

STATE OF MICHIGAN
COURT OF APPEALS

FOLLMER, RUDZEWICZ & CO., P.C.,

Plaintiff-Appellee/Cross-Appellant,

v

SADIE M. BOLOS,

Defendant-Appellant/Cross-
Appellee,

and

BOLOS AME, L.L.C.,

Defendant.

UNPUBLISHED

June 25, 2002

No. 229610

Oakland Circuit Court

LC No. 99-015524-CK

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Plaintiff, Follmer, Rudzewicz & Co., P.C. (FRC), brought an action against defendant,¹ alleging breach of employment contract, breach of fiduciary duty, tortious interference with business expectancy, and common law and statutory conversion. Both parties moved the trial court for summary disposition. The trial court granted summary disposition and judgment in favor of plaintiff regarding only the claim of common law conversion, and dismissed with prejudice plaintiff's remaining claims. Defendant appeals as of right, and plaintiff cross-appeals. We affirm.

I

Defendant argues that the trial court erred in finding, as a matter of law, that she converted the amount of \$11,060 under the common law theory of conversion because, at a minimum, there were genuine issues of material fact for the jury to decide regarding interpretation of the employee contract at issue. On cross-appeal, plaintiff argues that the trial

¹ Because Sadie Bolos and her company, Bolos AME, L.L.C., are considered one and the same in the instant lawsuit, Sadie Bolos will be referred to as defendant.

court erred in denying plaintiff an award of treble damages pursuant to the statutory conversion statute, MCL 600.2919a. Both arguments are without merit.

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Spiek, supra* at 337. A trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is proper where the proffered evidence fails to establish a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

We first address the common law claim of conversion. The tort of conversion is any distinct act of dominion wrongfully exerted over another person's personal property in denial of or inconsistent with the rights therein. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). To support an action for conversion of money, the defendant must have an obligation to return the specific, identified money entrusted to his care. *Blue Cross & Blue Shield of Michigan v Folkema*, 174 Mich App 476, 479; 436 NW2d 670 (1988). In Michigan, the doctrine of conversion extends to checks. *Sarver v Detroit Edison Co*, 225 Mich App 580, 585; 571 NW2d 759 (1997).

Here, the issue is resolved by defendant's own express admission that she was supposed to sign over to FRC the \$11,060 check that the Henry Ford Bone & Joint Center issued in the name of Bolos AME & Associates for services rendered during defendant's employment with plaintiff. Defendant admitted that there was no agreement with FRC that would allow her to keep any portion of the check. In further support of defendant's knowledge that the money belonged to FRC, defendant had unsuccessfully requested the Henry Ford Center to issue the check in FRC's name. She admitted that, upon receiving the check, she failed to sign it over to FRC, and she subsequently cashed the check. Therefore, the trial court did not err in granting summary disposition in plaintiff's favor regarding the claim of common law conversion.

Defendant, however, argues that the employment contract expressly entitled her to keep the \$11,060 at dispute. The proper construction and interpretation of a contract is a question of law that is reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). The primary goal in interpreting contracts is to determine and enforce the parties' intent. *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself. *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 383; 591 NW2d 325 (1998). However, when a contract is ambiguous, this Court may construe the agreement in an effort to find and enforce the parties' intent. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 607; 576 NW2d 392 (1997). It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10). *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

After thoroughly reviewing the contractual provisions at dispute, we find the contract unambiguous and clear. Contrary to defendant's claim, we find that the contract provided her with no express entitlement to the \$11,060 at dispute. Accordingly, defendant's claim is without merit.

Defendant also argues that equity would entitle her to the \$11,060. The facts in the instant case show that defendant was fired and escorted out of the premises. When defendant returned the next day to collect her business accounts, personal office furniture and other personal belongings, FRC barred her from doing so, and FRC kept defendant's personal property throughout the entire proceedings in the instant case. When defendant realized that FRC was not going to return her personal belongings, she kept the \$11,060 check. [deleted last sentence]

Although we do not condone FRC's behavior, the equity argument that defendant raises, based upon the treatment she received at the hands of FRC, is not dispositive in the instant case because it was part and parcel of two separate lawsuits that defendant brought against FRC. The claims on those lawsuits were not before the trial court in the instant case.² Moreover, the trial court expressly noted that the equity claim was not dispositive to the question of the conversion of the check. The sole issue before the trial court in the instant case was not plaintiff's wrongdoing, but whether the elements of conversion of the \$11,060 were met. In light of the above, the trial court did not err in granting summary disposition in plaintiff's favor.

Defendant next argues that plaintiff improperly injected into the record a document that she prepared in which she admitted to owing the \$11,060 in dispute. Defendant claims that the trial court erred in considering this admission of liability because the document was part of settlement negotiations. Evidence of settlement negotiations is inadmissible to prove either liability or the amount of damages. MRE 408; *Arnold v Darczy*, 208 Mich App 638, 640; 528 NW2d 199 (1995). Here, whether the document was part of any settlement negotiations is not dispositive to the issue. Although defendant challenged consideration of this document at the summary disposition hearing, defendant does not direct this Court to any portion in the hearing transcript showing that the trial court considered this document in its decision, and we find nothing in the record that suggests that the trial court did so. As previously discussed, defendant's own deposition testimony showed common law conversion of the disputed check.³

On cross-appeal, plaintiff argues that it was entitled to treble damages pursuant to the conversion statute, MCL 600.2919a. As previously noted, the tort of conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the rights herein. *Head, supra* at 111. Statutory conversion, by contrast, consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or

² At the time of the motion hearing, the two lawsuits had been dismissed without prejudice.

