following portions of MCL 440.9609:

> (1) After default, a secured party may do 1 or more of the following:
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> (a) Take possession of the collateral.
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> (b) Without removal, render equipment unusable and dispose of collateral on a debtor's premises under section 9610.
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> (2) A secured party may proceed under subsection (1) either pursuant to judicial process, or without judicial process if it proceeds without breach of the peace.

Buckeye states that, under these sections, it had a right to seize the inventory and that Meijer improperly interfered with this seizure.

Under the circumstances of this case, statutory conversion consists of a party's

> buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted. [MCL 600.2919a(1)(b).]

Conversion occurs when a "distinct act of domain [is] wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). "[A] defendant's knowledge that property was stolen, embezzled, or converted can be established by circumstantial evidence." *Echelon Homes, LLC v Carter Lumber Co.*, 472 Mich 192, 200; 694 NW2d 544 (2005). Constructive knowledge is not enough for statutory conversion. *Id.* No duty is imposed on a party to make a reasonably diligent inquiry into whether property was converted, stolen, or embezzled. *Id.* at 201-202.

Buckeye appears to be arguing that knowledge on the part of Meijer was not required here, because the transaction was between Pells and Buckeye, and Meijer should have essentially just "kept out of the situation." We cannot agree with this argument. Meijer had technical possession of the inventory, essentially as a landlord, and did not become liable for conversion by preventing the seizure of the property, given what it knew. Meijer was merely presented with a financing statement. "The purpose of a financing statement is to place third parties on notice of the existence of a security agreement." *Federal Land Bank of St. Paul v Bay Park Place Inc.*, 162 Mich App 1, 7; 412 NW2d 222 (1987). It does not indicate whether there has been a default on payment. See, e.g., *Continental Oil Co v Citizens Trust & Savings Bank*, 397 Mich 203, 212-213; 244 NW2d 243 (1976) (discussing financing statements in general). Given the circumstances, the trial court did not err in concluding that the September 2005 incident did not give rise to any liability on the part of Meijer.

Buckeye next contends that Meijer committed statutory conversion by continuing to accept Pells' receivables, despite Buckeye's interest. Buckeye states, "Meijer has committed statutory conversion by aiding in the concealment of converted assets in violation of MCL 600.2919a(1), and therefore Meijer is liable for three times the amount of Buckeye's actual damages . . . ." The financing statement discussed earlier did not provide Meijer with the requisite knowledge for conversion. Accordingly, Buckeye must necessarily be relying on the letter of May 10, 2006. In this letter, Buckeye attached loan agreements and stated that Pells had made no payments on them, resulting in a debt of over $830,000. The letter states, "We would ask that you hold all future receivable amounts due to Pells, Inc. in escrow until the resolution of the current litigation between Buckeye and Pells, Inc." We cannot discern how Meijer's continuing to pay Pells after receiving this letter, which referred to current litigation and asked for money to be placed in escrow, gave rise to liability for statutory conversion. As noted by the trial court, after receiving the letter, Meijer sought clarification regarding Pells' position in the dispute and was informed that Pells' position was that Buckeye was *not* entitled to any payment from Meijer. Meijer then sought further information from Buckeye but was provided with nothing more.

MCL 440.9406 states, in part:

> (1) Subject to subsections (2) through (9), an account debtor [Meijer] on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.
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> * * *
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> (3) Subject to subsection (8), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (1).

We agree with the trial court that Meijer did not obtain satisfactory proof that the money owed was to be paid to Buckeye as opposed to Pells. The letter of September 10, 2006, merely requested that the money be placed in escrow, and we find no basis on which to disturb the trial court's ruling.[2]

Buckeye next argues that the trial court erred in dismissing the claim for a constructive trust. "A court may impose a constructive trust when necessary to do equity or avoid unjust enrichment." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 202; 729 NW2d 898 (2006). "[T]he burden of proof is on the person seeking to establish a constructive trust . . . ." *MacKenzie v Fritzinger*, 370 Mich 284, 292; 121 NW2d 410 (1963).

> [W]here a person occupies a fiduciary relationship as agent for another, and thereby gains something for himself which in equity and good conscience he should not be permitted to keep, equity will raise a constructive trust and compel him to turn it over to the person equitably entitled to it, or to otherwise execute the trust as the court may direct. [*Id*. at 291 (citations and quotation marks omitted).]

We find no basis on which to disturb the trial court's ruling.[3] The constructive trust claim was based on Meijer's retaining its licensing and leasing fees. Meijer was receiving from Pells funds it was entitled to under the Master In-Store License; we cannot construe this as an unconscionable act that required a constructive trust.[4]

Buckeye next argues that the trial court erred in its analysis of MCL 440.9607 and that Meijer had sufficient notice that "Buckeye had a right to the collateral upon demand." We disagree that the court erred in analyzing this statute. As noted earlier, MCL 440.9607(5) states, "This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party." The sixth comment to the statute provides, in part:

> *Neither this section nor former Section 9-502 should be understood to regulate the duties of an account debtor or other person obligated on collateral*. . . . This section establishes only the baseline rights of the secured party *vis-a-vis the*

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[2] We disagree with Buckeye's contention that the trial court failed to address the issue regarding the alleged statutory conversion of receivables. The court's opinion, read as a whole, indicates that the court did address that issue.

[3] Contrary to Buckeye's assertion, we believe that the trial court's opinion, read as a whole, adequately addressed the issue of a potential constructive trust.

[4] Buckeye's argument that the trial court erred by not allowing discovery to be completed before ruling on the summary disposition motion is unfounded. "[S]ummary disposition before the close of discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000). Nothing Buckeye has asserted justifies the conclusion that discovery could reasonably produce further factual support for its claims.

> *debtor* – the secured party is entitled to enforce and collect after default or earlier if so agreed. [Emphasis in original.]

Given the pertinent statutory language, the trial court did not err in concluding that Buckeye did not have a valid cause of action under MCL 440.9607.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto