

8/14/2014

STATE OF MICHIGAN
IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Street
Grand Haven, Michigan 49417
(616)846-8320

* * * * *

DENNIS FOLEY,
Plaintiff,

OPINION AND ORDER

File No. 14-3599-CK

v

Hon. Jon A. Van Allsburg

JSJ FURNITURE CORPORATION,
d/b/a IZZYDESIGN,
Defendant.

Defendant brings a motion for partial summary disposition to count II of plaintiff's complaint¹ pursuant to MCR 2.116(C)(8) and (10). Defendant's motion is granted.

Plaintiff Dennis Foley (Foley) designs furniture. Defendant JSJ Furniture Corporation, d/b/a Izzydesign (Izzydesign) builds and sells furniture. Foley and Izzydesign entered into an agreement, formalized in a signed contract, pursuant to which Foley agreed to design a chair and Izzydesign agreed to build and sell the chair. The parties agreed that Foley would be compensated for his services with royalties paid from revenue generated by sales of the chair.

The parties' contract contains a provision that describes how plaintiff's royalties are to be calculated. Unfortunately, the parties disagree as to how this provision should be construed and applied. Their disagreement led plaintiff to file the instant action. Count I alleges breach of

¹ Plaintiff's complaint is pled in two counts: count I, breach of contract, and count II, conversion.



contract, and Count II alleges conversion by the defendant of royalties due plaintiff under the parties' agreement.

Plaintiff brought a motion for partial summary disposition as to count I, asking that the Court rule as a matter of law that plaintiff's interpretation of the royalty provision was the correct interpretation. On May 22, 2014, this Court held that there was a latent ambiguity in the royalty provision and, for this reason, denied plaintiff's motion for partial summary disposition.

Defendant now brings a motion for partial summary disposition as to count II. Defendant contends that plaintiff's action is no more than an action in breach of contract and therefore, that count II fails to state a claim on which relief can be granted. In the alternative, defendant argues that there is no genuine factual dispute as to count II. Plaintiff responds that revenue generated by the sales of the chairs created a specific and identifiable sum of money due and owing to plaintiff that was held in trust by defendant and that plaintiff's withholding of these funds constituted conversion.

“Under Michigan Law, a plaintiff may sue for the conversion of funds that were delivered to the defendant for a specific purpose, but that the defendant diverted to his or her use.” *Llewellyn-Jones v Metro Property Group, LLC*, ___ F Supp 2d ___ (ED Mich, 2014) (2014 WL 2214209), p 19 (slip op). “It is clear that when the dispute is over moneys owed, conversion is only applicable in cases involving money that is the property of one party but held by another party (e.g., bank accounts, trusts, etc.) which is then wrongfully taken.” *Llewellyn-Jones, supra*.

A conversion claim "... cannot be brought where the property right alleged to have been converted arises entirely from the plaintiff's contractual rights." *Llewellyn-Jones, supra*. However, "it is possible for a party's conduct to result in both a breach of contract and a tort for common law conversion, so long as the defendant's conduct constituted a breach of duty separate and distinct from the breach of contract." *Llewellyn-Jones, supra*.

In *Romeo Investment Ltd v Michigan Consolidated Gas Co*, unpublished per curiam opinion of the Court of Appeals, 2007 WL 1264008 (Docket No. 260320, May 1, 2007), plaintiff alleged that defendant had retained some of the royalty payments that defendant was obligated to pay the plaintiff under an express contract between the parties. Plaintiff brought an action in conversion to recover the withheld payments. The Court of Appeals held that an action in conversion will not lie for failure to pay all of the royalties due under an express contract. *Romeo Investment Ltd, supra*, pp 6-7 (slip op).²

In the case at bar, defendant owes no duty to the plaintiff that is separate and distinct from defendant's duty to pay plaintiff royalties pursuant to the parties' agreement. The proceeds from the sale of the chairs were received by the defendant in payment for the chairs, that is, they were proceeds from the sales of goods. These funds were not delivered to the defendant in safekeeping to be held as royalty payments for the plaintiff. The contract between the parties created no escrow obligation with respect to the specific monies to be paid as royalties. Thus, the funds were not in any sense the property of the plaintiff being held by the defendant and were

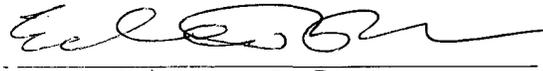
² An unpublished opinion of the Court of Appeals is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994). However, so long as the decision in the unpublished opinion does not conflict with a published decision of the Court of Appeals or a decision of the Michigan Supreme Court, a trial court is free to adopt the reasoning found in the unpublished opinion if the trial court finds the reasoning to be cogent and persuasive. *Steele v Dep't of Corrections*, 215 Mich App 710, 714 n 2; 546 NW2d 725 (1996). This Court finds the reasoning in *Romeo Investment* to be both cogent and persuasive and the Court adopts it as its own. See *Beyer v Verizon North, Inc*, 270 Mich 424, 431; 715 NW2d 328 (2006).

not wrongfully taken by the defendant. For this reason, plaintiff's claim in conversion fails to state a claim on which relief can be granted.

Defendant's motion for partial summary disposition to count II is GRANTED pursuant to MCR 2.116(C)(8).

IT IS SO ORDERED.

Dated: August 14, 2014



Hon. Edward R. Pest

**SIGNED IN THE ABSENCE OF
JON A. VAN ALLSBURG, CIRCUIT JUDGE**