³ Defendant also challenges the admission of two other documents. Beyond her assertion that these two documents were wrongfully considered by the trial court, defendant fails to explain the reasons for her claim, and fails to provide any supporting authority. A defendant may not merely announce her position and leave it to this Court to determine and rationalize the basis for her claim. *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000). This claim, therefore, is not properly presented on appeal and is deemed waived. *Id.*

converted property. MCL 600.2919a; *Head, supra* at 111. MCL 600.2919a also provides for treble damages, costs and reasonable attorney fees.

Here, the trial court dismissed the claim based on the “unclean hands” doctrine. We find it unnecessary to determine if that equitable doctrine is applicable to a claim premised on statutory conversion because the language of the statute clearly does not apply in this case. MCL 600.2919a applies where the property has *already* been stolen, and a person receives, buys, or conceals the stolen property such as in a “fencing” operation. See *Hovanesian v Nam*, 213 Mich App 231, 237; 539 NW2d 557 (1995). Here, the facts do not support application of the statute. Accordingly, plaintiff was not entitled to an award of treble damages pursuant to MCL 600.2919a.⁴

II

Defendant next argues that the trial court erred in failing to dismiss the case for plaintiff’s discovery abuses or, in the alternative, to compel discovery. We disagree.

A trial court’s decision to grant or deny discovery is reviewed by the Court of Appeals for an abuse of discretion. *Koster v June’s Trucking, Inc*, 244 Mich App 162, 166; 625 NW2d 82 (2000). While MCR 2.313 is supported by existing case law affirming the discretionary power of the court to dismiss an action or to enter a default judgment against a party who fails to comply with the discovery rules or who violates a court order mandating discovery, that same case law indicates that those procedural sanctions are a “drastic” step, and should only be imposed for flagrant and wanton actions by a party. *Schell v Baker Furniture Co*, 232 Mich App 470, 476-477 n 3; 591 NW2d 349 (1998), *aff’d* 461 Mich 502; 607 NW2d 358 (2000). The wilful, that is intentional, refusal of a party to comply with court ordered discovery would support such drastic steps. *Id.* Dismissal is not favored where a relatively short period elapses between a party’s failure to do something and the motion to dismiss and where there is an ambiguous showing of wilfulness on the part of the noncomplying party. *MacArthur Patton Christian Ass’n v Farm Bureau Ins Group*, 403 Mich 474, 477; 270 NW2d 101 (1978).

Dispositive to this issue in the instant case is the fact that the excerpts of the depositions provided to the trial court showed that defendant attempted to acquire from those depositions, information pertaining to her two other separate lawsuits that were not part of this case. Instead, by piecemealing this litigation, defendant has effectively barred herself from inquiring into those aspects of the litigation. Moreover, defendant fails to show any wilful disobedience on the part of plaintiff in defying any discovery rules or court orders. On this record, there is nothing to show that dismissal of the case is warranted. Therefore, the trial court did not err in denying defendant’s motion to dismiss the case or to compel discovery.

⁴ We may affirm the trial court’s decision on a different ground. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994).

Defendant next asserts, cursorily, that summary disposition was improper because of incomplete discovery. If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Here, defendant provides no independent evidence to show the existence of a dispute. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to compel discovery.

III

Defendant next argues, without providing any supporting law, that the trial court failed to remove the case to the district court because the circuit court lacked jurisdiction over the case, which was mediated⁵ for only \$7,500. We disagree.

Whether a trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999). Pursuant to Administrative Order No. 1998-1, a circuit court may not transfer an action to district court under MCR 2.227 based on the amount in controversy unless: (1) the parties stipulate to the transfer and to an appropriate amendment of the complaint, MCR 2.111(B)(2); or (2) from the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 473; 628 NW2d 577 (2001). MCL 600.8301 provides the district court with exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000. *Etefia, supra* at 473. The allegations of the complaint must be considered in determining whether the amount in controversy appears to a legal certainty to be within the jurisdictional limit of the district court. *Id.* at 475.

Defendant erroneously relies on a mediation award of \$7,500 in the instant case. Although the mediation evaluation may provide some guidance regarding a decision to transfer an action, it is not dispositive. *Id.* at 474-475. Simply because defendant believes the case has no settlement value, or because a mediation panel found the case to be worth less than the jurisdictional minimum of the circuit court, does not vest the circuit court with power to remove the action to district court. *Kinchion v Burnett*, 88 Mich App 25, 28; 276 NW2d 508 (1979). The issues of liability and damages are separate and distinct. *Id.*

Our review of the allegations contained in plaintiff's complaint, and the nature of the damages available under the claims, does not lead to a conclusion with legal certainty that the amount in controversy was within the jurisdictional limit of the district court. *Etefia, supra*. Instead, the allegations of the complaint may have likely placed the case within the jurisdiction of the circuit court. The complaint alleged common law and statutory conversion, breach of contract, breach of fiduciary duty, and tortious interference with a business expectancy. Had plaintiff prevailed on its claim of statutory conversion on the \$11,060 check, MCL 600.2919a

⁵ MCR 2.405 was amended effective August 1, 2000, mainly to change the terminology, replacing the word "mediation," as used in MCR 2.403, with the term "case evaluation." MCR 2.403, Staff Comment to 2000 Amendment.

would have allowed treble damages. This is an amount that alone exceeds the \$25,000 jurisdictional maximum amount for the district court's jurisdiction without consideration of the other claims. Accordingly, jurisdiction in the circuit court was proper.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ William B. Murphy

/s/ Christopher M. Murray