Affirmed and Majority and Concurring Opinions filed March 8, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00974-CV

ROBIN SINGH EDUCATIONAL SERVICES, INC., Appellant

V.

TEST MASTERS EDUCATIONAL SERVICES, INC., Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2009-07572

MAJORITY OPINION

Appellant, Robin Singh Educational Services, Inc., appeals from the granting of a motion for summary judgment in favor of appellee, Test Masters Educational Services, Inc. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and appellee both offer test preparation courses for various standardized scholastic examinations. Appellant is a California company based in Los Angeles, while

appellee is a Texas company based in Houston. Appellee operates as "Test Masters Educational Services" and owns the domain name "www.testmasters.com" and corresponding email addresses. Appellant operates as "Testmasters" and owns the domain names "www.testmasters.net" and "www.testmasters180.com." Appellant and appellee have engaged in extensive litigation over the use of the name "Testmasters" in all of its various forms. In the litigation involved in this appeal, appellant asserts a single cause of action against appellee: conversion. Specifically, appellant contends that potential consumers of appellant's test preparation courses, confused as a result of the similar names of the two businesses, mistakenly sent email communications to appellee. Appellant further asserts (1) it has a right to possess these "misdirected" emails; (2) it has demanded that appellee "return" them; and (3) that appellee has refused to do so.

Eventually, appellee moved for summary judgment. In its motion, appellee argued it was entitled to summary judgment because (1) email communications are intangible property incapable of being converted as a matter of law; and (2) receipt of misdirected intangible electronic communications is not conversion of property under Texas law. Following a hearing, the trial court granted appellee's motion without specifying the reason and dismissed appellant's claim. This appeal followed.

DISCUSSION

In two issues on appeal, appellant asserts the trial court erred when it granted appellee's motion for summary judgment. Initially, appellant contends the trial court erroneously determined that email communications are intangible property incapable of being converted under Texas law. In his second issue, appellant argues that if we conclude emails are intangible property, we should still reverse the summary judgment because the so-called merger exception applies to the misdirected emails.

I. The standard of review.

The movant for summary judgment has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). If there is no genuine issue of material fact, summary judgment should issue as a matter of law. *Haase v. Glazner*, 62 S.W.3d 795, 797 (Tex. 2001). In addition, summary judgment is proper where a plaintiff's claim is not cognizable under Texas law. *See Express One Int'l v. Steinbeck*, 53 S.W.3d 895, 898 (Tex. App.—Dallas 2001, no pet.). We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

II. Does Texas conversion law encompass intangible property?

"The unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another, to the exclusion of or inconsistent with the owner's rights, is in law a conversion." *Hunt v. Baldwin*, 68 S.W.3d 117, 131 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (*quoting Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971)). The elements of a cause of action for conversion are: (1) the plaintiff owned, had legal possession of, or was entitled to possession of the property; (2) the defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with the plaintiff's rights; and (3) the defendant refused plaintiff's demand for return of the property. *Id.*

Appellant's claim is based solely on the alleged conversion of intangible electronic communications which appellant alleges were mistakenly sent to appellee by potential customers of appellant. However, under Texas law, a tort action for conversion is limited to tangible property. *See Express One*, 53 S.W.3d at 901 ("Texas law has never recognized a cause of action for conversion of intangible property except in cases where an underlying intangible right has been merged into a document and that document has been

converted.") Because the allegedly misdirected emails are intangible, they cannot support a conversion claim. *See id.* Therefore, we overrule appellant's first issue.[1]

III. Did appellant waive its second issue?

In its second issue, appellant asserts that if we decide emails are intangible personal property, then the so-called "merger exception" should apply to defeat appellee's motion for summary judgment. Under the "merger exception," some courts have held that certain types of intangible property rights can be converted where the underlying intangible right has been merged into a physical document and that document itself has been converted. *Pebble Beach Co. v. Tour 18 I, Ltd.*, 942 F.Supp. 1513, 1569 (S.D. Tex. 1996). Under this so-called "merger exception," Texas courts have recognized conversion claims involving the following types of intangible property: lease documents, *Prewitt v. Branham*, 643 S.W.2d 122, 123 (Tex. 1983); confidential customer lists, *Deaton v. United Mobile Networks, L.P.*, 926 S.W.2d 756, 762 (Tex. App.—Texarkana 1996), *rev'd in part on other grounds*, 939 S.W.2d 146 (Tex. 1997); and shares of stock, *Watts v. Miles*, 597 S.W.2d 386, 387–88 (Tex. App.—San Antonio 1980, no writ).

In response to this issue, appellee asserts appellant waived this argument on appeal because it was not presented in appellant's summary judgment response. To preserve an argument against the granting of a motion for summary judgment for appellate review, the non-movant must expressly present that argument to the trial court within its written response to the motion. *Priddy v. Rawson*, 282 S.W.3d 588, 597 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). Appellant did not include in its summary judgment response any argument that the trial court should deny appellee's motion because the misdirected emails fall within the "merger exception." Thus, appellant failed to preserve this issue for appellate review. We overrule appellant's second issue.

[1] To the extent appellant invites this court to extend the law of conversion to include misdirected intangible email communications, we decline that invitation. *See Bren-Tex Tractor Co., Inc. v. Massey-Ferguson, Inc.*, 97 S.W.3d 155, 161 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (stating that the creation of a new tort duty is beyond the province of an intermediate appellate court).

CONCLUSION

Having overruled appellant's issues on appeal, we affirm the trial court's final judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Brown. (Frost, J., Concurring.)