

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BRYCEWOOD HOMEOWNERS
ASSOCIATION,

Plaintiff,

vs.

Case No. 2014-1055-CB

CRANBROOK PROPERTY
MANAGEMENT, INC., EDWARD
MCCLELLAN, and MARY MCCABE,

Defendants.

and

CRANBROOK PROPERTY
MANAGEMENT, INC.,

Cross/Third-Party Plaintiff,

vs.

MARY MCCABE,

Cross-Defendant,

and.

DANIEL MCCABE,

Third-Party Defendant.

OPINION AND ORDER

Third-Party Plaintiff Cranbrook Property Management, Inc. ("Cranbrook") has filed a motion for default judgment against Third-Party Defendant ("D. McCabe"). D. McCabe opposes the motion and requests that the motion be denied.

I. Facts and Procedural History

Defendant/Cross-Defendant Mary McCabe ("M. McCabe") is Cranbrook's former employee. M. McCabe allegedly ran the day to day operations of the business while its principal was away caring for his ailing wife. During that time, M. McCabe wrote checks to herself and D. McCabe from Cranbrook's client accounts. In total M. McCabe wrote \$182,508.34 in checks. M. McCabe was convicted of embezzlement and ordered to pay restitution of \$182,508.34.

On April 30, 2014, D. McCabe and M. McCabe were served Cranbrook's cross/third party complaint in this matter. On January 14, 2015, a default was entered against M. McCabe. On January 29, 2015, a default was entered against D. McCabe. On February 3, 2015, Cranbrook filed its instant motion for entry of default judgment against M. McCabe. On February 17, 2015, Cranbrook filed its instant motion for entry of default judgment against D. McCabe. On February 25, 2015, D. McCabe and M. McCabe filed their motions to set aside the defaults. On March 5, 2015, Cranbrook filed its response to the motions.

On April 1, 2015, the Court entered its Opinion and Order denying the motions to set aside default judgment and setting Cranbrook's motion for entry of default judgment for an evidentiary hearing.

On September 21, 2015, the Court held an evidentiary hearing in connection with Cranbrook's motion for default judgment. During the hearing, the Cranbrook and M. McCabe placed the terms of a settlement on the record which resolves Cranbrook's claims against M. McCabe. The portion of the hearing with respect to D. McCabe proceeded, and the Court ultimately took that matter under advisement.

II. Arguments and Analysis

In his opposition, D. McCabe asserts that he is not liable to Cranbrook because his actions did not cause Cranbrook to incur any damages. In its third-party complaint, Cranbrook stated three claims against D. McCabe: Conversion (Count I), Indemnification (Count II), and Conspiracy (Count III). With respect to Cranbrook's statutory conversion claim, a plaintiff who is damaged as a result of another person's wrongful conduct may recover 3 times the amount of actual damages sustained. MCL 600.2919a. In this case, M. McCabe has admitted that she took funds from Cranbrook's client's accounts by drafting and executing checks from said account to herself and to D. McCabe. Further, M. McCabe testified that while she deposited some of the checks into bank accounts held by D. McCabe or by herself and D. McCabe jointly, she would withdraw the same amount of money from the account. Further, D. McCabe testified that he did not execute any of the checks.

"Actual damages" in the context of MCL 600.2919a means "the actual loss of a complainant suffered as a result of a defendant's criminal conduct." *Alken-Ziegler, Inc. v Hague*, 283 Mich App 99; 767 NW2d 668 (2009). In this case, Cranbrook has failed to establish that it has suffered any harm as the result of D. McCabe's actions. While D. McCabe's name appears on some of the forged checks, and some of the funds were deposited into his bank account, M. McCabe's admissions establish that she utilized D. McCabe's bank account merely for the purposes of liquidating the checks. Moreover, D. McCabe's actions may have helped to minimize Cranbrook's damages as he and Defendant Edward McClellan both testified that D. McCabe approached Mr. McClellan to attempt to stop M. McCabe's wrongful conduct. Based on the evidence presented at

the hearing, the Court is convinced that Cranbrook did not suffer any actual damages as the result of D. McCabe's actions/inaction. Accordingly, Cranbrook's judgment amount against D. McCabe in with its conversion claim is zero.

With respect to Count II, Cranbrook has presented no evidence that it has incurred any costs as the result of D. McCabe's actions. While Michigan recognizes common-law indemnity claims, such claims will only be successful where the wrongful act of one results in liability being imposed on another. *Tahash v Flint Dodge Co*, 399 Mich 421; 249 NW2d 110 (1976). In this case, Cranbrook has failed to provide any evidence that it has incurred liability to a third party as the result of D. McCabe's actions. As a result, Cranbrook is not entitled to any damages from D. McCabe in connection with its indemnity claim.

In addition, Cranbrook is also not entitled to any damages from D. McCabe in connection with its conspiracy claim. A conspiracy claim requires a separate underlying tort. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 385; 670 NW2d 569 (2003). In this case, Cranbrook has failed to establish that it has suffered any damages in connection with its conversion claim, which is its only tort claim against D. McCabe. As a result, Cranbrook has also failed to establish that it has suffered any damages in connection with its conspiracy claim against D. McCabe. Consequently, Cranbrook is not entitled to any damages in connection with its conspiracy claim against D. McCabe.

III. Conclusion

Based upon the reasons set forth above, Defendant/Cross-Plaintiff Cranbrook Property Management, Inc.'s motion for entry of default judgment against Third Party-

Defendant Daniel McCabe is GRANTED, IN PART and DENIED, IN PART. A judgment in the amount of \$0.00 is hereby entered. This Opinion and Order resolves the last claim and CLOSES the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: DEC 02 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge