

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK A. HOFFMEYER and KIMBERLY A.
HOFFMEYER,

UNPUBLISHED
November 15, 2011

Plaintiffs/Counter-Defendants-
Appellants,

v

LON A. INGRAM and BONNY INGRAM,

Defendants/Counter-Plaintiffs-
Appellees.

No. 299868
Tuscola Circuit Court
LC No. 08-024879-CZ

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Patrick A. Hoffmeyer and Kimberly A. Hoffmeyer (hereinafter “the Hoffmeyers”) appeal as of right the trial court’s finding of no cause of action in favor of Lon A. Ingram and Bonny Ingram (hereinafter “the Ingrams”) regarding the Hoffmeyers’ claim for conversion of their personal property. We affirm.

On March 8, 2001, the Ingrams and the Hoffmeyers entered into a land contract for commercial real property. Over time the Hoffmeyers made improvements to the interior of the building on the property and purchased various items, including a bar and related items.

On July 10, 2007, the Ingrams served a forfeiture notice on the Hoffmeyers because they were in default on the land contract. On July 30, 2007, the Hoffmeyers and the Ingrams signed an amendment to the land contract. The amendment indicated that “[a]ll of the purchase money interest and taxes shall, however, be fully paid on or before November 30, 2007.” The amendment also included a provision indicating that at the time of the execution, the Hoffmeyers would assign the land contract to the Ingrams by executing a quit claim deed, and the Ingrams would execute a warranty deed to the Hoffmeyers. Both documents were to be held in escrow by the Ingrams’ attorney. If the balance owed by the Hoffmeyers was not paid by November 30, 2007, then the Hoffmeyers would remove the sound system and big screen television, and vacate the premises. The Ingrams could then record the quit claim deed, terminating the Hoffmeyers’ interest in the property. If, however, the balance owed by the Hoffmeyers was paid in full by November 30, 2007, then the warranty deed executed by the Ingrams would be recorded and supplied to the Hoffmeyers. The Hoffmeyers did not make any of the required payments to the

Ingrams and none of their personal property was removed from the premises by the November 30, 2007, deadline.

On December 23, 2007, Lon Ingram informed Patrick Hoffmeyer that he would be changing the locks on the building. Patrick Hoffmeyer then came to the property and there was an encounter with Lon Ingram during which Patrick Hoffmeyer took the new keys to the building. The police were called and Patrick Hoffmeyer was told by the police to return the keys and vacate the premises or else he would be arrested. Patrick Hoffmeyer complied, and the Hoffmeyers did not take any of their personal property from the premises on that date.

The next contact the Hoffmeyers had with the Ingrams occurred in approximately February 2008, when Kimberly Hoffmeyer was contacted by Lon Ingram who advised her that he believed that he had sold the building. Kimberly Hoffmeyer alleges that she asked Lon Ingram if she could get her personal property off of the premises, but was denied access.

On March 6, 2008, the Hoffmeyers' attorney sent a letter to Lon Ingram demanding the return of the Hoffmeyers' personal property. The letter included a list of all of the personal property that the Hoffmeyers claimed was on the premises. The real property was sold on March 7, 2008. The personal property contained on the premises at the time of sale had been accumulated by the Hoffmeyers from the onset of the land contract through 2007.

The Hoffmeyers filed a complaint against the Ingrams for conversion of their personal property due to the Ingrams' failure to return the Hoffmeyers' personal property after demands had been made. The Ingrams asserted that the Hoffmeyers had ample opportunity to remove their personal items from the premises before and after it was sold, and denied that the value of the personal property exceeded \$25,000. The Ingrams filed a counterclaim against the Hoffmeyers for breach of contract.

Following a bench trial, the trial court found that there was no cause of action against the Ingrams. The court ruled that there was no evidence that the Ingrams wrongfully exercised dominion or control over the Hoffmeyers' personal property. The court found that the Hoffmeyers did not show that they made a reasonable attempt to recover their property. The court also ruled that there was no cause of action against the Hoffmeyers with respect to the counterclaim.

On appeal, the Hoffmeyers argue that the trial court created a new element for a claim of conversion by requiring that they show a reasonable attempt to recover their property. The Hoffmeyers contend that requiring a plaintiff to make a reasonable attempt to recover their property in order to show that their right to possession has been refused would be futile and is not required when proving conversion. The Hoffmeyers assert that proving a claim of conversion simply requires the showing that they owned the property and that the Ingrams significantly interfered with their ownership of the property. We disagree.

The Hoffmeyers were not required to make objections in the trial court to preserve their issues for appeal, as “[n]o exception need be taken to a finding or decision” of the trial court.¹ This Court reviews “[t]he trial court’s legal conclusions . . . de novo.”²

There is both common law and statutory conversion. Common law conversion is defined as “any distinct act of dominion wrongfully exerted over another’s personal property. It occurs at the point that such wrongful dominion is asserted.”³

Under the common law, conversion may be committed by:

- (a) intentionally dispossessing another of a chattel,
- (b) intentionally destroying or altering a chattel in the actor’s possession,
- (c) using a chattel in the actor’s possession without authority so to use it,
- (d) receiving a chattel pursuant to a sale, lease, pledge, gift or other transaction intending to acquire for himself or for another a proprietary interest in it,
- (e) disposing of a chattel by a sale, lease, pledge, gift or other transaction intending to transfer a proprietary interest in it,
- (f) misdelivering a chattel, or
- (g) refusing to surrender a chattel on demand.⁴

A plaintiff must show “that a reasonable attempt has been made to recover their property in order to establish that their right to possession has been refused. Once this refusal is established they may recover the value of the lost or damaged goods determined as of the time of the conversion.”⁵ “If there is a refusal of the right to possession a conversion has occurred and no further demand is necessary.”⁶ “[L]iability for conversion does not arise . . . if the actor is privileged to dispose of the chattel.”⁷

¹ MCR 2.517(A)(7).

² *Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 265; 673 NW2d 815 (2003).

³ *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982).

⁴ *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960), citing 1 Restatement Torts, 1d, § 223.

⁵ *Gum v Fitzgerald*, 80 Mich App, 234, 239; 262 NW2d 924 (1977).

⁶ *Id.*

⁷ *Thoma*, 360 Mich at 438.

The statutory cause of action for conversion is codified in MCL 600.2919a, and permits a plaintiff to obtain treble damages⁸ against a defendant who:

[B]uy[s], receiv[es], possess[es], conceal[s], or aid[s] in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.⁹

The Hoffmeyers' complaint alleges facts in support of common law conversion. The complaint indicates that the Hoffmeyers demanded that the Ingrams return their personal property, but that the Ingrams refused. The complaint requests treble damages pursuant to MCL 600.2919a, however, it does not provide facts to support that statutory conversion is the proper cause of action.¹⁰ Regardless of whether the Hoffmeyers are making a claim for common law or statutory conversion, the same analysis applies.

This Court in *Gum* clearly stated that it is required that a "reasonable attempt" be made to recover property to establish that a plaintiff's "right to possession has been refused" proving conversion.¹¹ Since it is the Hoffmeyers' claim that the Ingrams failed to surrender a chattel on demand, a showing that they made a reasonable to attempt to recover their property is necessary to prove that their right to possession was refused by the Ingrams. Since the Hoffmeyers state in their complaint that demands were made to the Ingrams for the return of their personal property, the record would suggest that the Hoffmeyers were aware of this requirement at the time the complaint was filed. As such, the trial court did not create a new element for the claim of conversion.

The Hoffmeyers also argue on appeal that they made reasonable attempts to obtain their property by demanding that the Ingrams return the property in February 2007, and thereafter by having their attorney send a demand letter. We disagree.

"This Court reviews a trial court's findings of fact for clear error. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made."¹²

⁸ Treble damages are three times the amount of actual damages sustained, plus costs and reasonable attorney fees. [MCL 600.2919a(1)].

⁹ MCL 600.2919a(1)(b).

¹⁰ MCL 600.2919a.

¹¹ *Gum*, 80 Mich App at 239.

¹² *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995).

Whether the attempts by the Hoffmeyers were reasonable is a determination to be made by the finder of fact. This Court will not substitute its “judgment for the fact findings of a trial judge unless his decision appears against the great weight of the evidence.”¹³

The record indicates that the Hoffmeyers had keys to the property until December 23, 2007, almost one month after the deadline set for them to vacate the premises due to non-payment. The Hoffmeyers testified that they failed to remove their property before the deadline because Lon Ingram had reassured them that they could leave their personal property on the premises while they attempted to sell the property, get an investor for the property, or until the spring of 2008. There is nothing in writing to denote an agreement allowing the Hoffmeyers’ personal property to remain on the property after November 30, 2007.

Lon Ingram testified that on December 23, 2007, he called Patrick Hoffmeyer and asked that he come to the property and remove the television and sound system, but that Hoffmeyer refused. Kimberly Hoffmeyer testified that she also spoke with Lon Ingram on December 23, 2007, without her husband being present. Kimberly Hoffmeyer also testified that Lon Ingram did not request that she remove the personal property at that time. While the Hoffmeyers came to the property on December 23, 2007, and were aware that Lon Ingram was changing the locks, no personal property was removed by the Hoffmeyers.

There was no evidence introduced at trial regarding any efforts by the Hoffmeyers to obtain their property after the December 23, 2007, encounter until February 2008. The alleged verbal denial by Lon Ingram of Kimberly Hoffmeyer’s request to obtain their property in February 2008 is not conceded to by the Ingrams. Also, there is no other evidence that the Hoffmeyers contacted the police, went to the building, or made any effort to obtain their property.

Lon Ingram admitted that he received the March 6, 2008, letter from the Hoffmeyers demanding their personal property, and then called his attorney. Lon Ingram claims that his attorney sent the Hoffmeyers’ attorney a letter indicating that the Ingrams would comply with the demand if the outstanding property taxes were paid. The sale of the property was final the next day on March 7, 2008, at which time the Ingrams were no longer in possession of any of the Hoffmeyers’ personal property as it remained on the premises.

The sole written demand for the Hoffmeyers’ personal property was sent more than three months after the date designated in the amendment to the land contract for the Hoffmeyers to remove their personal property from the premises. The remaining evidence regarding the Hoffmeyers’ efforts to obtain their property was in the form of testimonial evidence and was not conceded to by the Ingrams. As such it became an issue of the credibility of the parties. The court found that based on the weight of the evidence the Hoffmeyers’ attempts to obtain their property were not reasonable. This Court “should not conduct an independent review of

¹³ *Waldo v Moore*, 16 Mich App 693, 694; 168 NW2d 627 (1969); *Berger v Berger*, 277 Mich App 700, 706-707; 747 NW2d 336 (2008).

credibility determinations, disregard findings of fact, or create new findings of fact.”¹⁴ There is nothing in the record to suggest that a mistake was made by the trial court. Therefore, the trial court’s ruling that the attempts were not reasonable must stand.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

¹⁴ *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010).