

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MICHIGAN PIPE AND VALVE, INC.,

Plaintiff,

vs.

Case No. 2015-3082-CB

BLADE ACTION, INC. and
CHRISTOPHER SORRENTINO,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for a default judgment. Defendants have conceded that they are liable to Plaintiff for \$40,955.16 in principal and interest and \$12,979.50 in attorney fees based on the parties' contractual relationship, but challenges Plaintiff's position that they are liable for treble damages.

I. Factual and Procedural History

This matter arises out of Defendant Blade Action, Inc.'s ("Defendant Blade") failure to pay the amount owed for certain materials under an open account between Plaintiff and Defendant Blade ("Account"). Defendant Blade's obligations under the Account are guaranteed by Defendant Christopher Sorrentino ("Defendant Sorrentino") pursuant to an unconditional and continuing guaranty ("Guaranty"). Defendants have conceded that they are liable to Plaintiff under the Account for the \$40,955.16 in principal and interest as of February 8, 2015 plus additional interest at a rate of 1.5% per month from June 8, 2015 onward. In addition, Defendants concede that they are

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liable for reasonable attorney fees under the Account's terms and the Guaranty in the amount of \$12,979.50.

In addition to Plaintiff's contractual claims, it has also brought a claim for statutory conversion against the Defendants. Plaintiff seeks treble damages in connection with that claim. Defendant challenges whether Plaintiff is entitled to such damages. On May 5, 2016, the Court held a hearing in connection with the issue of whether Plaintiff is entitled to treble damages. At the conclusion of the hearing, the Court took the matter under advisement.

II. Arguments and Analysis

Plaintiff's request for treble damages is based on its claim for statutory conversion. On January 11, 2016, Defendants were defaulted in connection with all of Plaintiff's claims, including its statutory conversion claim. A default is the equivalent to an admission by the defaulted party to all of the matters well plead. *Matter of Schuster*, 171 BR 807 (1994). In this case, Plaintiff's request for treble damages is its allegation that "upon information and belief [Defendants] diverted funds held in trust and/or intended to Plaintiff to themselves and/or other debts owed by Defendants on unrelated projects." (See Complaint, at ¶48.) However, allegations based solely on "information and belief" are not well plead. *Case v City of Saginaw*, 291 Mich 130, 147; 288 NW 357 (1939). Consequently, Plaintiff's conversion allegations are insufficient on their face, and an award of treble damages based on such allegations is inappropriate. In addition, even if the Court were to determine that Plaintiff's statutory conversion claim is well plead, it is not persuaded the treble damages are appropriate in this case.

A cause of action for statutory conversion provides a trial court with discretion as to whether to award attorney fees. MCL 600.2919a(1); *Aroma Wines & Equip, Inc. v Columbia Distrib Servs, Inc*, 303 Mich App 441, 449-450; 844 NW2d 727 (2013).” Moreover, even if a defendant is defaulted it retained the ability to challenge a potential award of treble damages. *Brooks Williamson & Associates, Inc v Mayflower Const. Co*, 306 Mich App 18, 36; 863 NW2d 333 (2014). Statutory conversion is governed by MCL 600.2919a, which provides:

Sec. 2919a. (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

- (a) Another person's stealing or embezzling property or converting property to the other person's own use.
- (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

(2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

In this case, Plaintiff alleges that Defendants converted funds that it was required to hold in trust under the Michigan Builders Trust Fund Act (“MBTFA”). Specifically, Plaintiff asserts that Defendants violated MCL 570.151, MCL 570.152 and MCL 570.153, and that their violation also amount to conversion. The sections Plaintiff relies upon provide:

In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the

trustee of all funds so paid to him for building construction purposes. [MCL 570.151.]

* * *

Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court. [MCL 570.152.]

* * *

The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud. [MCL 570.153.]

While the MBTFA is a criminal statute, the Michigan Supreme Court has long recognized a civil cause of action for its violation. *B F Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966). In this matter, Plaintiff has alleged that Defendants received money from American Jetway, the owner of the property on which the project was focused, and utilized the funds in a manner that violated MCL 570.152. While Plaintiff has presented evidence that Defendant Blade received \$25,480.00 from the owner of the property in question, it has not presented any evidence whatsoever that the funds were used in a manner that violates the MTFBA. The plaintiff, not defendant, has the burden to establish that funds were utilized in a manner that violated the MTFBA. *James Lumber Co, Inc. v J&S Const., Inc.*, 107 Mich App 793, 796-797; 309 NW2d 925 (1981).

While a defaulted party is deemed to have admitted liability, the decision as to whether to award treble damages is reserved to the discretion of the Court. "Punitive damages reflect a worthy public policy consideration of punishing dishonest defendants and setting an example for similar wrongdoers." *Alken-Ziegler, Inc. v Hague*, 283 Mich App 99; 767 NW2d 668 (2009). In this case, Plaintiff has failed to present any evidence that establishes that Defendants utilized the funds they received in a manner inconsistent with the MTFBA. Moreover, the Court repeatedly advised Plaintiff that it would allow it to conduct additional discovery on the issue of how the funds were utilized, but Plaintiff declined to take advantage of that opportunity afforded to it by the Court. The purpose of MCL 600.2919a, then, is to punish wrongdoing and embezzlement by granting victims of conversion the possibility of treble damages. *New Properties, Inc. v George D. Newpower, Jr., Inc.*, 282 Mich App 120, 137; 762 NW2d 178 (2009). In this case, Plaintiff has failed to establish any facts which would persuade the Court that Defendants' actions rose to a level of culpability that warrants imposing treble damages. Consequently, the Court is convinced that Plaintiff's request for treble damages should be denied.

III. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for a default judgment is GRANTED, IN PART and DENIED, IN PART. Specifically, Plaintiff is entitled to a judgment in the amount of \$40,955.16 in principal and interest as of June 8, 2015 plus additional interest at a rate of 1.5% per month from February 9, 2015 onward and attorney fees in the amount of \$12,979.50. Plaintiff's request for treble damages is DENIED. Plaintiff shall submit a proposed judgment consistent with this Opinion and

Order within 14 days of the date of this Opinion and Order. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and CLOSES the case.

IT IS SO ORDERED.

Date: JUL 08 2016

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