

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

MOBILETECH AUTOMOTIVE, L.L.C.,

Plaintiff,

Case No. 13-05000-CKB

vs.

HON. CHRISTOPHER P. YATES

CRYSTAL CLEAN AUTOMOTIVE
DETAILING L.L.C; and ROSS TIMYAN,

Defendants.

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

This dispute about the changing of the locks at leased commercial space turned into a one-sided fight when Defendant Ross Timyan failed to appear for a settlement conference before Judge Mark A. Trusock, who responded to Timyan's absence by entering a default against the defendants, *i.e.*, Timyan and his company, Crystal Clean Automotive Detailing L.L.C. ("Crystal Clean"), under MCR 2.401(G)(1).¹ On January 30, 2014, the Court entered an order denying the defendants' motion to set aside that default, so the case proceeded to trial on June 9 and 30, 2014, with the defendants' liability already established by dint of the default. See Kalamazoo Oil Co v Boerman, 242 Mich App 75, 79 (2000). Accordingly, the Court's responsibility at this juncture simply involves determining the damages to which Plaintiff Mobiletech Automotive, L.L.C. ("Mobiletech") is entitled based upon the evidence adduced at trial. This opinion sets forth the Court's findings of fact, conclusions of law, and verdict that Defendants Timyan and Crystal Clean must pay to Mobiletech the sum of \$248.39 as damages in this case.

¹ Judge Trusock also dismissed the defendants' counterclaims under MCR 2.401(G)(1), so the Court need not address the merits of those counterclaims.

I. Findings of Fact

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, “the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” The Court must render “[b]rief, definite, and pertinent findings and conclusions on the contested matters” that may take the form of a written opinion. See MCR 2.517(A)(2) & (3). Therefore, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

Defendant Crystal Clean leased commercial space at 3413 Eastern Avenue, S.E., in the City of Grand Rapids to Plaintiff Mobiletech and its principal, Matt Wiersma. At first, Crystal Clean was willing to charge Mobiletech rent on the basis of a percentage of Mobiletech’s sales, but in January of 2013, Crystal Clean started charging Mobiletech a fixed monthly rent of \$1,500. By May 2013, Mobiletech was approximately \$6,000 in arrears on its rent obligation. At that point, someone used a key to gain access to the premises and stole a vehicle that had been left for service. That vehicle theft prompted Crystal Clean employee Cynthia VanDenbosch to have the building’s locks changed on May 30, 2013.

On the afternoon of May 30, 2013, Defendant Timyan and Cynthia VanDenbosch met with Plaintiff Mobiletech’s principal, Matt Wiersma, to express concerns about the lack of rent payments and Mobiletech’s work. Wiersma left that meeting and went back to his rented space in the building, where he remained until he departed for the day between 5:30 and 6:30. After Wiersma left for the day, the building was locked. On the following day, May 31, 2013, Wiersma apparently went to the premises and unsuccessfully tried to gain entry. As a result, he filed this action on that day and also obtained a temporary restraining order (“TRO”) at 4:50 P.M. on May 31, 2014, granting him access to the building. Later that evening, Defendant Timyan gave a new key to Wiersma’s attorney, so by

June 1, 2013, Wiersma was afforded access to the building. He stayed on as a tenant without any further interruption in access until he formally vacated the leased space at the end of June 2013. But Wiersma claims in his complaint that his temporary exclusion from late in the day on May 30, 2013, until the morning of June 1, 2013, supports claims for breach of contract, claim and delivery, forcible eviction, and conversion.

II. Conclusions of Law

“ “[A] default settles the question as to well-pleaded allegations and precludes the defaulting party from litigating that issue.” Kalamazoo Oil, 242 Mich App at 79, quoting Wood v DAIIE, 413 Mich 573, 578 (1982). Consequently, the defendants cannot challenge liability with respect to the claims set forth in Plaintiff Mobiletech’s complaint. Accordingly, the Court must accept without any proof that the defendants breached their lease with Mobiletech, effectively evicted Mobiletech on a temporary basis, and temporarily converted Mobiletech’s tools and other property on the premises by changing the locks on May 30, 2013, and failing to promptly give Mobiletech a new key.² Thus, the Court must determine the appropriate measure of damages for those transgressions.

Plaintiff Mobiletech has presented demands for several components of damages: (1) \$96.77 to account for the temporary loss of possession of the rented space; (2) \$3,800.00 for lost profits due to work orders that the company could not accept; (3) trebling of Mobiletech’s aggregate damages of \$3,896.77; and (4) \$24,411.61 in attorney fees. The Court shall address each of these aspects of the request for damages individually.

