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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Michigan Circuit Court.

Michael J. PALAZZOLO, an individual, Bernadette Harrington, an individual, and Bernadette Morris, an individual, Plaintiffs,

v.

Gary D. NITZKIN, P.C., a Michigan professional Corporation d/b/a Nitzkin & Associates, Gary D. Nitzkin, an individual, Carl Gredier, an individual, T.J. Royal II, an individual, Rob Reznick, an individual, and John Doe, an individual, jointly and severally, Defendants.

**No. 04-4348-CK.**

Jan. 7, 2005.

[Gerard Mantese](#), Mark C. Rossman, Mantese and Associates, P.C., Troy, MI, for Plaintiffs.

[Harvey R. Heller](#), Maddin, Hauser, Wartell, Roth & Heller, P.C., [Gary D. Nitzkin](#), and Carl Gredier, Southfield, MI, for Gary D. Nitzkin, P.C.

[Richard Hamilton](#), Flint, Michigan, for Defendants Reznick and Royal.

*OPINION AND ORDER*

MACERONI, J.

\*1 Defendants, Gary D. Nitzkin, P.C., Gary D. Nitzkin, and Carl Gredier, have filed a motion for partial summary disposition.

I

Michael J. Palazzolo filed a complaint against Defendants on April 28, 2004 in Wayne County Circuit Court. The basis for the complaint was Mr. Palazzolo's allegation that Defendants, in attempting to collect on a judgment debt Mr. Palazzolo allegedly owed to Defendant Carl Gredier, illegally invaded Mr. Palazzolo's home and wrongfully converted monies and property belonging to him. Apparently, it was later discovered (and admitted by

moving Defendants) that Plaintiff Palazzolo is not the same Michael Palazzolo against whom Carl Gredier had a judgment. Mr. Palazzolo alleged that Defendants' actions in invading his property and converting his property amounted to, among other things, statutory conversion, negligence, intentional infliction of emotional distress, and violation of the Fair Debt Collection Act.

A first amended complaint was filed in this matter on May 21, 2004. The primary amendments to the complaint consisted of adding two additional plaintiffs; Bernadette Harrington, who was present during the incident and is a co-owner of the home, and Bernadette Morris, a co-owner of the home and owner of some monies allegedly converted by Defendants. Venue in this matter was transferred to Macomb County Circuit Court on September 13, 2004.

II

Defendants, Gary D. Nitzkin, P.C., Gary D. Nitzkin, and Carl Gredier (hereinafter "Defendants"), now move for partial summary disposition pursuant to [MCR 2.116\(C\)\(7\) and \(8\)](#). [MCR 2.116\(C\)\(7\)](#) permits summary disposition where the claim is barred because of any one of several occurrences, including release, payment, or immunity granted by law. In reviewing a motion under [MCR 2.116\(C\)\(7\)](#), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. [Hanley v. Mazda Motor Corp.](#), 239 Mich.App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. [Kent v Alpine Valley Ski Area, Inc.](#), 240 Mich.App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

Summary disposition may be granted pursuant to [MCR 2.116\(C\)\(8\)](#) on the ground that the opposing party "has failed to state a claim on which relief can be granted." [Radtke v. Everett](#), 442 Mich. 368, 373; 501 NW2d 155 (1993). In assessing a motion brought under [MCR 2.116\(C\)\(8\)](#), all factual allegations are accepted as true, as

well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v. Dep't of Corrections*, 439 Mich. 158, 163; 483 NW2d 26 (1992); *Cork v. Applebee's Inc.*, 239 Mich.App 311, 315-316; 608 NW2d 62 (2000).

\*2 Defendants have moved for summary disposition on several counts of Plaintiffs' complaint. The majority of the issues having been resolved between the parties, however, this Court is left to determine only whether summary disposition is appropriate with regard to Plaintiffs' claims sounding in violations of the Fair Debt Collection Practices Act and statutory conversion. The Court will address each of the above claims in turn.

### III

With regard to the Fair Debt Collection Practices Act, Defendants' sole argument in support of summary disposition is that the present case does not come within the purview of the Fair Debt Collection Practices Act, and that Plaintiffs thus failed to state a claim under the Act. Specifically, Defendants assert that the underlying debt that was sought from Plaintiff Palazzolo did not arise out of personal, family, or household purposes as is required to trigger application of the Act, but rather was based upon a commercial lease agreement. However, as pointed out by Plaintiffs, recovery under the Fair Debt Collection Practices Act is not so limited as Defendants would have the Court believe.

In 1977 Congress enacted the Fair Debt Collection Practices Act ("FDCPA") in response to national concern over the use of abusive, deceptive and unfair debt collection practices by many debt collectors. *West v. Costen*, 558 F Supp 564, 569 (DC Va., 1983). The purpose of this Act was to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors. *Hicken v Arnold, Anderson & Dove, PLLP*, 137 F Supp2d 1141, 1142 -1143 (D Minn., 2001). To that end, the FDCPA proscribes certain conduct on the part of debt collectors in connection with their collection of a debt including, but not limited to, the use or threat of use of violence or other criminal means to

harm the physical person, reputation, or property of any person, and the use of obscene or profane language. 15 USC 1692d.

The FDCPA generally applies to consumer, rather than business, debts. *Bloom v. IC Sys. Inc.*, 972 F.2d 1067, 1068 (CA 9, 1992). The term "debt" is defined in the FDCPA as: "[A]ny obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes ..." 15 USC 1692a(5). This is not to say, however, that *only* consumers may recover under the FDCPA.

Relevant to the instant matter, 15 USC 1292k provides that "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person ..." According to *Dutton v. Wolhar*, 809 F Supp 1130, 1134 (D Del., 1992), the above language indicates that recovery under the FDCPA is broad and imposes liability when a debt collector has failed to comply with the Act with respect to *any person*, not simply those whose obligation or alleged obligation arose out of a transaction concerning personal, family, or household purposes. The *Dutton* court cites to the legislative history behind the FDCPA, specifically, House Report 95-131, to support its broad reading of the Act: "This bill also protects people who do not owe money at all. In the collector's zeal, collection efforts are often aimed at the wrong person either because of mistaken identity or mistaken facts. This bill will make collectors behave responsibly towards people with whom they deal. Another group of people who do not owe money, but who may be deliberately harassed are the family, employer and neighbors of the consumer. These people are also protected by this ... bill." Based upon the language in the above House Bill, the *Dutton* court determined that it was Congress' intent to protect people other than debtors who are subject to harassment by debt collectors. *Id.*

\*3 Furthermore, in *Whatley v Universal Collection Bureau Inc.*, 525 F Supp 1204 (DC Ga., 1981), the court found that, given the clear language in the Act, "any person," as used in 15 USC 1692k(a) specifically includes persons who claim they have been harmed by proscribed debt collection practices directed to the collection of another person's debt.

As Plaintiffs in the present matter clearly asserted in their complaint that they were subject to unfair debt collection practices stemming from attempted collection of another person's debt, they have sufficiently stated a cause of action for violation of the Fair Debt Collection Practices Act. Summary disposition in Defendants' favor would therefore be inappropriate on this cause of action.

#### IV

Defendants' argument with respect to Plaintiffs' claim of statutory conversion focuses on the retention of property under the mistaken belief that the retention is lawful. Defendants assert that in the present matter, they are not liable under a statutory conversion theory because there was simply a mistake in identity when the property at issue was seized and that such a mistake in identity does not equate with receiving property with the knowledge that the property was stolen or converted.

Statutory conversion is provided for at [MCL 600.2919a](#). Pursuant to [MCL 600.2919a](#), a person who is 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, plus costs and reasonable attorney's fees. According to [Marshall Lasser, PC v. George, 252 Mich.App 104, 112; 651 NW2d 158 \(2002\)](#), [MCL 600.2919a](#) is not designed to provide a remedy against the individual who has actually stolen, embezzled, or converted the property, as the actions proscribed--buying, receiving, or aiding in the concealment--all occur after the property has been stolen, embezzled, or converted by the principal.

In their response to Defendants' motion, Plaintiffs, naturally, contend that their claim of statutory conversion should proceed as they have properly stated a claim upon which relief can be granted. This Court finds Plaintiffs' position devoid of merit for several reasons. First, Plaintiffs initially offer a definition of conversion ("any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein"), different than that set forth in [MCL 600.2919a](#). However, the offered

definition applies only to the common-law tort of conversion--not statutory conversion as asserted by Plaintiffs in their complaint. The initial definition offered by Plaintiffs, then, is inapplicable to the facts of this case.

Second, Plaintiffs acknowledge that [MCL 600.2919a](#) is not violated when a defendant retains property under the mistaken belief that the retention is lawful. Given this acknowledgement, it follows that Plaintiffs would have been compelled to allege in their complaint that Defendants were *not* acting under a mistaken belief in the case at hand, and that the retention of Plaintiffs' property was done with Defendants' knowledge that the property was stolen or converted. Plaintiffs have not adequately alleged the above in their complaint, having simply made the blanket statement that Defendants bought, received, and/or aided in the concealment of converted property. While Plaintiffs assert that Defendants were informed from the outset that Plaintiff Palazzolo did not owe the claimed debt, this is not necessarily sufficient to put Defendants on notice that the property they received was in fact stolen, embezzled, or converted. It would not be surprising, after all, to find that denial of a debt is common, whether such debt is actually owed or not.

\*4 In addition, it appears to be uncontested that at the time Plaintiffs' property was seized, a judgment in favor of Carl Gredier and against a Michael Palazzolo was in existence. While Plaintiffs dismiss the significance of the judgment's existence, it cannot be ignored that the judgment tends to indicate that Defendants were under the belief that their retention of Plaintiffs' property, at the time it was retained, was lawful. Plaintiffs allegation in their complaint that Defendants returned their property a week after it was taken would also suggest that Defendants did not retain or aid in the concealment of the property once it was known that mistaken identity had led to the seizure of Plaintiffs' property.

According to the clear language of [MCL 600.2919a](#), knowledge that the retained property was stolen or converted is necessary in order to impose liability under statutory conversion. Plaintiffs have neither alleged in their complaint nor supported a claim that, at the time Defendants retained Plaintiffs' property, they did so knowing that the

property was being wrongfully retained. As a result, summary disposition in Defendants' favor is warranted with respect to Plaintiffs' statutory conversion claim.

V

Based on the foregoing, it is hereby

ORDERED Defendants Gary D. Nitzkin, P.C., Gary D. Nitzkin, and Carl Grenedier's motion for partial summary disposition as to Plaintiffs' claims of violation of the Fair Debt Collection Practices Act is DENIED. It is further

ORDERED Defendants' motion for partial summary disposition as to Plaintiffs' claims of statutory conversion, [MCL 600.2919a](#), is GRANTED.

Pursuant to [MCR 2.602\(A\)\(3\)](#), this *Opinion and Order* neither resolves the last claim nor closes the case.

SO ORDERED.

2005 WL 221431 (Mich.Cir.Ct.)

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