STATE OF MICHIGAN

COURT OF APPEALS

GENERAL MOTORS, L.L.C., Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 291236 Wayne Circuit Court
COMERICA BANK, Defendant-Appellant.	LC No. 06-618803-CZ

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant Comerica Bank ("Comerica") appeals as of right from a judgment of $744,255 entered in favor of plaintiff General Motors, L.L.C. ("GM"), after the trial court granted GM's motion for partial summary disposition on its unjust enrichment claim. Because neither the statute of limitations barred nor the Uniform Commercial Code displaced GM's claim for unjust enrichment, we affirm.

I. BACKGROUND

This appeal involves the final two of five overpayments that GM made to a supplier, Hy-Lift, L.L.C. ("Hy-Lift"). GM made each payment by electronic transfer into a Comerica account maintained by Hy-Lift, but which was also used as collateral for Comerica's revolving credit loan to Hy-Lift. GM made the two overpayments at issue in this appeal on June 28, 2000. Comerica applied the overpayments to pay down Hy-Lift's revolving credit loan. Comerica identified the overpayments during an audit of Hy-Lift's collateral account in August 2000, but continued to consider the overpayments as having paid down Hy-Lift's revolving credit loan when determining the amount that Hy-Lift could borrow.

In 2002, Hy-Lift became entrenched in a federal bankruptcy proceeding. In December 2004, GM filed an action against Comerica, Hy-Lift, and others in connection with the overpayments, but that case was administratively closed, without prejudice, because of a stay issued in the bankruptcy proceeding. GM later filed this action in June 2006. GM's complaint against Comerica sought to recover the overpayments based on theories of unjust enrichment and constructive trust. Comerica claimed that it was entitled to retain the overpayments as a secured creditor of Hy-Lift. The parties filed cross-motions for summary disposition in 2007. In relevant part, the trial court denied Comerica's motion, which it brought under MCR 2.116(C)(7) (statute of limitations) and (10) (no genuine issue of material fact.) The trial court granted GM's

motion for partial summary disposition, which was based on the two June 28, 2000, overpayments, and awarded GM judgment in the amount of $744,255. Following further motions, including a "renewed" motion for summary disposition brought by Comerica with respect to the June 28, 2000, overpayments, which the trial court treated as a motion for reconsideration and then denied, the trial court entered a final judgment of $744,255 in favor of GM.

II. STANDARD OF REVIEW

We review a trial court's summary disposition ruling de novo. *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by a statute of limitations. In reviewing such a motion, the contents of the complaint are accepted as true unless contracted by documentary evidence. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). Where the facts are not disputed, whether a cause of action is barred by the applicable limitations period is a question of law. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Adair v Mich*, 470 Mich 105, 120; 680 NW2d 386 (2004); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This Court also reviews issues of statutory interpretation de novo. *Healing Place at North Oakland Med Ctr*, 277 Mich App at 55. This Court begins the analysis with the specific statutory language at issue. *Id.* at 58. If there is no ambiguity, the statute is applied as written. *Id.* at 59. A statute is ambiguous if a provision irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 650; 770 NW2d 915 (2009).

Equity cases are also reviewed de novo on the record. *Tkachik v Mandeville*, 487 Mich 38, 44; ___ NW2d ___ (2010); *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). The granting of equitable relief to a party is ordinarily a matter of grace. *Tkachik*, 487 Mich at 45. "Equity allows 'complete justice' to be done in a case by 'adapt[ing] its judgment[s] to the special circumstances of the case.'" *Id.* at 46, quoting 27A Am Jur 2d, Equity, § 2, at 520-521.

III. MCR 2.116(C)(10)

Comerica argues that GM was not entitled to summary disposition on its unjust enrichment and constructive trust claims because the parties' rights are instead governed by Article 9 of the Uniform Commercial Code (UCC), MCL 440.9101 *et seq.*

Initially, we point out that in arguing this issue, both parties improperly rely on evidence that was only presented in connection with Comerica's "renewed" motion for summary disposition, which the trial court treated as a motion for reconsideration. A trial court's grant or denial of a motion for reconsideration is discretionary. *Woods v SLB Prop Mgmt, LLC*, 277 Mich App 622, 629-630; 750 NW2d 228 (2008). Because this issue does not involve a challenge to the trial court's denial of reconsideration, but rather a challenge to the trial court's original summary disposition ruling, it is inappropriate to consider the evidence that was presented with the "renewed" motion. See *Barnard Mfg Co,* 285 Mich App at 380-381 (when reviewing a motion for summary disposition, this Court limits its review to evidence properly presented to the trial court). Comerica does not separately address the trial court's denial of its "renewed" motion, thereby abandoning any challenge to that decision. *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999); see also *Roberts & Son Contracting, Inc v North Oakland Dev Corp,* 163 Mich App 109, 113; 413 NW2d 744 (1987).[1]

We also decline to consider Comerica's argument first raised in its reply brief that, to the extent the UCC does not apply, GM did not establish a viable unjust enrichment claim. "Reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Props, Inc* 259

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[1] Even if were we to consider the arguments raised in Comerica's "renewed" motion for summary disposition filed on March 24, 2008 we would find no error, The argument that Comerica made when responding to GM's motion for partial summary disposition on August 3, 2007, was that it detrimentally relied on Hy-Lift's loan repayment to extend further credit to Hy-Lift. The trial court rejected the latter argument, given that Comerica had knowledge of the overpayments and "still proceeded to, to lend money that they were not damaged, that there was no reliance, ability [sic] to rely on this, on this overpayment."

Regardless, viewing the evidence in a light most favorable to Comerica, Comerica benefited from the mistaken payments by reducing the amount of risk that it faced from the outstanding loan made to Hy-Lift. In addition, Comerica factored the mistaken payments into its formula for extending future credit to Hy-Lift, even after it discovered the overpayments during an August 2000 collateral review of Hy-Lift. Comerica concedes that it discovered the overpayments in August 2000.

Comerica's application of GM's overpayments to Hy-Lift's loan obligation and failure to take any corrective action after discovering the overpayments in August 2000, thus enabled Comerica to avoid financial loss. Essentially, given the lack of evidence that Hy-Lift had assets to cover the amount of GM's overpayments, the case comes down to two parties, Comerica and GM, only one of whom will suffer a loss in the amount of GM's overpayments. Were we to consider this issue, we would conclude that because Hy-Lift had no right to GM's overpayments, and such mistaken payments are treated as involuntary payments, *Wilson v Newman*, 463 Mich 435, 443; 617 NW2d 318 (2000) rather than an extension of credit by the payor to the payee, it follows that Comerica was unjustly enriched at GM's expense.

Mich App 241, 252; 673 NW2d 805 (2003); see also MCR 7.212(G); *Curry v Meijer, Inc*, 286 Mich App 586, 596 n 5; 780 NW2d 603 (2009).

Nonetheless, for purposes of our review of Comerica's argument based on the UCC, we observe that unjust enrichment is a cognizable equitable action in which a payor seeks restitution for money paid by mistake, even where the mistake was due to the payor's lack of investigation. *Sentry Ins v ClaimsCo Int'l, Inc*, 239 Mich App 443, 452; 608 NW2d 519 (2000). The mistaken payment is regarded as an involuntary payment. *Wilson v Newman*, 463 Mich 435, 442; 617 NW2d 318 (2000). But the mistake of fact rule has not been applied where the payment has caused such a change of circumstances that it would be unjust to require a refund of the mistaken payment. *Id.* at 441. Stated otherwise, a payor is not precluded from availing itself of the mistake if the other party can be relieved of any prejudice caused by the mistaken payment. *Id.* at 442. A claim of unjust enrichment requires that the plaintiff establish "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an equity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps*, 273 Mich App at 195. If these elements are satisfied, the law will imply a contract to prevent unjust enrichment. *Id.* at 195.

A constructive trust may also be imposed to avoid unjust enrichment. *Morris Pumps*, 273 Mich App at 202. A constructive trust arises by operation of law where the circumstances under which property was acquired make it inequitable for the recipient to hold legal title. *Kent v Klein*, 352 Mich 652, 657-658; 91 NW2d 11 (1958). A court of equity may shape a constructive trust remedy to the circumstances before it. *Union Guardian Trust Co v Emery*, 292 Mich 394, 406; 290 NW 841 (1940). In this case, however, it is unnecessary to consider GM's constructive trust claim because the trial court did not impose a constructive trust on any property. Rather, it awarded GM a monetary judgment consistent with a restitution remedy for unjust enrichment. Accordingly, we need only determine whether the trial court properly concluded that the UCC did not preclude GM from obtaining the restitution remedy based on unjust enrichment.

"The UCC is a highly integrated body of statutes whose provisions must be carefully read as such. Fair and just application of the UCC rarely involves reference to only one or a few of its provisions in isolation." *Yamaha Motor Corp, USA v Tri-City Motors & Sports, Inc*, 171 Mich App 260, 270; 429 NW2d 871 (1988). Here, the starting point in determining the applicability of the UCC is MCL 440.1103, which provides:

> Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Accordingly, Comerica must demonstrate that a particular provision of the UCC displaces GM's claim for unjust enrichment. *Gen Equip Mfr v Bible Press, Inc*, 10 Mich App 676, 680; 160 NW2d 370 (1968). Specifically, Comerica must demonstrate a particular provision in Article 9 of the UCC that displaces the unjust enrichment claim arising from GM's June 28, 2000, overpayments.

