

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

ARCHITECTURAL OPENINGS &  
ACCESS, INC.; HOME SPECIALISTS,  
LLC; LAKESHORE GLASS & METALS,  
LLC; THE HERB RITSEMA CO.; SOBIE  
COMPANY, INC.; and MICHIGAN  
RENTAL, LLC,

Plaintiffs,

vs.

FIFTH THIRD BANK,

Defendant.

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Case No. 14-07940-CZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING SUMMARY DISPOSITION  
TO DEFENDANT FIFTH THIRD PURSUANT TO MCR 2.116(C)(10)

Ordinarily, when a large, active business seeks bankruptcy protection, its creditors must take part in a zero-sum game in which the meager remaining assets of the business are distributed. Thus, when an active general contractor named Lamar Construction suddenly filed for bankruptcy, its many creditors – including a myriad of subcontractors – dug in for a protracted battle in bankruptcy court. But a few ingenious subcontractors came up with a novel idea. Instead of limiting themselves to the scraps available in bankruptcy, they filed this case against Lamar Construction’s banking institution, Defendant Fifth Third Bank (“Fifth Third”), seeking recovery for Fifth Third’s alleged mishandling of funds subject to the Michigan Builders Trust Fund Act (“MBTFA”), MCL 570.151, *et seq.* After the close of discovery, Fifth Third moved for summary disposition under MCR 2.116(C)(10) on the theory that its banking practices with respect to Lamar Construction did not run afoul of the MBTFA. The Court agrees, so Fifth Third must be awarded summary disposition.

## 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, the 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. To assist the Court in resolving their complicated, novel arguments, the parties have justifiably furnished a large collection of materials for the Court’s review. Therefore, the Court must glean the controlling facts from the wealth of information supplied by both sides.

Beginning in 2007, Lamar Construction conducted the lion’s share of its banking activities with Defendant Fifth Third. Like most sophisticated commercial borrowers, Lamar Construction maintained a wide variety of accounts with Fifth Third. Funds available to Lamar Construction quite often moved among these various accounts. Significantly, Lamar Construction had a sizable line of credit that eventually climbed to \$12 million. As a courtesy to Lamar Construction aimed at keeping interest obligations on the line of credit to a minimum, Fifth Third often swept Lamar Construction’s other accounts containing large balances and applied the funds obtained from those sweeps to reduce the balance on Lamar Construction’s line of credit. As far as the Court can tell, this practice appears to be quite common in the commercial-banking industry.

On a daily basis, money arrived in Lamar Construction’s accounts for work on a broad range of construction projects. Because Lamar Construction regularly served as the general contractor on major developments, its accounts at Fifth Third almost always contained payments from developers that were ultimately intended for the subcontractors that reported to Lamar Construction. But when Fifth Third engaged in routine sweeps of Lamar Construction’s accounts, those funds destined for

the subcontractors wound up being applied, at least to some extent, to reduce Lamar Construction's obligation on its line of credit. Nobody even noticed as long as the money kept flowing, but when Lamar Construction filed for bankruptcy protection, the subcontractors quickly came to realize that Fifth Third had swept up money intended for them and then applied that money to pay down Lamar Construction's obligation to Fifth Third on the line of credit.

For its part, Defendant Fifth Third pointed out to Lamar Construction's creditors that it, too, had suffered an enormous loss when the company went into bankruptcy. That loss reflected the fact that Fifth Third had poured much more money into Lamar Construction's accounts than Fifth Third withdrew through all of its sweep activity. Apparently unmoved, six subcontractors filed this action on August 27, 2014, presenting claims for violation of the MBTFA, common-law conversion, and statutory conversion. Since that time, the Court has denied Fifth Third's first motion for summary disposition under MCR 2.116(C)(10) as premature, but granted summary disposition to Fifth Third with regard to the MBTFA claim of Plaintiff Michigan Rentals, LLC. In addition, the plaintiffs filed an amended complaint on May 8, 2015, that sharpened the issues. After the close of discovery, Fifth Third filed a renewed motion for summary disposition under MCR 2.116(C)(10), so the Court must now provide the decision it deferred while discovery was still in progress

## II. Legal Analysis

By filing a renewed motion for summary disposition under MCR 2.116(C)(10), Defendant Fifth Third has chosen to "test[ ] the factual sufficiency" of the plaintiffs' amended complaint. See Maiden v Rozwood, 461 Mich 109, 120 (1999). "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). As our Supreme Court has explained, “[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 well-known standards, the Court must give careful consideration to each of the three claims advanced by the plaintiffs in their amended complaint.