² The count alleging claim and delivery and demanding return of Plaintiff Mobiletech’s tools and other property has effectively been rendered moot by events occurring on June 1, 2013, and after that date. Specifically, the defendants afforded Mobiletech unfettered access to the premises as of June 1, 2013, so Mobiletech was able to retrieve its own tools and other property at its leisure.

A. Damages for Temporary Exclusion.

Plaintiff Mobiletech seeks \$96.77 as compensation for the short period of time during which it was denied access to its rented space after Defendant Crystal Clean changed the locks. The record establishes that Mobiletech's principal, Matt Wiersma, did not receive a new key from Crystal Clean on May 30, 2013, when the locks were changed, but Wiersma did receive a new key after the close of business on May 31, 2013, so Wiersma was afforded access to the rented space on June 1, 2013. For all practical purposes, therefore, Wiersma was excluded from the rented space for one business day, *i.e.*, May 31, 2013. Because Mobiletech's rent obligation was \$1,500 per month and the month of May has 31 days, the Court concludes that Mobiletech is entitled to 1/31 of the monthly rent, *i.e.*, \$48.39, as compensation for its loss of use of the rented space for one business day.³ This element of damages is predicated upon Mobiletech's claim for breach of the lease agreement.

B. Lost Profits.

Plaintiff Mobiletech's demand for \$3,800.00 in lost profits flows from the testimony of John Burns, who works with consigned cars at Grand Rapids Auto Gallery. Burns testified that he would have given Mobiletech two projects – restoration work on a 1950 Ford pick-up truck for \$3,000 and removal of rust from a Mercedes 280 station wagon for \$800 – but he was unable to have either of the vehicles delivered on May 31, 2013. The Court simply does not accept the testimony that both of those projects required delivery on May 31, 2013, and not on any other date. Mobiletech plainly

³ This amount is exactly one-half of the \$96.77 requested by Plaintiff Mobiletech, which took the position that it was excluded for two days, rather than just one day. The record makes clear that Mobiletech's principal, Matt Wiersma, remained in the rented space all day on May 30, 2013, and then received a new key after business hours on May 31, 2013, so the Court finds that the exclusion resulting from the changing of the locks lasted for only one business day.

was open for business all day long on May 30, 2013, Mobiletech’s principal was readily available by cellular telephone on May 31, 2013, and Mobiletech’s principal received a new key shortly after the close of business on May 31, 2013, thereby allowing him access to the rented space at the very beginning of the day on June 1, 2013. Burns testified that the rust-removal project would have taken “a little while” to complete, and the restoration of the Ford pick-up truck was a major undertaking. Moreover, Burns explained that nobody else “stepped up” to take on either project, so time was not of essence. In sum, the Court simply rejects the theory that Mobiletech would have realized \$3,800 in profit if its principal had been afforded access to the rented space on May 31, 2013.⁴

C. Treble Damages.

Citing authority in two separate statutes, MCL 600.2919a(1) governing statutory conversion and MCL 600.2918 defining forcible eviction, Plaintiff Mobiletech requests treble damages. Thus, the Court must consider each of those statutes to determine whether Mobiletech is entitled to recover three times the amount of its actual damages. As our Court of Appeals recently observed, the statute dealing with conversion provides that a plaintiff “*may* recover 3 times the amount of actual damages sustained[.]” Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc, 303 Mich App 441, 449 (2013), quoting MCL 600.2919a(1). “The term ‘may’ is permissive and indicates discretionary activity.” Id. As a result, “treble damages . . . are discretionary[.]” id., so the decision “whether to award treble damages is a question for the trier of fact[.]” Id. Here, the Court concludes

⁴ Indeed, Jayson Malusky testified that the entire building – including Plaintiff Mobiletech’s rented space – was opened on the morning of May 31, 2013, and remained open throughout that day. Thus, Mobiletech’s principal, Matt Wiersma, simply had to show up at the rented space on May 31, 2013, in order to gain access and conduct business. The Court concludes, therefore, that Wiersma’s unavailability to take on the two projects from Grand Rapids Auto Gallery resulted from Wiersma’s failure to show up for work, rather than Crystal Clean’s changing of the locks.

that Mobiletech should not be awarded treble damages for temporary denial of access to its tools and other equipment that lasted for, at most, one business day. The trial record is bereft of evidence that the defendants made use of Mobiletech's tools and equipment. Indeed, the record strongly suggests that those tools and other equipment simply remained in place throughout the brief period when Mobiletech could not gain access to the rented space. Although the default establishes liability on the claim for statutory conversion, the Court concludes that any statutory conversion was so limited and innocuous that treble damages cannot be justified in this case.

The eviction statute cited by Plaintiff Mobiletech, MCL 600.2918, divides exclusions from property into two categories. The more serious category, defined by MCL 600.2918(1), comprises situations where a tenant "is ejected or put out of any lands or tenements in a forcible and unlawful manner" or "held out and kept out, by force." In such situations involving the use of force, the tenant "is entitled to recover 3 times the amount of his actual damages or \$200,00, whichever is greater, in addition to recovering possession." See MCL 600.2918(1). The less serious category, defined by MCL 600.2918(2), comprises all other situations where a tenant's "possessory interest has been unlawfully interfered with by the owner," including any "change, alteration, or addition to the locks or other security devices on the property without forthwith providing keys or other unlocking devices to the person in possession." See MCL 600.2918(2)(c). In those situations, the tenant is "entitled to recover the amount of his actual damages or \$200.00, whichever is greater." This case manifestly falls into the latter category because the defendants simply changed the locks, rather than expelling or excluding Mobiletech through the use of force, so Mobiletech has no right to the treble damages it seeks. Instead, its remedy is limited to its "actual damages or \$200.00, whichever is greater." See MCL 600.2918(2). Here, that amount must be set at \$200.00.

D. Attorney Fees.

Plaintiff Mobiletech's final claim for damages involves \$24,411.61 in attorney fees. But as a general rule, "attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." See Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 297 (2009). Here, Mobiletech contends that it should receive all of its attorney fees based upon its statutory-conversion claim. To be sure, attorney fees are permissible on a successful claim for statutory conversion pursuant to MCL 600.2919a. But the language of that statute provides that attorney fees "may" be awarded, so such an award falls squarely within the discretion of the trier of fact. See Aroma Wines, 303 Mich App at 449. For two separate reasons, the Court shall exercise that discretion by denying attorney fees to Mobiletech.

First and foremost, although a default establishes liability on the statutory-conversion claim, the dispossession of tools and other property in this case was innocuous and lasted for, at most, one business day. Moreover, the defendants made no use of those tools and other property belonging to Plaintiff Mobiletech. Second, neither Mobiletech nor its principal, Matt Wiersma, paid any attorney fees. Mobiletech's attorneys sent attorney-fee statements to Wiersma on a monthly basis, see Trial Exhibit 3, but Wiersma apparently made no effort to pay the bills. And because Wiersma died before the case went to trial, the likelihood of collection at this point seems, at best, remote. Our Supreme Court and our Court of Appeals have explained that provisions in Michigan law allowing for awards of attorney fees are "not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls." Smith v Khouri, 481 Mich 519, 529 (2008); Van Elslander v Thomas Sebold & Associates, Inc, 297 Mich App 204, 228 (2012). Therefore, when an attorney

agrees to perform legal services *pro bono*, an award of attorney fees “constitutes a windfall” because it “goes beyond making the parties whole.” Van Elslander, 297 Mich App at 237. Here, although the attorneys for Mobiletech did not agree at the outset to represent Mobiletech *pro bono*, their legal work in the face of months of unpaid bills effectively rendered their representation *pro bono*.⁵ If the Court ordered the defendants to pay Mobiletech’s legal fees as an element of damages, that award would constitute a fiction that “goes beyond making the parties whole.” See id. Accordingly, the Court concludes that an award of attorney fees is unwarranted in this case.

III. Verdict

In light of the default entered against the defendants, liability has been established on all of the claims in Plaintiff Mobiletech’s complaint. With respect to damages, the Court’s verdict in favor of Mobiletech includes \$48.39 for the temporary loss of its rented space and \$200.00 as statutorily prescribed relief under MCL 600.2918(2) for the temporary eviction resulting from the changing of the locks by the defendants. Mobiletech may submit a proposed judgment reflecting those damages as well as a request for costs allowed under Michigan law.

IT IS SO ORDERED.

Dated: August 13, 2014



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

⁵ The Court sincerely appreciates counsel’s willingness to remain on the case despite the lack of payments from their client. Too often, attorneys withdraw simply because their legal fees have outstripped their retainer. Seeing a case through to its conclusion not only benefits the court system, but also inevitably raises the public’s esteem for the legal profession.