Article 9 was substantially amended by 2000 PA 348, effective July 1, 2001. *In re Estate of Moukalled*, 269 Mich App 708, 714; 714 NW2d 400 (2006). The amendatory act generally applies to actions commenced after its effective date. *Prime Fin Servs, LLC v Vinton*, 279 Mich App 245, 258; 761 NW2d 694 (2008). The amendatory act also generally applies to a "transaction or lien within its scope, even if the transaction or lien was entered into or created before this amendatory act takes effect." MCL 440.9702(1). It also determines the "priority of conflicting claims to collateral," except that "if the relative priorities of the claims were established" before the amendatory act, Article 9 "as in effect before this amendatory act takes effect determines priority." MCL 440.9709(1).

Because this case involves GM's equitable claim based on conduct that occurred before the amendatory act became effective, and Comerica's argument that the UCC provides it with priority to the June 28, 2000, overpayments, we reject Comerica's claim that the current version of Article 9 applies. Cf. *Prime Fin Servs, LLC*, 279 Mich App at 258 (prior version of UCC applies where common-law claims were based on propriety of bank's actions under the prior version of Article 9, and where the relative priorities were established before the effective date of the amendatory act).

In any event, Comerica's reliance on the priority rules in the current version of Article 9 for "conflicting security interests in the same deposit account," MCL 440.9327, and a transferee's rights to take funds from a deposit account free of a security interest, MCL 440.9332(2), is misplaced because GM did not acquire a security interest in Hy-Lift's deposit account by making an overpayment. A "security interest" under both the prior and current versions of the UCC means, in part, "an interest in personal property or fixtures which secures payment or performance of an obligation. . . ." MCL 440.1201(37). Because GM did not have a security interest, Comerica has not established anything in current MCL 440.9327 or 440.9332(2) that could be said to have displaced GM's unjust enrichment claim.

And while the provision in MCL 440.9201 that a "security agreement" is effective against "creditors," is contained in both the prior and current versions of Article 9, we need not reach the issue whether GM could be viewed as a "creditor" of Hy-Lift, as defined in MCL 440.1201(12). We recognize that this statutory term includes a "general creditor." *Id*. The term "creditor," while not statutorily defined, is a broad term that may include one who is owed a debt, or even a claim arising out of tort. See *Ford v Maney's Estate*, 251 Mich 461, 394-395; 232 NW 393 (1930), and *Chicago Title Ins Co v Mary B*, 190 Md App 305, 316; 988 A2d 1044 (2010), cert gtd 415 Md 38 (2010). A general creditor has no legal right or interest in a debtor's property and, therefore, could not be injured by a debtor's disposal of the property to evade payment. *Van Royen v Lacey*, 262 Md 94, 99; 277 A2d 13 (1971).

In this case, however, GM's claim is based on Hy-Lift not acquiring rights to the June 28, 2000, overpayments, which were deposited into an account controlled by Comerica. Further, Comerica's security agreement with Hy-Lift is merely an agreement that creates or provides for a security interest under both the prior version of Article 9, MCL 440.9105(1)(l), and the current version, MCL 440.9102(1)(ttt). Under both versions, a security interest does not attach, and is not enforceable against a debtor or third party with respect to collateral, unless the debtor acquires rights in the collateral or the right to transfer the collateral. See MCL 440.9203; *Prime Fin Servs, LLC*, 279 Mich App at 263-264. The nature of the debtor's rights need not be

absolute. *Valley Nat'l Bank v Cotton Growers Hail Ins*, 155 Ariz 526, 529; 747 NW2d 1225 (1987). But mere possession is inadequate. *Litwiller Machine & Mfg, Inc v NBD Alpena Bank,* 184 Mich App 369, 374; 457 NW2d 163 (1990); see also *Wawak v Affiliated Food Stores, Inc,* 306 Ark 186, 189; 812 SW2d 679 (1991). As explained in *Jerke Constr, Inc v Home Fed Savings Bank,* 693 NW2d 59, 62-63 (SD, 2005):[2]

> The phrase "rights in the collateral" describes the range of transferable interests that a debtor may possess in property. For example, such rights may be as comprehensive as full ownership of property with legal title or as limited as a license. "Essentially, the debtor normally can only convey something once it has something and that something may be less than the full bundle of rights that one may hold in such property." Formal title is not required for a debtor to have rights in collateral. An equitable interest can suffice. . . . On the other hand, mere naked possession does not create "rights in the collateral." [Citations omitted.]