A. The MBTFA Claim.

The plaintiffs’ principal claim set forth in Count One of their amended complaint rests upon the MBTFA, which comprises three statutory provisions, *i.e.*, MCL 570.151, 570.152, and 570.153. See Livonia Building Materials Co v Harrison Construction Co, 276 Mich App 514, 518-519 (2007). In simple terms “[t]he MBTFA imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts.” Id. at 518. As a general proposition, the MBTFA focuses upon the obligations of contractors to ensure that the money they receive from developers is kept safe until it is distributed to the subcontractors who are entitled to the funds. But MCL 570.151 speaks more expansively in stating that “the building contract fund paid by any person to a contractor . . . shall be considered by this act to be a trust fund, for the benefit of . . . laborers, subcontractors or materialmen, and the contractor . . . shall be considered the trustee of all funds so paid to him for building construction purposes.” Thus, although our Court of Appeals has defined the elements of a MBTFA violation to require “that the defendant is a contractor or subcontractor engaged in the building construction industry,” BC Tile & Marble Co, Inc v Multi Building Co, Inc, 288 Mich App 576, 585 (2010), the parties seem to agree Defendant Fifth Third could face MBTFA liability for mishandling trust funds held by its customer, Lamar Construction.

The basic banking operations of Defendant Fifth Third *vis-a-vis* Lamar Construction appear quite clear. When Lamar Construction received payments, the funds would go into a general account at Fifth Third. Without question, some of those funds would be swept by Fifth Third to pay down Lamar Construction's balance on its line of credit. But as a routine matter, Lamar Construction had far more money from the line of credit infused into the general account than Fifth Third swept from the general account to pay down the balance on the line of credit. For example, Lamar Construction received a \$3.2 million wire transfer from Leprino Foods on March 12, 2014, see Fifth Third Bank's Renewed Motion and Brief for Summary Disposition, Exhibit 8, that went into Lamar Construction's general account, see id., Exhibit 7 at page 3, from which Fifth Third swept \$2,960,000 on the date of the deposit, see id., Exhibit 7 at page 1, and then applied to trim the balance on the line of credit. But in the ensuing ten-day period, Fifth Third transferred the aggregate amount of \$3.42 million into Lamar Construction's general account from the line of credit. See Exhibit 7 at page 3. In the same manner, when Lamar Construction received a check for \$3,885,535.58 on the Harbor Village project on March 25, 2014, see id., Exhibit 9, that entire amount was deposited into Lamar Construction's general account on that same date, id. Exhibit 7 at page 3, and then Fifth Third swept \$3.86 million from the general account on the following day, March 26, 2014. See id., Exhibit 7 at page 2. But within a few days of that sweep, Lamar Construction drew \$2.5 million from the line of credit, see id., Exhibit 7 at page 3, and transferred an additional \$2,472,270.40 from its general account for its payables. See id., Exhibit 7 at page 2.

The two sides vehemently disagree about the propriety of Defendant Fifth Third's periodic sweeps of Lamar Construction's general account to pay down the balance on the line of credit. From the plaintiffs' perspective, Fifth Third committed a violation of the MBTFA every time it swept any

money from the general account because doing so amounted to mishandling trust funds. Fifth Third counters that the records of Lamar Construction's accounts clearly show that Fifth Third always put more money into the general account than it swept from that account, and the proof of that fact is the existence of an outstanding balance of nearly \$12 million on the line of credit at the time that Lamar Construction filed for bankruptcy protection. See Fifth Third Bank's Renewed Motion and Brief for Summary Disposition, Exhibit 14 (Fifth Third claim in Lamar Construction bankruptcy). The Court concludes that Fifth Third has the better argument.

As an initial matter, even if all of the funds deposited by Lamar Construction with Defendant Fifth Third constituted trust funds, Lamar Construction did not violate the MBTFA by depositing the funds in its bank account, and Fifth Third did not violate the MBTFA by moving those funds as a result of the routine sweeps. The funds remained with Fifth Third in its custodial capacity as the financial institution of Lamar Construction, and Fifth Third routinely enabled Lamar Construction to draw much more from its line of credit than Fifth Third swept from the general account. If Fifth Third had enriched itself by pulling funds from the general account in light of Lamar Construction's impending bankruptcy, the Court would reach a different conclusion. But Fifth Third's practice of sweeping and replenishing the general account cannot be characterized as a violation of the MBTFA when the funds never left the bank. Indeed, a contrary conclusion could subject banking institutions to MBTFA liability for temporarily moving funds from a general account to a checking account that would otherwise be overdrawn without the infusion of enough money to cover outstanding checks. Banks need not figuratively put the funds of their general-contractor customers into metal boxes and then bury those boxes in the ground in order to avoid MBTFA liability. Banks simply must ensure that their customers' funds remain with the financial institutions in order to satisfy the MBTFA.

