IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 13, 2002 Session

PATRICK C. COOLEY, et ux. CATHY COOLEY, v. FIRST AMERICAN BANK and NATIONSBANK

Direct Appeal from the Circuit Court for Roane County
No. 11847 Hon. William Lantrip, Circuit Judge

No. 2001-02185-COA-R3-CV

Bank depositors brought action against Banks for mishandling depositors' check payable to the Internal Revenue Service. The Trial Court granted Banks summary judgment. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Gerald Largen, Kingston, Tennessee, for Appellants.

H. Frederick Humbracht, Jr., and Melissa R. Ballengee, Nashville, Tennessee, for Appellee, NationsBank of Tennessee, N.A.

Melinda Meador and Regina M. Lambert, Knoxville, Tennessee, for Appellee, First American National Bank, AmSouth Bank.

OPINION

Plaintiffs' action against defendant banks resulted in a summary judgment in the Trial Court in favor of the defendants.

Plaintiffs alleged in their suit against defendants First American Bank and NationsBank, that they had prepared their personal quarterly income tax return and mailed it, along with a check drawn on the First American Bank in the amount of $18,400.00, that the return and check were received by the Internal Revenue Service, and that the check was deposited with

NationsBank. The check was then forwarded to First American, and at some point along the way was treated as a check for $8,400.00, rather than $18,400, apparently because the "1" overlapped the dollar sign in the numerical portion of the check. The written-out portion of the check, however, reflected the proper amount. First American paid $8,500.00 to NationsBank, who, in turn, paid the same amount to the IRS, who credited that amount to plaintiffs' account, leaving a deficiency of $10,000.00 owing the IRS.

Plaintiffs further allege the error was discovered some days later, and an additional $10,000.00 was taken out of their account, and that First American claims to have remitted same to the IRS, but the IRS had not received it. As a result, plaintiffs claims penalties have been assessed against them by the IRS.

The plaintiffs' multi-faceted complaint, then alleged the defendants were guilty of conversion, trover, theft, fraudulent breach of trust, and outrageous conduct. Also charged are RICO violations which would subject defendants to treble damages.

First American denied the allegations, except that the check was written out for $18,400.00, but First American stated that the numerical amount shown was $8,400.00, and attached a copy of the check, and a copy of the Clearing House Adjustment showing that the Bank had transmitted $10,000.00 to NationsBank on July 10, 1997, and further that it was not responsible for creating the mistake which was made regarding the check.

NationsBank of Tennessee also answered, denying the allegations in the Complaint, and stated that the check in question was received by BankOne (formerly First Chicago Bank) pursuant to a servicing agreement with the IRS, and that First Chicago micro-encoded the check as if it were drawn in the amount of $8,400.00, and then forwarded the check to NationsBank. NationsBank then forwarded the check to NationsBank of Tennessee, and the check was then presented to First American for payment. NationsBank stated that First American credited NationsBank of Tennessee for $8,400.00, and that NationsBank of Tennessee credited NationsBank for the same amount, and NationsBank in turn credited First Chicago for that amount. Similarly, the $10,000.00 was later remitted by First American to NationsBank of Tennessee, who remitted the same to NationsBank, who, in turn, remitted the same to First Chicago.

Motions for Summary Judgments were filed by defendants, which included the affidavit of Melody Sherer, who stated that she was the assistant vice president of technology and operations for Bank of America (formerly NationsBank), and that she researched the transaction in question. She stated that when the check was presented to NationsBank by First Chicago, it was already micro-encoded to reflect the amount of $8,400.00, and that this amount was transferred through the banks. She stated that First American notified NationsBank of Tennessee of the encoding error and credited NationsBank of Tennessee with the additional $10,000.00. The additional $10,000.00 was then credited up through the chain to First Chicago. She further opined that it is customary for a collecting bank to rely upon the micro-encoding placed on the check by the depository bank, and that NationsBank complied with all federal and state laws.

First American filed the Affidavit of Linda Seiber, a Vice President of that Bank, and she basically set forth the same facts contained in Sherer's Affidavit, in that she states the check was micro-encoded for $8,400.00 before it reached her bank, and when the error was discovered, the additional $10,000.00 was transmitted up through the chain of banks. She further expressed that First American complied with all federal and state laws, and that it was customary for the payor bank to rely on the micro-encoding placed on the check by the depository bank or its customer.

Summary judgment is appropriate when the record demonstrates there are no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. Rule 56.

Plaintiffs claim that defendants are guilty of trover, conversion, theft, fraudulent breach of trust, outrageous conduct, and RICO violations. Thus, we are required to review the undisputed facts in the record and determine whether defendants have established they are entitled to judgment as a matter of law based upon all of the causes of action.[1]

Theft is defined in the Tenn. Code Ann. § 39-14-103 as:

> A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent.

Given the undisputed facts presented in this record, it is clear that neither of these defendants intentionally deprived the plaintiffs of their property. Plaintiffs wrote a check for $18,400.00, and $18,400.00 was taken from plaintiffs' account and transferred by defendants into the IRS account at First Chicago. Plaintiffs did not establish a deprivation nor the intent to deprive.

"A conversion, in the sense of the law of trover, is the appropriation of the thing to the party's own use and benefit, by the exercise of dominion over it, in defiance of Plaintiff's right." *Barger v. Webb*, 391 S.W.2d 664, 665 (Tenn. 1965). In *General Elec. Credit Corp. of Tennessee v. Kelly & Dearing Aviation*, 765 S.W.2d 750, 753-754 (Tenn. Ct. App. 1988), we said:

> The main focus of the tort is the interference with an owner's property right. The degree of this interference, as well as the impact on the property, determines whether there has been a conversion. For example, if a defendant test drives a car, which an owner has for sale, with the owner's permission, there has been no conversion

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[1] Plaintiffs raise other issues in their brief, but these claims were not pled in the Complaint. As we have previously held: "While we recognize that the adoption of the Tennessee Rules of Civil Procedure greatly relaxed the requirements as to pleadings, pleading of some facts giving rise to a claim for relief is still a necessary requirement. The adverse party is entitled to have sufficient notice to inform him of the allegations he is called upon to answer." *Jasper Engine and Transmission Exchange v. Mills*, 911 S.W.2d 719, 720 (Tenn. Ct. App. 1995).

> because there has been no interference with that owner's dominion over the car. If damage occurs to the car while the defendant is driving it, he may be liable in damages for negligence, but not conversion. However, if while the defendant is test driving the car, he exceeds the owner's permission by driving it 1,000 miles, or using it for illegal transportation of drugs, which results in it being confiscated by the government, this is conversion because it is a clear departure from the implied use authorized by the owner, and as a result of this action, the owner has been deprived of his property. Prosser and Keeton, Law on Torts, Conversion, § 15, at 101 (5th Ed.1984). The tort of conversion is complete once the defendant has taken, detained, or disposed of a chattel for an unreasonable length of time. Prosser, supra, at 106.
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> To constitute conversion, the defendant must intend to convert the property. This intention does not necessarily have to be a matter of conscious wrongdoing, but can merely be an exercise of dominion or control over the property in such a way that would be inconsistent with the owner's rights and which results in injury to him. Prosser, supra, at 92. A defendant cannot undo his wrong by merely returning the property to the owner. Here again, it is the degree of interference with the chattel, as well as the duration of that interference, that will be determinative of whether there has been conversion. Prosser, supra, at 106.

Here, the evidence establishes that defendants simply paid the check that had been micro-encoded by another entity. The fact that the micro-coding was incorrect was not defendants' responsibility since they did not place the micro-encoding on the check. Further, once the error was detected, the remainder of the money was timely sent through the chain of banks to First Chicago. There is no evidence to support the allegation that these defendants converted plaintiffs' property for their own use.

Plaintiffs' cause of action based upon a fraudulent breach of trust, has historically been treated as a criminal offense and not a civil cause of action. *See State v. Amanns*, 2 S.W.3d 241 (Tenn. Crim. App. 1999). Fraudulent breach of trust has now been consolidated with other similar offenses under the general theft statute. Tenn. Code Ann. §39-14-101. Tenn. Code Ann. § 40-13-221 states:

> Any indictment charging a felonious taking and/or appropriation of the personal property of another, of any value, with intent to convert the same to the use of the defendant and to deprive the true owner thereof, shall be deemed a good and sufficient indictment for embezzlement and/or fraudulent breach of trust.

As already discussed, plaintiffs have failed to show any facts to support their allegation that either defendant took plaintiffs' property, or that they intended to do so.

In a civil action for fraud, there must be proof of a false representation of an existing or past material fact, and the false representation must have been made knowingly without belief in its truth or recklessly. *Pusser v. Gordon*, 684 S.W.2d 639 (Tenn. Ct. App. 1984). Moreover, there

must be someone who reasonably relied on it and suffered some damage as a result of the reliance. *Id*. Plaintiffs offer no facts to support this claim.

Next, is the plaintiffs' allegation of outrageous conduct. Such conduct consists of three elements: the conduct complained of must be intentional or reckless, it must be so outrageous that it is not tolerated by a civilized society, and it must result in serious mental injury. *Lyons v. Farmers Ins. Exchange*, 26 S.W.3d 888 (Tenn. Ct. App. 2000). Plaintiffs have not shown intentional or reckless conduct, nor outrageous conduct, and they have not shown a serious mental injury. In fact, plaintiffs' only alleged injury is that the additional $10,000.00 sent up through the chain of banks never was credited to them by the IRS.[2]

Finally, as to the allegation of a RICO violation, the United States Supreme Court in *Beck v. Prupis*, 529 U.S. 494 (2000), in its discussion of RICO said:

> a civil cause of action for any person "injured in his business or property by reason of a violation of section 1962," 18 U.S.C. § 1964(c) (1994 ed., Supp. IV). Section 1962, in turn, consists of four subsections: Subsection (a) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce"; subsection (b) makes it "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce"; subsection (c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt"; and, finally, subsection (d) makes it unlawful "for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

18 U.S.C. §1961(1) contains a list of acts of "racketeering" activities, including extortion, mail fraud and wire fraud, three of the acts alleged by plaintiffs. It also states that a "pattern of racketeering activity" is basically where there are two or more acts of racketeering within a certain time frame.

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[2]Defendants did show that the $10,000.00 was sent to First Chicago Bank and we note that First Chicago is not a defendant, nor did they establish in response to the Motion for Summary Judgment that the IRS was still seeking this tax payment from plaintiffs.

Given the facts of this case, plaintiffs have not established that they were injured by any violation of this Act by the defendants. Plaintiffs have not shown a pattern of racketeering activity, or indeed any racketeering activity by defendants.

We find that the defendants are entitled to a summary judgment as a matter of law, based upon this record, and we affirm the Judgment of the Trial Court. The cost of the appeal is assessed to the plaintiffs Patrick C. Cooley and Cathy Cooley, and the cause is remanded.

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HERSCHEL PICKENS FRANKS, J.