IN THE SUPREME COURT OF THE STATE OF MISSOURI

Missouri Supreme Court No. SC89795

MOORE AUTOMOTIVE GROUP, INC.,

Appellant,

v.

SANDY GOFFSTEIN, and GOFFSTEIN, RASKAS, POMERANTZ, KRAUS & SHERMAN, L.L.C.,

Respondents.

APPEAL FROM THE ST. LOUIS COUNTY CIRCUIT COURT
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 2
Cause No. 2107CC-02219
The Honorable Maura B. McShane, Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT

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ARGUMENT

I. MOORE'S LEGAL ARGUMENTS AS TO THE PROPER SCOPE OF RULE 90.07 ARE NOT PRECLUDED BECAUSE THEY WERE RAISED AT THE TRIAL COURT AND AT EACH STAGE OF THESE PROCEDINGS AND BECAUSE MOORE MAY MAKE ANY ARGUMENT FOR REVERSAL OF SUMMARY JUDGMENT WHICH IS SUPPORTED BY THE RECORD ON APPEAL.

In a portion of the Argument not included under any specific Point Relied On, Respondents attempt to avoid a decision on the appropriate scope of Rule 90.07 by claiming that Moore's arguments are precluded because Moore failed to raise these arguments at the trial level. (*See* Page 13 of Respondent's Brief). This is simply not correct for two reasons.

A. Moore Has Consistently Argued that Rule 90.07(c) Should Not Preclude All Inquiry Into the Propriety of the Transfer at Issue.

First, Moore has consistently argued throughout this litigation that Missouri Supreme Court Rule 90.07 should not preclude Moore's present claims against Respondent Goffstein for both legal and equitable relief. For example, in Moore's Supplemental Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Moore argued that "even assuming Defendant's interrogatory responses are conclusively binding upon Plaintiff; that does not preclude Plaintiff

from pursuing its causes of action." (LF 258). Moore further argued that "[r]egardless of whether the funds at issue were Defendants' property as of December 21, 2006, the service date of the interrogatories, Plaintiff may still claim that the funds were converted by Defendants or obtained by improper means between the date of receipt by Defendants, October 7, 2005 and December 21, 2005." (LF259).

Moore's Original Appellant's Brief before the Eastern District also contained the same arguments as to why Moore's current claims are not precluded by Rule 90.07. For example, under Point II, Moore argued:

> "Moore is alleging that the conversion, fraud and/or conspiracy regarding the money Lewis transferred to Defendants occurred prior to the service of the Pre-Judgment Writ of Attachment on Defendant. … The facts and propriety regarding what happened to the $286,790.17 during the seventy-five day between October 7 and December 21, 2005 have not been conclusively established by Defendants' interrogatory answers."

(Original Brief of Appellant, p. 32).

Obviously, both Moore's and Respondents' arguments have been expanded and refined during the briefing process. However, the substance of the dispute over the scope of Rule 90.07(c) has not changed. Respondents argue that their

garnishment interrogatory answer "cuts off all inquiry with respect to any earlier time period." (Respondents' Substitute Brief, p. 35). Moore argues that "Defendants' responses do not establish that, as a matter of law, the manner in which these funds were acquired or the retention of them by Defendant is proper." (Original Brief of Appellant, p. 26). Whether Rule 90.07(c) precludes all claims by Moore against Respondents is, and always has been, the central issue in this case.

B. Moore May Advance Any Argument on Appeal that is Supported by the Record.

Second, even if Moore had not raised these issues below, Moore would still be able to raise them on appeal. "A party against whom summary judgment is rendered may advance for reversal any legal argument that is supported by the record." *Johnson v. McDonnell Douglas Corporation*, 745 S.W.2d 661, 663 (Mo. banc 1988) (Blackmar, J., dissenting).[2] "It is of no significance that the point was raised for the first time on appeal." *Id.*

In this case, the trial record reflects the highly suspect circumstances surrounding the transfer of the funds from Lewis to Respondents on the eve of civil

[2] Justice Blackmar dissented on grounds unrelated to the issue of whether appellant's claim was precluded, and the majority opinion also reached the merits of appellant's argument that was first raised on appeal. *Johnson,* 745 S.W. at 663.

and criminal cases being filed against her. The record supports Moore's argument that Respondents should not be allowed to prevent all inquiry into the propriety of their actions through an overly broad reading of Rule 90.07. In short, Moore's arguments are not precluded as they are supported by the record in this case.

C. The Sole Case Cited by Respondents is Not On Point.

In support of its position, Respondents cites a single case, *Vinson v. Vinson*, 243 S.W.3d 418, 423 (Mo. App. E.D. 2007) and quotes a portion of that case out of context. However, the *Vinson* decision is not relevant to the present case because *Vinson* dealt with an appeal from a divorce case that had been bench tried, in which a completely different standard of review is applied. *Cf. Vinson*, 243 S.W.3d at 421-22 *with ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc. 1993). On appeal, the appellant attempted to assert an argument she had not raised at *the trial* of the matter. *Vinson*, 243 S.W.3d at 423. For that reason, the Court of Appeals found that the issue had not been properly preserved for appellate review. *Id.*

In support of this position, the *Vinson* court cited a single case, *Savory v. Hensick*, 143 S.W.3d 712, 719 (Mo. App. E.D. 2004). *Savory* was also not an appeal from a grant of summary judgment. Rather, in *Savory*, the appellant was appealing from an unfavorable jury verdict. *Savory*, 143 S.W.3d at 715. On appeal, the appellant attempted to assert an argument that had not been raised in

the appellant's motion for a directed verdict as required by Rule 72.01. *Id.* at 719. For this reason, the Court of Appeals found that the argument had not been preserved for review. *Id.*

Both cases are factually and procedurally distinct from the present case and as addressed above, Appellant's arguments have been properly asserted.

D. Conclusion.

Moore has consistently argued throughout this litigation that Missouri Supreme Court Rule 90.07 should not preclude Moore's present claims against Respondent Goffstein for both legal and equitable relief. Furthermore, even if Moore had not raised these issues below, Moore would still be able to raise them on appeal.

For these reasons, Moore respectfully requests that this Court issue an opinion based upon the merits of Moore's argument that Rule 90.07 does not preclude Moore's claims against Respondents.

II. MOORE HAS ADEQUATELY PLED CLAIMS FOR CONVERSION, FRAUD AND CIVIL CONSPIRACY.

Respondents also attempt to avoid the primary issue in this case by attacking the adequacy of Moore's pleadings for the first time on appeal. The Court should reject this diversion, as Moore's First Amended Petition (LF 88-96) clearly sets forth principles of substantive law which, if proven true, would entitle Moore to relief.

"When an attack on the sufficiency of a petition is made for the first time on appeal, the pleading will be held good unless it wholly fails to state a claim." *Lone Star Industries, Inc. v. Howell Trucking, Inc.*, 199 S.W.3d 900, 905 (Mo. App. E.D. 2006) (citing *Sumpter v. J.E. Sieben Const. Co.*, 492 S.W.2d 150, 153 (Mo. App. 1973)). "In this determination, the petition will be given its fullest intendment as a claim for relief." *Id.*

Respondents have the burden of establishing that, " taking all factual allegations as true, plaintiff's pleadings are insufficient to establish a cause of action." *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33, 35-36 (Mo. 2003). Failure to state a claim "is solely a test of the adequacy of the plaintiff's petition." *Id.* "It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." *Id.*

A. Conversion.

Moore has properly pled a claim for conversion and the limited factual record supports this claim. Conversion can be shown by one of three methods: "(1) a tortious taking; (2) any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the true owner's rights; or (3) by a refusal to give up possession to the owner on demand, even though the defendant's original possession of the property was proper." *Mackey v. Goslee*, 244 S.W.3d 261, 263-264 (Mo. App. S.D. 2008).

While ordinarily a plaintiff cannot use conversion to sue for an ordinary indebtedness, "money can be an appropriate subject of conversion 'when it can be described or identified as a specific chattel.'" *In re Estate of Boatright*, 88 S.W.3d 500, 506 (Mo. App. S.D. 2002) (quoting *Breece v. Jett*, 556 S.W.2d 696, 709 (Mo. App. 1977)). "Also, misappropriated funds placed in the custody of another for a definite purpose may be subject to a suit for conversion." *Id.* (multiple citations omitted).

In this case, the funds at issue are clearly an identifiable amount coming from a single source. Moreover, Moore has alleged that Lewis transferred the funds at issue to Respondents in order to begin repaying Moore the money she had stolen. (LF 90). This position is supported by Respondent Goffstein's statements to Judge Wiesman regarding the purposed of these funds. (LF 176-177, A 13-14).

Respondents have intentionally failed or refused to transfer or give possession and control of money that is rightfully Moore's. (LF 91). Moore also alleges that the Respondents have maintained and continue to maintain possession and control over said monies to the exclusion of Moore's rights and interests in said monies. (LF 91).

Moore's allegations cite a specific, identifiable body of funds which Lewis placed with Respondents for a specific purpose and which Respondents have since misappropriated. Based on these factual allegations, Moore has stated a claim for conversion against Respondents.

B. Fraud.

Moore has already established that the First Amended Petition adequately alleges the elements of fraud with particularity, as required by Rule 55.15, and that argument will not be repeated here. (See Substitute Appellant's Brief, pp 31-32).

However, even if the Court determines that Moore has not stated a claim for common law fraud, Moore has still stated a claim pursuant to the Missouri Uniform Fraudulent Transfer Act (MUFTA), R.S.Mo. §428.005, et seq. "[T]he character of a cause of action must be determined from the factual allegations of the pleading, without regard to the caption or name assigned by the pleader." *Temple v. McCaughen & Burr, Inc.*, 839 S.W.2d 322, 326 (Mo. App. E.D. 1992) (citing *Jenish v. Weaver,* 676 S.W.2d 526, 527 (Mo. App. 1984)).

The MUFTA states: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor… if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay, or defraud any creditor of the debtor." R.S.Mo. §428.024. "To establish a cause of action under [the MUFTA], the creditor must show a conveyance by the debtor for the purpose of putting his assets beyond the reach of the creditor." *Campbell v. Rickert* , 938 S.W.2d 282, 286 (Mo. App. S.D. 1997)

In this case, Moore alleges Lewis transferred the funds at issue to Respondents for the purpose of repaying Moore the monies owed to him, and Respondents subsequently transferred or misappropriated these funds for attorney's fees, costs and expenses. (LF 93). Furthermore, "[s]aid transfers were undertaken with the intent to hinder, delay or defraud Plaintiff." (LF 93).

The MUFTA also set forth eleven badges of fraud, which can be used by the court to determine a debtor's actual intent. R.S.Mo. §428.024. Several of these badges are highly relevant here, including:

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(7) The debtor removed or concealed assets;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred.

R.S.Mo. §428.024.

The facts of this case weigh heavily against Respondents on all five of these factors. Even if the Court were to determine that there existed some technical deficiency with regard to Moore's fraud claim, Moore has clearly pled a claim under the MUFTA.

C. Civil Conspiracy.

As Moore has adequately pled claims for conversion, fraud and fraudulent transfer against Respondents, Moore has also adequately pled a claim for civil conspiracy. "The essence of a civil conspiracy is an unlawful act agreed upon by two or more persons." *Mackey v. Mackey*, 914 S.W.2d 48, 50 (Mo. App. W.D. 1996). Moore alleges that Respondents and Lewis had a meeting of the minds to deny Moore its interests in the funds, through the actions as set forth in the First Amended Petition. (LF 96). Since Moore's has adequately pled claims for fraud and conversion, Moore's allegations in Count V are sufficient to state a claim for civil conspiracy.

D. Conclusion.

Moore has adequately pled claims for conversion, fraud and civil conspiracy. Therefore, Moore respectfully requests that this Court issue an opinion

based upon the merits of Moore's argument that Rule 90.07 does not preclude Moore's claims against Respondents.

III. MOORE HAS ADEQUATELY PLED CLAIMS FOR CONSTRUCTIVE TRUST AND MONEY HAD AND RECEIVED.

Respondents also argue that Moore fails to state a claim for Constructive Trust and Money Had and Received, primarily because Moore does not state that there is no adequate remedy at law. (See Respondents' Substitute Brief, p. 42.) This argument fails because the absence of the phrase "no adequate remedy at law" from Moore's First Amended Petition is not fatal to Moore's claims.

A. Constructive Trust.

Count II of the First Amended Petition alleges facts sufficient to state a claim for unjust enrichment and a constructive trust. "The elements of unjust enrichment are: 'a benefit conferred by a plaintiff on a defendant; the defendant's appreciation of the fact of the benefit; and the acceptance and retention of the benefit by the defendant in circumstances that would render that retention inequitable.'" *Howard v. Turnbull*, 258 S.W.3d 73, 76 (Mo. App. W.D. 2008) (citing *Hertz Corp. v. RAKS Hospitality, Inc.*, 196 S.W.3d 536, 543 (Mo. App. E.D. 2006)).

Noticeably absent from the elements listed in *Howard* is a recitation that the plaintiff has no adequate remedy at law. In *Howard*, the court held the plaintiff successfully stated a claim for unjust enrichment by alleging that the defendants "accepted and retained the benefit under circumstances that would render the

retention inequitable." *Id.* Similarly, Moore alleges that Respondents "have assets in their possession received by them in trust for the benefit of Plaintiff…[and Respondents] have been unjustly enriched and it is unfair and wrong to allow [Respondents] to maintain possession of those assets of Julie Lewis." (LF 92).

Moore's allegations, in combination with the factual allegations contained in the remainder of the First Amended Petition, satisfy the requirements for stating a claim for unjust enrichment or constructive trust. Furthermore, even if Moore is required to recite the phrase "no adequate remedy at law," this could be remedied by simply amending the Petition and should not be grounds for dismissing Moore's entire case.

B. Money Had and Received.

Moore has already addressed Respondents' argument that Moore has failed to state a claim for money had and received. (See Substitute Appellant's Brief, pp 39-40). However, there is one issue that requires a reply.

