

STATE OF MICHIGAN
COURT OF APPEALS

ECHELON HOMES, L.L.C.,

Plaintiff/Counter-Defendant-
Appellant,

v

CARTER LUMBER COMPANY,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

July 6, 2006

No. 267233

Oakland Circuit Court

LC No. 01-029345-CZ

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Plaintiff/counter-defendant appeals as of right the trial court's order of dismissal of all claims and counterclaims. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This case is before us a second time. See *Echelon Homes v Carter Lumber*, 261 Mich App 424; 683 NW2d 171 (2004) (*Echelon I*), reversed in part by *Echelon Homes v Carter Lumber*, 472 Mich 192; 694 NW2d 544 (2005) (*Echelon II*). The basic facts are set out in those decisions: plaintiff Echelon Homes, L.L.C. builds and develops residential housing, and defendant Carter Lumber Company operates a chain of retail stores selling building supplies. *Echelon I, supra* at 427. This action arises out of the acts of a former employee of plaintiff, Carmella Wood, who worked as a secretary, administrative assistant, and bookkeeper from 1997 to 2000. *Echelon II, supra* at 194.

During this time, Wood "engaged in a scheme with several members of her family to embezzle from [plaintiff]." *Echelon I, supra* at 427. "Wood engaged in fraudulent schemes against [plaintiff], including, but not limited to, forging company checks to herself, opening company credit cards in her name, and opening lines of credit to herself in [plaintiff]'s name." *Echelon II, supra* at 194-195. "The scheme included fraudulently obtaining credit accounts with several vendors, including [defendant], and then using those accounts for their own personal use, including purchasing building supplies for Wood's residence." *Echelon I, supra* at 427.

Specifically, "Wood opened an unauthorized account with defendant . . . and purchased approximately \$87,000 in materials used to remodel her home and her brother's home. [Plaintiff] did not discover Wood's fraudulent activity until June 2000, when it learned that Wood had embezzled over \$500,000. When Wood's embezzlement was discovered, [plaintiff]

had an outstanding invoice from [defendant] for approximately \$27,000.” *Echelon II, supra* at 195. *Id.* “[Plaintiff] reported Wood’s actions to the Michigan State Police and terminated her employment. Wood pleaded guilty to one count of embezzlement of more than \$20,000 and four counts of uttering and publishing a forged instrument.” *Echelon I, supra* at 427-428.

Before *Echelon I* and *Echelon II*, the trial court granted summary disposition in favor of defendant on all four of plaintiff’s claims (fraud, statutory conversion under MCL 600.2919a, aiding and abetting conversion, and aiding and abetting breach of fiduciary duty), and granted summary disposition in favor of plaintiff on defendant’s counterclaim for account stated. *Echelon I, supra* at 428. In *Echelon I*, this Court affirmed the grant of summary disposition in favor of defendant on the aiding and abetting conversion claim, and reversed the grant of summary disposition in favor of defendant on the claims of fraud, statutory conversion, and aiding and abetting breach of fiduciary duty. *Id.* at 447. Additionally, this Court affirmed the grant of summary disposition in favor of plaintiff on defendant’s counterclaim. *Id.* In *Echelon II*, our Supreme Court, in lieu of granting leave to appeal, reversed this Court’s holding that constructive knowledge is sufficient to impose liability under MCL 600.2919a, and ordered the trial court to conduct a hearing to “determine whether there was a material issue of fact concerning whether there was sufficient circumstantial evidence to establish that [defendant] knew that Wood’s transactions were fraudulent.” *Echelon II, supra* at 202. The Court denied leave to appeal on all other issues. *Id.*

On remand, the trial court held an evidentiary hearing in which it attempted to comply with the Supreme Court’s instructions. Following the evidentiary hearing, the trial court found no circumstantial evidence that defendant had knowledge that Wood was perpetrating a fraud and entered a final order for judgment of dismissal with prejudice on that basis.

Plaintiff first argues that the trial court erred in dismissing the claims of fraud and aiding and abetting breach of fiduciary duty because, under the law of the case, there were questions of fact regarding those claims. We agree. We review de novo a trial court’s decision on a motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion under MCR 2.116(C)(10), we consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* “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.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

This Court reversed the trial court’s dismissal of plaintiff’s fraud, statutory conversion, and aiding and abetting breach of fiduciary duty claims and affirmed dismissal of the remaining claims. *Echelon I, supra* at 447. Our Supreme Court reversed this Court’s holding regarding only the statutory conversion claim. *Echelon II, supra* at 202. Therefore, this Court’s determination that a genuine issue of material fact existed regarding the claims of fraud and aiding and abetting breach of fiduciary duty stands. *Echelon I, supra* at 444-446.

Concerning the fraud claim, this Court held that “there was sufficient evidence produced to create a question of fact about whether [defendant] acted recklessly in regard to the lien waivers.” *Id.* at 444. Concerning the claim of aiding and abetting breach of fiduciary duty, this

Court held that “[w]hether [defendant] aided and abetted Wood in her breach of fiduciary duties depend[s] on factual determinations for a jury to decide.” *Id.* at 446. Accordingly, the trial court was required to have a jury trial on the claims of fraud and aiding and abetting breach of fiduciary duty.