Even assuming, *arguendo*, that the money swept from Lamar Construction's general account and applied to reduce the balance on Lamar Construction's line of credit was transferred from Lamar Construction to Defendant Fifth Third, the plaintiffs' MBTFA claim against Fifth Third founders upon the limitations upon the plaintiffs' rights as trust beneficiaries. "[A]n entity or party claiming the status of a trust beneficiary can collect trust property from a transferee of the trustee only if three separate factors are established: the property transferred must in fact be trust property; the transferee must not be a bona fide purchaser for value; and the transferee must still be in possession of the trust property." *In re Williams Brothers Asphalt Paving Co*, 59 BR 71, 75 (Bkrcty WD Mich 1986). In the instant case, even if the swept funds were trust funds and Fifth Third understood the status of the swept funds when Fifth Third applied that money to reduce the balance on Lamar Construction's line of credit, the plaintiffs cannot show that Fifth Third "is still . . . in possession of the trust property." See id. To the contrary, Fifth Third has made a persuasive showing that all of those trust funds and much more money than that flowed from Fifth Third back into Lamar Construction's general account before Lamar Construction sought bankruptcy protection. Therefore, the Court must grant summary disposition to Fifth Third on the MBTFA claim in Count One.

B. Common-Law Conversion.

In Count Two, the plaintiffs accuse Defendant Fifth Third of common-law conversion based upon Fifth Third's practice of periodically sweeping Lamar Construction's general account and using the swept funds to reduce Lamar Construction's obligation on its line of credit. Our Supreme Court has noted that "the scope of common-law conversion is now well-settled in Michigan as 'any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with

his rights therein.”” Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc, 497 Mich 337, 351-352 (2015). Significantly, conversion requires dispossession, destruction, or use of a “chattel.” See id. at 352. Accordingly, “[m]oney is treated as personal property, and an action may lie in conversion of money provided that ‘there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified.’” Dunn v Bennett, 303 Mich App 767, 778 (2014). Here, Fifth Third’s periodic sweeps of Lamar Construction’s general account bore no direct relationship to MBTFA funds, which coursed through Lamar Construction’s various accounts at Fifth Third in a mixture of sundry deposits and advances from Lamar Construction’s line of credit. Under the circumstances, the best that the plaintiffs can show is Fifth Third’s use of generic money from Lamar Construction’s general account to pay down the balance on the line of credit. This does not constitute conversion of money under Michigan law, Dunn, 303 Mich App at 778, so the Court must award summary disposition to Fifth Third pursuant to MCR 2.116(C)(10) on Count Two of the plaintiffs’ amended complaint.

C. Statutory Conversion.

The Court’s analysis of the plaintiffs’ common-law conversion claim in Count Two renders summary disposition on Count Three (alleging statutory conversion) inevitable. Our Supreme Court has observed that statutory conversion under MCL 600.2919a is limited “to a subset of common-law conversions in which the common-law conversion was to the other person’s ‘own use.’” See Aroma Wines, 497 Mich at 355. Consequently, the failure of the plaintiffs’ common-law conversion claim means that the plaintiffs’ statutory conversion claim cannot succeed, regardless of whether the record suggests that Defendant Fifth Third applied Lamar Construction’s funds to its “own use” when Fifth

Third swept Lamar Construction's general account and then used the resulting money to pay down the balance on Lamar Construction's line of credit. Simply put, the plaintiffs' statutory conversion claim fails because the plaintiffs cannot demonstrate that the MBTFA funds "can be identified" as the precise dollars swept from Lamar Construction's general account that Fifth Third used to reduce Lamar Construction's obligation on its line of credit. See Dunn, 303 Mich App at 778. Therefore, the Court must grant summary disposition under MCR 2.116(C)(10) to Fifth Third on Count Three of the plaintiffs' amended complaint.

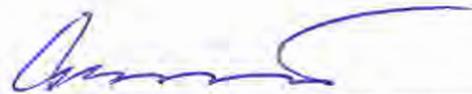
### III. Conclusion

For all of the reasons set forth in this opinion, the Court shall grant summary disposition to Defendant Fifth Third under MCR 2.116(C)(10) on each of the three claims set forth in the plaintiffs' amended complaint. Additionally, the Court concludes that the plaintiffs ought not be afforded the opportunity to amend their complaint again under MCR 2.116(I)(5) because any amendment would be futile. See Ormsby v Capital Welding, Inc, 471 Mich 45, 53 (2004).

IT IS SO ORDERED.

**This is a final order that resolves the last pending claim and closes the case.**

Dated: May 19, 2016



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