

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**CH ROYAL OAK, LLC,
Plaintiff/Counter-Defendant,**

v.

**Case No. 14-143935-CK
Hon. James M. Alexander**

**ALIDADE MAIN NORTH, LLC,
Defendant/Counter-Plaintiff.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is again before the Court – this time on Plaintiff’s “Motion for Partial Summary Disposition as to Tax Refund Proceeds and Prevailing Party Clause.”

As summarized in an earlier opinion:

In 2009-2010, Plaintiff considered buying a vacant lot from Defendant’s predecessor in interest – non-party Main Eleven North, LLC in order to build an entertainment venue (theaters, bowling lanes, and a restaurant). . . .

According to Plaintiff, in [order to] induce it to purchase the vacant lot, Main Eleven decided to leverage its underutilized parking garage and surface lot by providing a perpetual easement for parking and a share of parking revenue to Plaintiff as a part of the deal.

To that end, Plaintiff and Main Eleven negotiated three agreements: a Second and Restated Amendment (to a Planned Unit Development); a Parking Management Agreement; and a Declaration of Reciprocal Easement Agreement.

Main Eleven’s interest was subsequently acquired by Bank of America, who sold the same to Defendant in May 2013.

In its current motion, Plaintiff seeks summary rulings on its conversion and breach of contract claims – but only as to liability. Both of these claims center on a single set of

allegations – that Defendant collected refunds on tax overpayments that it did not forward to Plaintiff within 30 days as required under the Declaration of Reciprocal Easement Agreement.

A motion brought under MCR 2.116(C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹ In response, Defendant seeks dismissal of Plaintiff's breach of contract and conversion claims under (I)(2).

The Declaration of Reciprocal Easement Agreement, at paragraph 4.3, provides (emphasis added):

The Owner of Parcel 1 shall reconcile the estimated versus actual Taxes within three months of the end of each calendar year. To the extent the estimated Taxes are lower than actual Taxes, the Owner of Parcel 2 shall reimburse the Owner of Parcel 1 within thirty (30) days of receipt of an invoice detailing the actual Taxes. **To the extent the estimated Taxes are higher than the actual Taxes, the Owner of Parcel 1 shall refund the amount of the overpayment to the Owner of Parcel 2 within thirty (30) days of determining such overpayment of Taxes.**

Plaintiff alleges that Defendant breached this provision by receiving tax overpayment refunds and not forwarding the same to Plaintiff within thirty days. On these allegations, Plaintiff brings breach of contract and conversion claims.²

1. Breach of Contract (Count I)

Plaintiff first seeks a ruling establishing liability on its breach of contract claim (only with respect to the tax refund proceeds). In response, Defendant seeks dismissal of said claim under (I)(2).

¹ The Court will note that Plaintiff does not specify which Court Rule it relies on in support of its motion, but the Court finds that only MCR 2.116(C)(10) could apply. This is so because Plaintiff attaches evidence in support of his motion, which is impermissible if considering a motion under (C)(8). See MCR 2.116(G)(5); and *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

² Plaintiff's breach of contract claim also alleges breaches with respect to the calculation of operating expenses, CAM charges, capital improvements, management fees, and attorney fees. But Plaintiff's conversion claim is based solely on allegations regarding the tax refund proceeds.

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Plaintiff argues that it is entitled to a ruling establishing liability on its breach of contract claim as to tax refund proceeds because it is undisputed that Defendant retained such proceeds for longer than 30 days.

In response, Defendant argues that it is entitled to dismissal of this claim because it has actually paid Plaintiff the amount due, and as a result, Plaintiff can identify no damages as the result of any breach.

It is undisputed that Defendant received tax appeal refunds for the 2012 and 2013 tax years that were partially refundable to Plaintiff. It is also undisputed that, following its calculation, Defendant directly paid Plaintiff \$18,768.93 and also provided Plaintiff with certain credits.

According to the Affidavit of Michele Prentice, Defendant's Property Manager, determining the refund amount was complex because it was based on four different types of taxes that run for different time periods. And the parties still dispute whether Plaintiff received all refunds due. Plaintiff claims that it is still owed thousands (although it is not certain exactly how much), and Defendant claims that Plaintiff has been paid in full.

Because Defendant claims that Plaintiff has been paid in full, it argues that Plaintiff cannot identify any damages that would support a recovery. This, ultimately, may prove to be true. But it is unnecessary and improper to resolve this factual dispute at this time. This is so because there is a bigger problem – it remains unclear whether Defendant even breached the agreement such that damages would become an issue.