Under the law of the case doctrine, a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). A question of law, once decided by an appellate court, will not be decided differently on remand or in a subsequent appeal in the same case. *Id.* The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters already decided during the course of a single continuing lawsuit. *Id.*

This Court’s ruling that genuine issues of material fact existed regarding the claims of fraud and aiding and abetting breach of fiduciary duty is the law of the case because it was not reversed by our Supreme Court. *Echelon II, supra* at 202. The trial court, instead of holding a jury trial on these two claims, revisited them and dismissed them, effectively granting summary disposition in favor of defendant. The trial court failed to follow the law of the case in contravention of this Court’s ruling that summary disposition of these two claims was not warranted. Accordingly, we again reverse the trial court’s dismissal of the claims of fraud and aiding and abetting breach of fiduciary duty.

Plaintiff next argues that the trial court erred when, in reviewing evidence in support of the statutory conversion claim, it stated that it did not have to view the evidence in a light most favorable to plaintiff. We agree. Our Supreme Court remanded to the trial court for a hearing on the claim under MCL 600.2919a to “determine *whether there was a material issue of fact . . . that [defendant] knew that Wood’s transactions were fraudulent.*” *Id.* (emphasis added). This language clearly indicates a summary disposition standard, and summary disposition was the procedure from which the appeals were taken. *Echelon I, supra* at 427. Therefore, the trial court was obliged to apply a summary disposition standard, viewing the evidence in a light most favorable to the non-moving party. *Corley, supra* at 278.

Plaintiff also argues that the trial court erred in holding that there was insufficient evidence to support the statutory conversion claim under MCL 600.2919a, which provides:

A person damaged as a result of another person’s buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property *knew that the property was stolen, embezzled, or converted* may recover 3 times the amount of actual damages sustained
[Emphasis added.]

“The term ‘knew’ in the statute means knowledge that the property is stolen, embezzled, or converted.” *Echelon II, supra* at 202. “Constructive knowledge is not sufficient to impose liability under MCL 600.2919a.” *Id.*

Here, plaintiff’s proofs were not evidence of actual knowledge but of constructive knowledge. For instance, plaintiff emphasizes that defendant opened a credit account for plaintiff *without* knowing whether the person opening the account was even employed by plaintiff. Plaintiff relies on evidence that defendant did *not* attempt to contact the purported

signer of the application, and did *not* ever call one of defendant's two members, the account owner and guarantor, to determine whether he authorized the account, the credit limit increases, or additional users of the account. These facts all point, at best, toward *constructive* knowledge that the account was fraudulent; they do not suggest that defendant *actually* knew that Wood was perpetrating a fraud upon plaintiff.

Plaintiff also cites evidence that defendant knew that plaintiff was a Brighton builder, yet defendant never made deliveries to the Brighton area for plaintiff. But this evidence suggests that defendant *should have known* that Wood was perpetrating a fraud; it does not indicate that defendant *actually* knew so. Plaintiff cites evidence that defendant allowed purchases on plaintiff's account that were inconsistent with plaintiff's business, such as swing set equipment. But swing set equipment could be viewed by defendant's employees as incidental to a builder's business. Plaintiff cites evidence that defendant accepted multiple checks from plaintiff's title company for particular projects without any records to confirm that it supplied goods to those projects. But again, this evidence suggests that defendant *should have known* that Wood was perpetrating a fraud. Accordingly, the trial court did not err in holding that there was insufficient evidence to support the statutory conversion claim.

While the trial court failed to apply the proper standard for a summary disposition ruling, instead employing a preponderance of the evidence standard, it reached the right result, albeit for the wrong reason (applying the wrong standard). None of the evidence proffered at the evidentiary hearing indicated that defendant had actual knowledge of Wood's fraudulent scheme of embezzling money from plaintiff. Where a trial court reaches the right result for the wrong reason, the ruling will not be disturbed. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 82; 709 NW2d 174 (2005). Therefore, we affirm the trial court's dismissal of the statutory conversion claim.

Plaintiff next argues that the trial court improperly excluded evidence concerning construction liens, affidavits, and waivers, and that the trial court erred in using its own personal knowledge of how the building supply industry operated. However, this issue is not properly preserved for appellate review because plaintiff did not object below on the same ground that it presents on appeal; therefore, we decline to address it. MRE 103(a)(1); *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 468; 702 NW2d 671 (2005); *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003).

Plaintiff next argues that the trial court erred in limiting its damages to those flowing from its relationship with defendant. However, it is well settled in Michigan that the liability of each defendant for damages is several only and not joint. *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 50; 693 NW2d 149 (2005); MCL 600.2956. Accordingly, the trial court correctly concluded that plaintiff's damages would be limited to those resulting from its relationship with defendant and not other frauds committed by Wood.

We affirm in part, reverse in part, and remand for a jury trial on the claims of fraud and aiding and abetting breach of fiduciary duty. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens