

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION



UNRECORDED

AURORA LOAN SERVICES, INC.,)
Plaintiffs,)
)
v.)
)
AMERICAN FAMILY INSURANCE,)
Defendant.)
)
AMERICAN FAMILY INSURANCE,)
Third-Party Plaintiff,)
)
v.)
)
US BANK, CITIBANK FSB and JERRY)
HIERO, individually and d/b/a DUN)
RITE CONSTRUCTION COMPANY)
and DUN RITE CONSTRUCTION,)
Third-Party Defendants.)

No. 02 L 009610

7/28/05

MEMORANDUM DECISION AND JUDGMENT

THIS CAUSE COMING TO BE HEARD on trial of the captioned third-party action, the Third-Party Plaintiff, AMERICAN FAMILY INSURANCE (“American Family”), appearing in open Court by its attorney, Gary W. Leydig of Worker, Sitko & Hoffman, LLC, and the Third-Party Defendant JAROSLAW “JERRY” HIERO, appearing in open Court in person and with his attorney, Edward Cohen of COHEN & HUSSIEN, P.C., the Court having received documents into evidence, having heard the testimony and evidence adduced in open court, and having considered the demeanor and credibility of the witnesses, and the arguments made on behalf of the parties, and now being fully informed in the premises, and having jurisdiction over the parties and the subject matter herein, makes the following **FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

On January 25, 1999, Augustus Saunders, insured by American Family, incurred property damage and loss as a result of a fire at his property located at 8041 South Saginaw in the City of Chicago. On April 30, 1999, Mr. Saunders entered into a contract with the third-party defendant Dun Rite Construction Company (“Dun Rite”), wherein Dun Rite agreed to act as Mr. Saunders’ public adjuster and to repair the home. The contract was executed on behalf of Dun Rite by John “Jack” Keane, a public insurance adjuster employed by Dun Rite. The third-party defendant, Mr. Hiero, was a shareholder, officer and director of Dun Rite during the time periods at issue.

In satisfaction of its obligations to Mr. Saunders, American Family issued two drafts; one in the amount of \$97,852.05, and another in the amount of \$23,997.53. Both drafts were made payable to three payees, Mr. Saunders, Aurora Loan Services, and Dun Rite, and required the endorsements of all three payees in order to be lawfully negotiated. Mr. Saunders endorsed the

drafts and gave them to Mr. Keane, who, in turn, gave them to Mr. Hiero. At some point, Aurora Loan Services' endorsements appeared on the drafts, although those endorsements were never authorized by Aurora Loan Services. Mr. Hiero contends that, without his knowledge, the endorsements of Aurora Loan Services were forged by Mr. Keane. Mr. Hiero deposited the drafts, with the fraudulent endorsements, into Dun Rite's checking account at Citibank. Citibank accepted the drafts and credited Dun Rite's account accordingly. Citibank then transferred the two drafts to US Bank, where American Family maintained an account. US Bank accepted the two drafts and debited American Family's account there in the amount of the two drafts. Neither Aurora Loan Services nor Mr. Saunders received any of the money.

In the weeks following Mr. Hiero's depositing of the drafts, Dun Rite encountered financial difficulties. Mr. Hiero testified that, in addition to paying for work on the 8041 South Saginaw project, he used the money paid out by American Family to pay various subcontractors and cover other business-related debts. In addition, Mr. Hiero stated that he withdrew some of this money at ATMs to purchase materials needed for other jobs. Mr. Hiero also acknowledged that he used some of these ATM withdrawals to cover non-business related personal expenses.

Upon learning that the two drafts were not properly negotiated, Aurora Loan Services made demand on American Family to pay Aurora Loan Services the amounts of the two drafts. In turn, American Family made demand on US Bank to credit its account in the same amounts. US Bank credited American Family's account in the amount of the smaller draft, \$23,997.53, but did not credit the larger draft. American Family, in turn, tendered only \$23,997.53 to Aurora Loan Services. As a result, Aurora Loan Services filed its complaint against American Family seeking recovery in the amount of the larger draft, \$97,852.05. On March 4, 2003, American Family paid Aurora Loan Services' claim for that amount without having received reimbursement from US Bank. Subsequently, American Family filed its first amended third-party complaint against Mr. Hiero for conversion, seeking damages in the amount of the two drafts, in the sum of \$121,849.58, plus an award of punitive damages.

Conversion is the unauthorized deprivation of property from a person entitled to its possession. *IOS Capital, Inc. v. Phoenix Printing, Inc.*, 348 Ill. App. 3d 366, 370 (4th Dist. 2004). Although conversion is classified as an intentional tort, the intent is a state of mind more than mere negligence, but not necessarily malicious, culpable, or conscious of wrongdoing. *Martel Enterprises v. City of Chicago*, 223 Ill. App. 3d 1028 (1st Dist. 1991). To prove conversion, the plaintiff must establish: 1) a right in the property; 2) a right to immediate possession; 3) wrongful control by the defendant; and, in some cases, 4) a demand for possession. See *IOS Capital*, 348 Ill. App. 3d at 371. The Court finds that the third-party plaintiff met its burden of establishing each of the applicable elements of conversion of the funds at issue, of which Dun Rite seized wrongful control. Mr. Hiero argues that the conversion consisted solely of the act of forging Aurora Loan Services' signature to the checks, however, the Court agrees with the third-party plaintiff that the conversion consisted of the forgery, the deposit of the funds into Dun Rite's account and the withdrawal of the funds for payment of expenses that were unrelated to the repair of the property at 8041 South Saginaw. See, e.g., *Welfare Fund v. Gleason & Fritzshall*, 295 Ill. App. 3d 719, 726 (1st Dist. 1998) (explaining that the object of the conversion was the funds described by the check that had been falsely endorsed).

Mr. Hiero also argues that, although Dun Rite may be liable for conversion, he is not individually liable. While it is true that a corporate officer is not liable for his corporation's torts

simply by virtue of his office, he is liable for the corporation's torts in which he actively participates. National Acceptance Co. v. Pintura Corp., 94 Ill. App. 3d 703, 706 (2d Dist., 1981). Thus, a corporate officer may be liable for conversion, even if committed by the corporation, where he "actively participated in or personally authorized the conversion." Evergreen Marine Corp. v. Div. Sales, Inc., 2003 U.S. Dist. LEXIS 3425 (N. D. Ill., 2003). The Court finds that by depositing the checks at issue in Dun Rite's account, and by then withdrawing the funds and spending them on expenses that were unrelated to the repair of the 8041 South Saginaw property, Mr. Hiero was an active participant in the conversion of the funds.

It is important to note that Illinois courts will hold a corporate officer personally liable even where he does not personally benefit from the conversion. For example, in National Acceptance, a case with facts very similar to those at issue here, the court rejected the corporate officer's contention that he could not be held liable for his corporation's conversion when the converted funds were deposited in the corporation's account and used for the benefit of the corporation:

In Illinois, liability for conversion, generally, does not require proof that the converter has thereby personally benefited, since the essence of conversion is not acquisition of property by the wrongdoer, but deprivation of the owner. . . In Landfield Finance Co. v. Regal Box Co., (1952), 345 Ill. App. 611 (abstract), defendant corporate officers were held liable although the converted funds were deposited in the corporate bank account. Likewise, in Taylor v. Currey (1915), 192 Ill. App. 502 (abstract), the court held that a "corporate agent is liable to third persons for conversion . . . [and] it is no defense . . . that he received no benefit from his wrong or that he has paid the proceeds of his wrong to his principal." In this respect, Illinois follows the majority rule that a corporate officer is individually liable in conversion although he does not personally benefit.

94 Ill. App. 3d at 706.

By Mr. Hiero's own admissions, he deposited the drafts, used the proceeds to pay business expenses unrelated to the 8041 South Saginaw project, and withdrew some of the funds from various ATMs for his personal use. Accordingly, the evidence is sufficient to establish Mr. Hiero's liability for conversion, even though there was no evidence implicating him in the forgery.

DAMAGES

American Family asks for damages of \$121,849.58, the full amount of the two drafts deposited by Mr. Hiero. Mr. Hiero testified that the value of the work that was done to secure the building at 8041 South Saginaw, demolish and remove damaged walls, apply sealant, demolish and remove the garage, install new drywall, repair joints and beams, and insulate the house, is \$23,997.53. This testimony was especially credible in light of the fact that much of the demolition work was done painstakingly by hand due to the inability to use large equipment or to place dumpsters on the premises. In addition, Mr. Hiero testified that he and Dun Rite performed electrical and plumbing repairs, purchased new windows for the property, and repaired the wood surrounding the windows. The evidence and testimony shows that the value of the windows and the work that was performed is \$21,728.81, making the total value of the work performed by Dun Rite \$45,726.34. This reduces the monies converted to \$76,123.24.

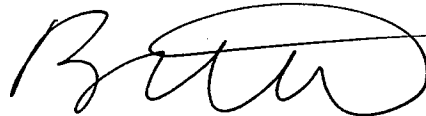
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American Family also seeks punitive damages, which may be imposed when torts are committed with "fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard for the rights of others." *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186 (1978). The Court finds that Mr. Hiero's conduct does not rise to that level, but reflects errors of judgment which constitute ordinary negligence for which punitive damages should not be awarded. *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 415 (1990).

Accordingly, the Court enters judgment in the amount of \$76,123.24 against the third-party defendant, Jerry Hiero, and in favor of the third-party plaintiff, American Family Insurance.

Dated: July 28, 2005

ENTER:



ASSOC JUDGE BRIGID MARY McGRATH

BRIGID M. MCGRATH, JUDGE

JUL 28 2005

Circuit Court-1800



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N.W.

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