The Agreement provides “To the extent the estimated Taxes are higher than the actual Taxes, the Owner of Parcel 1 shall refund the amount of the overpayment to the Owner of Parcel 2 **within thirty (30) days of determining such overpayment of Taxes.**” Based on the Agreement’s plain terms, the 30-day payment clock does not begin until a determination of **the amount of the overpayment**. This is so because the term “such overpayment” necessarily refers back to the term “the amount of the overpayment” earlier in the same sentence – making the two terms synonymous.

And based on the arguments and evidence offered, it is apparent that the parties still dispute the proper calculation of Plaintiff’s portion of the tax refund. As a result, the Court cannot conclude that there has been a determination of the amount of the overpayment that started the 30-day clock – much less whether the clock has run.

Rather, the parties agreed to start the 30-day payment clock on the determination of the amount of the overpayment of taxes.³ Because the parties remain embroiled in a genuine dispute over said determination, the Court cannot conclude that Defendant has breached the Agreement as a matter of law.

Simply, resolution of Plaintiff’s breach of contract claim (with respect to tax refund proceeds) requires factual determinations that are inappropriate for summary disposition. As a result, both parties’ motions with respect to this claim are DENIED.

³ If the parties wished to start the 30-day clock upon receipt of the tax refund by one party or the other, they could have easily done so. But they did not. Instead, they agreed that the clock would start on the determination of the amount of the overpayment. Whether this has occurred is disputed and, therefore, a question of fact.

2. Conversion (Count II)

Plaintiff next seeks a ruling establishing liability on its conversion claim. Michigan law provides that “[t]he tort of conversion is ‘any distinct act of domain wrongfully exerted over another’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), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Our appellate courts have further reasoned:

Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. *Head*, supra; MCL 600.2919a. **This Court has ruled that simply retaining money does not amount to “buying, receiving or aiding in the concealment of stolen, embezzled or converted property.”** *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 592-593; 683 NW2d 233 (2004) (emphasis added); quoting *Hovanesian v Nam*, 213 Mich App 231, 237; 539 NW2d 557 (1995).

This is precisely the case here. As stated, Plaintiff bases its conversion claim solely on the allegation that Defendant held onto its tax refund longer than the 30 days permitted under the parties’ agreement.⁴ These allegations cannot serve as the basis for a conversion claim.

If the Court were to accept Plaintiff’s argument, then necessarily every breach of contract claim alleging withheld- or non-payment under a contract would also contemporaneously and automatically be a conversion claim. The Court will not so extend the conversion doctrine.

Under these circumstances, Plaintiff’s conversion claim fails as a matter of law. Plaintiff’s allegations of non-payment of the tax refund are limited to its breach of contract claim.

⁴ While the Court found that a question of fact exists whether the 30-day clock has started (or run), even if the Court were to accept as true that the 30-day clock has run and Defendant still retains some money due to Plaintiff, Plaintiff’s allegations still only amount to a retention longer than permitted under the agreement. This is so because the payment timing is a specific term of said agreement.

For the foregoing reasons, Plaintiff's motion for summary disposition on this claim is DENIED. Defendant's motion for summary of said claim under (I)(2), however, is GRANTED, and Plaintiff's Count II is DISMISSED.

3. Prevailing Party Clause

Finally, Plaintiff seeks a declaration that it is "the prevailing party" with respect to: (1) whether consent is required for property use changes (as provided in the Court's July 15, 2015 summary opinion), and (2) the tax refund issue addressed above.

In support, Plaintiff cites to both the Parking Management Agreement (paragraph 24) and the Declaration of Reciprocal Easement Agreement (paragraph 8.1). Each agreement provides that if a party successfully brings legal action for the enforcement of any right under the same, then it is entitled to its costs and attorney fees. Both provisions also include costs and fees related to any appellate proceedings.

Initially, the Court notes that Plaintiff has not prevailed on the tax refund issue for the above reasons. Further, the consent issue is presently in the appellate process, and appeals are specifically considered under the agreements' provisions. As a result, it is yet to be determined which party is the prevailing party on this issue.

For the foregoing reasons, it is premature to declare either party the prevailing party, and Plaintiff's request, is therefore DENIED.

IT IS SO ORDERED.

October 14, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge