IP 08-1504-C H/L JP Morgan Chase v Smith Bros.
Judge David F. Hamilton Signed on 07/27/09

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JPMORGAN CHASE BANK, NA,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:08-cv-01504-DFH-DML
	)	
SMITH BROTHER'S BUILDERS &	)	
SUPPLY, INC.,	)	
FORUM CREDIT UNION,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JPMORGAN CHASE BANK, N.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CASE NO. 1:08-cv-1504-DFH-DML
SMITH BROTHER'S BUILDERS & SUPPLY, INC., and FORUM CREDIT UNION,	)	
	)	
Defendants.	)	

ENTRY ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff JPMorgan Chase Bank, NA mistakenly transferred $32,487 to an account that defendant Smith Brother's Builders & Supply, Inc. had with defendant Forum Credit Union. The bank later realized the mistake it had made and demanded that Smith Brother's return the money. Smith Brother's acknowledged that the transfer was a mistake and that it was not entitled to keep the money, but it has failed to return the money. The bank filed this case, and Smith Brother's has essentially defaulted. It filed an answer, but not through an attorney, as required for a party that is a corporation. It has not participated further in the case. The bank has moved for summary judgment, and Smith Brother's has failed to respond.

There is no doubt that the bank is entitled to a judgment in its favor for the sum of $32,487, plus interest. See, *e.g.*, *Monroe Financial Corp. v. DiSilvestro*, 529 N.E.2d 379, 383 (Ind. App. 1988) ("as a general rule money paid under a unilateral mistake of fact may be recovered when it would have not been otherwise paid, even though the party paying it may have been careless"), cited in *CSX Transportation, Inc. v. Appalachian Railcar Services, Inc.*, 509 F.3d 384, 388 (7th Cir. 2007) (applying Indiana law).

But the bank wants much more. It contends here that Smith Brother's has committed a crime by failing to repay the money that the bank sent to it by mistake. The bank contends this conduct amounts to criminal conversion in violation of Indiana Code § 35-43-4-3(a). If it did, the bank could recover treble damages, attorney fees, and costs under Indiana Code § 34-24-3-1, which provides a civil remedy for victims of broad categories of crimes who suffer "pecuniary loss."[1]

The Indiana criminal conversion statute provides: "A person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor." Ind. Code § 35-43-4-3(a). The key terms are defined in a separate section. The phrase "exert control over property" means "to obtain . . . convey, encumber, or possess property." Ind. Code

[1]Only the potential for treble damages raises the amount in controversy here to the level needed to support diversity jurisdiction under 28 U.S.C. § 1332.

§ 35-43-4-1(a). The statute further provides: "Under this chapter, a person's control over property of another person is 'unauthorized' if it is exerted: (1) Without the other person's consent." Ind. Code § 35-43-4-1(b).

The siren song of treble damages has led many civil plaintiffs to try to stretch the criminal conversion statute to cases where no sensible prosecutor would try to bring a criminal case. No criminal conviction is required to allow use of the crime victims' civil remedy, *e.g.*, *JET Credit Union v. Loudermilk*, 879 N.E.2d 594, 597 (Ind. App. 2008), but Indiana state courts and federal courts applying Indiana law have had to draw some lines to corral the criminal conversion statute and prevent its inappropriate and unintended use in ordinary commercial disputes.

The bank has not cited, and the court has not found, any case holding that a party who was the recipient of money mistakenly sent to it committed a crime by failing to pay it back or return it.

One threshold question in this case is whether fungible money can be the subject of a claim for conversion (as opposed to a claim for repayment of a debt). The answer is only sometimes, such as where a specific sum of money has been set aside for a particular purpose. See, *e.g.*, *In re Clayton*, 778 N.E.2d 404, 405 (Ind. 2002) (attorney who used settlement proceeds for client for his own purposes engaged in criminal conversion); *Roake v. Christensen*, 528 N.E.2d 789, 791 (Ind.

App. 1988) (employer committed criminal conversion by continuing to withhold health insurance premiums from employee's wages while allowing policy to lapse); *Midland-Guardian Co. v. United Consumers Club, Inc.*, 502 N.E.2d 1354, 1355 (Ind. App. 1987) (denying rehearing and distinguishing *Kopis v. Savage*, 498 N.E.2d 1266 (Ind. App. 1986)). Cf. *Huff v. Biomet, Inc.*, 654 N.E.2d 830, 836 (Ind. App. 1995) (employer's reduction of employee's commissions or wages was not conversion where employee did not entrust money to employer for particular purpose and employer did not retain specific funds that could be directly attributed to employee); *Kopis v. Savage*, 498 N.E.2d 1266, 1270 (Ind. App. 1986) (earnest money deposit on real estate had been commingled with other funds; failure to repay was failure to pay debt but not conversion). For all that appears here, the funds mistakenly sent to the Smith Brother's account in the credit union were mingled with other funds, lost any distinct identity, and had not been set aside for any particular purpose.

Even if the bank could overcome the hurdles to asserting that money has been the object of conversion, Indiana courts have repeatedly held that a mere failure to pay a debt does not amount to civil or criminal conversion. *E.g.*, *Storey v. Leonas*, 904 N.E.2d 229, 239 (Ind. App. 2009) (attorney's alleged failure to distribute portion of settlement to his client's ex-husband could not be conversion); *Tobin v. Ruman*, 819 N.E.2d 78, 89 (Ind. App. 2004) (law firm's alleged failure to pay minority owner's equity upon termination of employment relationship could not be conversion). Those cases deal with debts that

defendants have voluntarily taken upon themselves. Their reasoning would seem to apply with even more force where the defendant has not done anything to create the debt or to seize the money.[2]

Also instructive here is *Excel Industries, Inc. v. Signal Capital Corp.*, 574 N.E.2d 946 (Ind. App. 1991). The defendant finance company refused to return the deposit that had accompanied Excel's credit application when Excel decided to seek financing elsewhere. The credit application provided that the defendant would refund Excel's deposit if it did not approve the application. The court affirmed the trial court's grant of summary judgment against Excel and held that the finance company's refusal to refund the deposit could not support an action for conversion: "The parties did not have an ongoing business relationship, the deposit had ceased to be a separate, specifically identifiable chattel, and Excel no longer had a property interest in the specific funds deposited." *Id.* at 948.

For these reasons, the bank's motion for summary judgment is granted in part, to the extent that the bank is entitled to $32,487 from Smith Brother's. The bank's motion is denied to the extent it seeks additional relief under the crime

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[2]By way of comparison, in an example discussed in dicta in *Kentuckiana Healthcare, Inc. v. Fourth Street Solutions, LLC*, 517 F.3d 446, 447 (7th Cir. 2008) (applying Indiana law), a person who deposits a check that he knows is not meant for him can commit conversion (if not forgery, as well). The bank in this case does not allege that Smith Brother's undertook any such affirmative act. The bank itself sent the money directly into the Smith Brother's account, without Smith Brother's itself having done anything wrong.

victim's statute. The court will not enter a separate judgment at this time but invites further input from the bank as to how it intends to proceed.

So ordered.

Date: July 27, 2009

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

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