Because Comerica has failed to establish any evidence or legal basis for concluding that Hy-Lift acquired rights in GM's June 28, 2008, overpayments by means of GM's mere deposit of the overpayments in Hy-Lift's account, we conclude that Comerica's claim that Article 9 of the UCC displaces GM's unjust enrichment claim fails as a matter of law. Accordingly, we affirm the trial court's grant of summary disposition in favor of GM with respect to its restitution claim based on the June 28, 2000, overpayments.

IV. SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

Comerica next argues that the trial court erred in denying its motion under MCR 2.116(C)(7) based on the statute of limitations. Comerica argues that GM's claim is governed by the three-year limitations period for "actions to recover damages for . . . injury to . . . property" in MCL 600.5805(10).[3]

To determine the applicable statute of limitations, it is necessary to determine the true nature of GM's claim, reading its complaint as a whole. *Tenneco, Inc v Amerisure Mut Ins Co,* 281 Mich App 429, 457; 761 NW2d 846 (2008). "The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought." MCL 600.5815; see also *Terlecki v Stewart,* 278 Mich App 644, 658; 754 NW2d 899 (2008). MCL 600.5815 evidences "a legislative intent to subject equity actions to the same statute of limitations available for law actions, thereby modifying the prior judicial practice of applying a statute of limitations by

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[2] When interpreting a uniform act like the UCC, it is appropriate to consider cases decided in other jurisdictions where the UCC has been adopted. *Heritage Resources, Inc v Caterpillar Fin Servs Corp,* 284 Mich App 617, 632; 774 NW2d 332 (2009).

[3] Comerica has not challenged the trial court's determination that, to the extent MCL 600.5805(10) does not apply, GM's action was timely filed within the six-year limitations period prescribed in MCL 600.5813.

analogy in an equity action." *Eberhard v Harper-Grace Hosps*, 179 Mich App 24, 36; 445 NW2d 469 (1989).

In *Attorney General v Harkins*, 257 Mich App 564, 570-571; 669 NW2d 296 (2003), this Court, relying on MCL 600.5815, found that MCL 600.5813 was applicable to an action for injunctive relief sought by a plaintiff for violation of a statute that did not contain its own limitations period. In *Tenneco, Inc*, 281 Mich App at 454-458, this Court found that the six-year limitations period for contract actions in MCL 600.5807(8) applied where the plaintiff styled a lawsuit as an action for declaratory relief, but the gravamen of the claim sought to recover monetary damages for breach of contract.

In *Huhtala v Travelers Ins Co*, 401 Mich App 118, 124-125; 257 NW2d 640 (1977), our Supreme Court found that a claim for promissory estoppel was subject to the six-year limitations period for contract actions because it was based on a rule of contract law that renders a promise binding where injustice could only be avoided by its enforcement and the "promisor should reasonably expect to induce forbearance by the promisee or a third person and which does induce forbearance." Our Supreme Court also observed that "[w]here the nature and origin of an action to recover damages for injury to persons or property is a duty imposed by law, this Court has held that it cannot be maintained on a contract theory beyond the three-year period." *Id.* at 126-127. They type of legal duty to which this holding applies is one arising under negligence law, such as an innkeeper's duty to safeguard a guest against an assault. *Id.*

This case does not involve Comerica's liability for a duty imposed by law. Further, while we recognize that the three-year limitations period in MCL 600.5805(10) has been applied to conversion claims, *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47; 742 NW2d 622 (2007), we disagree with Comerica's argument that the essence of GM's cause of action is a conversion claim. "[C]onversion is a wrongful act of dominion over another person's property, even including forgery of instruments." *Id.* at 49. Although the retention of a mistaken payment may involve a wrongful act of dominion, as discussed earlier, unjust enrichment is a cognizable equitable action that may be remedied by restitution. *Sentry Ins*, 239 Mich App at 452; see also *Wilson*, 463 Mich at 441-442. "[T]he law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Morris Pumps*, 273 Mich App at 195.

Examining GM's complaint as a whole, the gravamen of the claim is not that GM suffered an injury to its property by making a mistaken payment. Rather, the claim is based on the injustice of having Comerica retain the benefit of the overpayments after it acquired knowledge that the payments were made by mistake. Because GM is not seeking damages for injury to property as required by MCL 600.5805(10), the trial court did not err by failing to apply the three-year limitations period in that statute. And considering Comerica's failure to show that the six-year limitations period in MCL 600.5813 is not otherwise applicable, we conclude that the trial court did not err in denying Comerica's motion for summary disposition under MCR

2.116(C)(7) with respect to the June 28, 2000, overpayments.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald