STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

JOLAN JACKSON; and JOLAN JACKSON AS BENEFICIARY OF EQUITY TRUST COMPANY FBO JOLAN JACKSON IRA NO. 118410,

Plaintiffs,

vs.

JAY SPENCER,

Defendant.
_____/

Case No. 13-04271-NZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Investments ordinarily involve risk, and investment advisors routinely receive a portion of the value of portfolios for managing their clients' investments. But those responsible for managing invested funds cannot divert those funds to their own personal use without running a substantial risk of liability for conversion. Here, Plaintiff Jolan Jackson, in his individual capacity and as the sole beneficiary of a self-directed individual retirement account, loaned $241,000 to Mackinac Advisory Services, LLC ("Mackinac Advisory") for the purpose of buying and rehabilitating six properties as investments.[1] Jackson contends that Defendant Jay Spencer diverted those funds to Mackinac Realty Group, LLC ("Mackinac Realty"), which Spencer owned and controlled, and then used that money to pay his personal expenses. Because the record supports Jackson's allegation, the Court shall grant summary disposition to Jackson under MCR 2.116(C)(10) on his conversion claims.

[1] Plaintiff Jackson named Mackinac Advisory and its principal, Tate Jesky, as defendants in this case, but those parties memorialized a settlement with a stipulated dismissal on July 14, 2014, so the Court need not address Jackson's claims against Mackinac Advisory and Jesky.

I. Factual Background

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." Id. In this case, both sides have requested summary disposition under MCR 2.116(C)(10), so the Court shall present the factual background by considering the entire record in an objective manner.

After Plaintiff Jackson retired from General Motors Corporation, he moved his retirement account to a financial advisor named David Scholl, who introduced Jackson to Defendant Spencer and Tate Jesky. On June 16, 2011, Defendant Spencer sent an e-mail explaining how he planned to handle the $241,000 from Jackson's retirement funds and noting that Jackson's money was "funding the acquisition and rehabbing of several homes" listed in the e-mail. See Plaintiffs' Brief in Support of Motion for Summary Disposition as to Defendant Jay Spencer, Exhibit 5. The terms set forth in that e-mail matched a "Direction of Investment" description that Jackson signed on June 21, 2011, See id., Exhibit 6, but the "Direction of Investment" document further explained that Jackson's "IRA is loaning these funds to Mackinac Advisory Services, LLC" – as opposed to Spencer's company, Mackinac Realty – "for the acquisition and rehabilitation/construction of several properties described below." See id. Jackson also received a promissory note signed by Spencer on June 21, 2011, that obligated Mackinac Advisory to pay Jackson $257,870 within 120 days. See id., Exhibit 7.

What happened to Plaintiff Jackson's money differed substantially from the plan Defendant Spencer laid out in his e-mail on June 16, 2011, and confirmed in the promissory note. Specifically, Spencer diverted $180,000 of the funds through America's One Title Agency to the account of his

own company, *i.e.*, Mackinac Realty, in June of 2011. See Plaintiffs' Brief in Support of Motion for Summary Disposition as to Defendant Jay Spencer, Exhibit 10 (bank records for "Mackinac Realty Group LLC" showing wire transfers of $124,000 on June 21 and $56,000 on June 28). After that, Spencer did not use most of Jackson's funds to buy or rehabilitate the identified properties. See id., Exhibit 4 (Deposition of Jay Spencer at 45-48). Instead, some of the money paid for rehabilitation work on properties separate from Jackson's investment, see id., and Spencer spent a substantial share of the money on his own personal expenses. See id. (Deposition of Jay Spencer at 53). In the end, Jackson never received a payoff on the promissory note, see id. (Deposition of Jay Spencer at 50), and Spencer depleted the funds in the Mackinac Realty account and then closed that account. See id. (Deposition of Jay Spencer at 54).