Even if Moore were required to state that it has "no adequate remedy at law" in order to state a claim for equitable relief, there is no equivalent requirement in order to state a claim for money had and received. Money had and received is a legal claim based upon equitable principles. *Bueneman v. Zykan*, 181 S.W.3d 105, 113 (Mo. App. E.D. 2005). Thus, Respondents are incorrect in insisting that

Moore is required to recite that it "has no adequate remedy at law" in order to state a legal claim for money had and received.

C. Conclusion.

Moore has adequately pled claims for constructive trust and money had and received. Therefore, Moore respectfully requests that this Court issue an opinion based upon the merits of Moore's argument that Rule 90.07 does not preclude Moore's claims against Respondents.

IV. MOORE WAS UNABLE TO INQUIRE INTO THE SOURCE OF THE FUNDS TRANSFERRED FROM LEWIS TO RESPONDENTS BECAUSE THE TRIAL COURT UNREASONABLY LIMITED THE SCOPE OF DISCOVERY.

Several times throughout their brief, Respondents insist that there is no direct evidence in the record that the funds transferred from Julie Lewis to Respondents are the same funds that Lewis stole from Moore. The reason for this lack of evidence is that the Trial Court prevented Moore from inquiring into the source of Lewis's funds, or any other aspect of the transfer. The Trial Court limited Moore's discovery to a single deposition of Respondent Goffstein.

However, the few facts that are on the record clearly support an inference that the money Lewis transferred to Respondents was wrongfully obtained from Moore, and as the non-movant, Moore is entitled to all reasonable inferences in his favor. *Daugherty v. City of Maryland Heights,* 231 S.W.3d 814, 818 (Mo. banc 2007). These facts are as follows:

Near the end of September, 2005, Julie Lewis was confronted by a fellow employee about improper payments out of Moore's bank account. (Transcript of Proceedings, LF 174 – 175, A 11-12). That same day, Lewis resigned as chief financial officer of Moore Automotive. (LF 168, A 5). On Monday, October 3, 2005, Lewis met with Ron Moore and admitted to stealing $280,000.00 from the

company. (LF 168, A 5). She also offered to pay Moore Automotive that amount back. (LF 168, A 5). On Thursday, October 7, 2005, Lewis transferred the $286,790.17 at issue in this case to Respondents. (Deposition of Goffstein, LF 285, A 26). Respondents accepted this sum without entering into any kind of written agreement with Lewis. (LF 289, A 30).

On November 18, 2005, a hearing was held on Moore's Motion for Pre-Judgment Writ of Attachment during which Respondent Goffstein stated, on the record, that Lewis had transferred the $286,790.17 to Respondents to serve as a down payment to repay Moore for the funds that she had stolen. (LF 176-77, A13-14). Lewis eventually pled guilty to stealing in excess of two million dollars from Moore over a several year period. (LF 197). Given the nature and amount of money embezzled from Moore, it is nonsensical to argue that Lewis had any money of her own that was not derived from Moore. Furthermore, there is nothing in the record to suggest these funds came from another source. As such, the record certainly supports the inference that Lewis transferred money that was rightfully Moore's to Respondents

The facts of this case underscore the importance of interpreting Rule 90.07 in a manner that does not prevent inquiry into fraudulent or otherwise unlawful transactions.

CONCLUSION

The facts of this case present a perfect case to address Moore's argument that Rule 90.07 must be interpreted consistent with Rule 41.03 and in a manner that promotes justice and minimizes the number of cases disposed of on technical grounds. Respondents should not be allowed to cut off all inquiry into the propriety of their transaction with Lewis by hiding behind an overly-broad interpretation of Rule 90.07.

The preclusive effect of a failure to object to an Interrogatory Response pursuant to Rule 90.07 should be limited to garnishment proceedings. It should not preclude a separate cause of action inquiring into the propriety of a transfer between a debtor and a garnishee. This is even more compelling in a case such as this where the garnishee profited from the transfer. Clearly Rule 90.07 was not intended to prohibit inquiries into allegedly fraudulent transactions. Consistent with Rule 41.03, this Court should limit the preclusive affect of any interrogatory answers to garnishment proceedings and allow Moore to inquire into the propriety of the transaction at issue.

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CERTIFICATION

Comes now Jamie L. Boock, pursuant to Rule 84.06(c), and certifies that the brief complies with Rule 84.06(b) in that it contains 3,892 words.

Further, pursuant to Rule 84.06(g), counsel certifies that the CD-ROM has been scanned for viruses and is virus-free.

Finally, pursuant to Rule 84.08, counsel does hereby certify that one (1) regular copy and one (1) electronic copy of Appellant's brief was served via United States Mail, postage prepaid this 29th day of April, 2009, upon Charles Alan Seigel, Michael Fisher and Matthew J. Aplington, 911 Washington Ave., 7th Floor, St. Louis, MO 63101.

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