On May 9, 2013, Plaintiff Jackson filed a seven-count complaint against Defendant Spencer as well as Tate Jesky, Mackinac Realty, and Mackinac Advisory. On November 12, 2013, Spencer filed for bankruptcy protection, so the Court honored the automatic stay of the proceedings against Spencer by administratively closing the case. But on April 3, 2014, the United States Bankruptcy Court for the Western District of Michigan granted Jackson's motion for relief from the automatic stay and authorized Jackson to proceed against Spencer in the instant case. After the completion of discovery, Jackson moved for summary disposition on his conversion claims against Spencer, who responded by filing a cross-motion for summary disposition.[2] As a result, the Court must consider each side's request for summary disposition under MCR 2.116(C)(10) on the conversion claims set forth in Counts Four and Five of Jackson's complaint.

---

[2] Neither the bankruptcy stay nor the cross-motions for summary disposition have anything to do with Mackinac Realty. The clerk entered a default against Mackinac Realty on June 18, 2013, so Mackinac Realty has had no involvement in the case since that date.

II. Legal Analysis

"Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v General Motors Corp, 469 Mich 177, 183 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." Id. Applying these standards, the Court shall review Plaintiff Jackson's claims against Defendant Spencer for common-law and statutory conversion.[3]

"Common law conversion . . . consists of any 'distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" See Department of Agriculture v Appletree Marketing, LLC, 485 Mich 1, 13-14 (2010). Statutory conversion under MCL 600.2919a(1)(a) similarly encompasses "converting property to the other person's use." See MCL 600.2919a(1)(a). "Conversion may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party." Plaintiff Jackson asserts that Defendant Spencer engaged in all of those impermissible acts with respect to Jackson's $241,000. The Court agrees.

Bank records establish that Defendant Spencer diverted $180,000 of Plaintiff Jackson's funds through America's One Title Agency to a Mackinac Realty account on June 21 and 28, 2011. See Plaintiffs' Brief in Support of Motion for Summary Disposition as to Defendant Jay Spencer, Exhibit 10. Shortly thereafter, Spencer used that Mackinac Realty account to pay for babysitting services,

---

[3] Plaintiff Jackson has not sought summary disposition against Defendant Spencer on any of the other claims in his complaint. Although the Court presumes that Spencer has abandoned those other claims because they would be dischargeable in bankruptcy, the Court need not determine the justification for Spencer's decision. Instead, the Court simply must focus on the claims Spencer has chosen to advance in his motion for summary disposition.

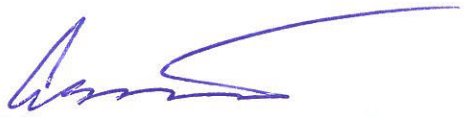
dinners at the Whiskey Lounge, Applebees, Smokey Bones, and other restaurants, animal-clinic bills, vehicle repairs at Fox Pontiac/Buick/GMC, mysterious expenses at "Beachbody," and other charges that had nothing to do with the purchase or rehabilitation of properties. See id., Exhibit 16. Spencer ran his life out of the Mackinac Realty account, using money that Jackson had entrusted to Mackinac Advisors. In the end, Spencer spent nearly $180,000 of Jackson's money for expenses not remotely related to Jackson's investment venture. By July 2012, Spencer had depleted the entire balance in the Mackinac Realty account, see id., Exhibit 17, so the account was closed without any return paid to Jackson for his $241,000 investment or his right to collection on the promissory note. Spencer's acts constitute a paradigmatic example of conversion. Accordingly, the Court shall grant summary disposition to Jackson pursuant to MCR 2.116(C)(10) on his claims in Counts Four and Five of the complaint for common-law and statutory conversion.

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall grant summary disposition to Plaintiff Jackson under MCR 2.116(C)(10) on his claims for common-law and statutory conversion. The Court shall deny Defendant Spencer's cross-motion for summary disposition on those counts. **The Court shall conduct a hearing at 9:00 A.M. on Tuesday, April 28, 2015, to determine the appropriate measure of damages that Defendant Spencer must pay to Plaintiff Jackson.**

IT IS SO ORDERED.

Dated: March 31, 2015



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge