UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

KENTUCKIANA HEALTHCARE,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:04-cv-00022-DFH-WGH
	)	
FOURTH STREET SOLUTIONS, LLC,	)	
KENNETH B. ROSS,	)	
SAGE HEALTH SERVICES OF	)	
INDIANA, INC.,	)	
SEAN M. DUGAN,	)	
ESTATE OF JOAN M. DUGAN,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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KENTUCKIANA HEALTHCARE, LLC, Plaintiff, v. FOURTH STREET SOLUTIONS, LLC, SAGE HEALTH SERVICES OF INDIANA, INC., KENNETH B. ROSS, and JOAN DUGAN, Defendants.	))))))))))))	CASE NO. 4:04-cv-0022-DFH-WGH

ENTRY ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Kentuckiana Healthcare, LLC, seeks to recover approximately $362,000 in Medicare, Medicaid, and other third-party payments for services it rendered as manager of the Scott County Healthcare Center ("the Facility") prior to June 30, 2002. Although the payments were owed to Kentuckiana, they were received by the Facility's subsequent management company, Scott County Nursing and Wellness Center (SCNW), which took over management of the Facility after the owner evicted Kentuckiana for failing to pay rent. For present purposes, there is no doubt that SCNW owed this money to Kentuckiana, but SCNW sought and obtained bankruptcy protection from the debt. Kentuckiana now seeks to recover this money from defendants Fourth Street Solutions, LLC ("Fourth Street") and its president Joan Dugan, and Sage Health Services of Indiana, Inc. ("Sage") and its president Kenneth Ross. Fourth Street and Sage provided management and accounting services to SCNW. As explained below, however, the undisputed facts show that Fourth Street and Sage did not thereby take over responsibility for SCNW's debts under any of Kentuckiana's host of legal theories.

In its motion for summary judgment, Kentuckiana argues that the defendants are liable as a matter of law for the payments owed to Kentuckiana but received by SCNW. The defendants argue in their motion that Kentuckiana cannot meet its burden on any of its theories and that they are entitled to summary judgment. Kentuckiana's principal theories fail because they rely upon the mistaken premise that it had a property interest in the payments owed to it, rather than a mere creditor's interest. Kentuckiana's other theories are without merit. The undisputed facts establish that the defendants had no duty to treat Kentuckiana any differently than any other creditor of SCNW. As a mere creditor, Kentuckiana is not entitled to recover from these defendants as a matter of law the sums that SCNW owed to Kentuckiana. Accordingly, Kentuckiana's motion is denied and the defendants' motion is granted.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The motion should be granted so long as no rational fact finder could return a verdict in favor of the non-moving parties. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, a court's ruling on a motion for summary judgment is akin to that of a directed verdict. The question for the court in both is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. Only genuine disputes over material facts can prevent a grant of summary judgment. *Id.* at 247-48. A fact is material if it might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine only if the evidence would allow a reasonable jury to return a verdict for the non-moving party. *Id.* at 248.

When deciding a motion for summary judgment, the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light reasonably most favorable to the non-moving party. See Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 255. However, a party must present more than mere speculation or conjecture to defeat a summary judgment motion. The issue is whether a reasonable jury might rule in favor of the non-moving party based on the evidence in the record. *Id.* at 251-52.

The fact that both sides have filed motions for summary judgment does not alter the applicable standard. The court must consider each motion independently and will deny both motions if there is a genuine issue of material fact. *E.g.*, *Heublein, Inc. v. United States* 996 F.2d 1455, 1461 (2d Cir. 1993); *Harms v. Laboratory Corp. of America*, 155 F. Supp. 2d 891, 905-06 (N.D. Ill. 2001). Thus, in considering cross-motions for summary judgment, the court must consider the evidence through two lenses. Because the court is granting the defendants' motion, the facts set forth in this opinion give Kentuckiana the benefit of all conflicts in the evidence and the benefit of all reasonable inferences that might be drawn from the evidence in its favor.

Facts For Summary Judgment

The Facility, Scott County Healthcare Center, is a nursing facility located in Scottsburg, Indiana. It has been owned and managed by a number of different individuals and entities, and it seems to have operated under a kind of fiscal curse. Plaintiff Kentuckiana managed and operated the Facility from December 1, 2000 until June 30, 2002. Kentuckiana's nineteen months managing the Facility were both preceded and followed by other management companies that ultimately failed financially.

Kentuckiana managed the Facility under a lease agreement with the Facility's owner, Randolph Nursing, LLC. In return for monthly rent payments, Kentuckiana was entitled under the lease agreement to retain all Facility revenues, including payments made by or on behalf of the Facility's patients, from whatever source. Kentuckiana was unable to pay the May 2002 rent. Randolph Nursing promptly terminated the lease and evicted Kentuckiana from the Facility on June 30, 2002. Randolph Nursing then contracted with SCNW to assume the management and operation of the Facility effective July 1, 2002. SCNW was owned and operated by Dr. Agnes Bacala.

Dr. Bacala and SCNW managed the Facility for several months, and then looked for help. On December 16, 2002, SCNW entered into a Management Services Agreement with defendant Fourth Street Solutions. Fourth Street agreed to act as manager of the Facility, under the direction of SCNW, in return for monthly compensation. On that same day, SCNW entered into an Agreement for Data Processing and Accounting Services with defendant Sage Health Services of Indiana. SCNW agreed to pay monthly fees to Sage in return for data processing and accounting services required by SCNW in connection with its operation, and Fourth Street's management, of the Facility.

When SCNW took over the operation of the Facility, there was an existing bank account at Scott County State Bank ("the Account") into which most of the Facility's revenue was deposited and out of which most of its debts were paid. Medicare, Medicaid, and other third-party payments for services rendered by the Facility were deposited into the Account. Medicare and Medicaid payments were wired directly to the bank via direct deposit, apparently using the same account numbers the Facility and its prior operators had used. Private payments were made at the Facility. Fourth Street and Sage never directly received any of these payments.

Some of the payments owed to the Facility were received many months after it provided the services. Hence, some of the payments for services rendered while Kentuckiana was managing the Facility ("the K/H Payments") – payments owed to Kentuckiana – were received months after Kentuckiana ceased its management of the Facility. The K/H Payments were deposited into the Account while SCNW was operating the Facility, with the help of services of Fourth Street and Sage.

In carrying out its accounting function, Sage prepared financial reports for SCNW showing receipts, accounts receivable, and accounts payable. On the Facility's General Ledger Audit Report, Sage listed funds that had been received for services rendered while Kentuckiana had still been operating the Facility as "DUE TO PRIOR OWNERS." The payments for services originally provided by Kentuckiana were not segregated into a separate bank account. Instead, the money was commingled in the Facility's general operating account with all other revenues. SCNW then paid the Facility's expenses out of the commingled funds in the Account.

Defendants Kenneth Ross and Joan Dugan were signatories to the Account. As signatories to the Account, each had the legal authority to make disbursements from the Account on behalf of Fourth Street and Sage. There is no evidence, however, that either of them ever exercised this authority. Instead, the undisputed evidence shows that they were added as signatories to the Account only so that they could obtain financial information about the Account that they needed to fulfill the functions of Fourth Street and Sage in compiling and maintaining accurate financial records.

SCNW operated the Facility under Dr. Bacala's direction until approximately July 31, 2003. Cathedral Rock, SCNW's lender, then assumed control of the Facility's operations and continued to use SCNW's name and license. Fourth Street resigned and terminated its agreement with SCNW on April 30, 2004. Sage continued to provide services to SCNW until October 31, 2004. SCNW filed for bankruptcy on February 17, 2005. In its bankruptcy petition, SCNW identified plaintiff Kentuckiana and defendants Fourth Street and Sage as creditors. Additional facts are noted below as needed, keeping in mind the standard for summary judgment.

Discussion

I. *Conversion, Conspiracy, and Aiding and Abetting*

In its motion for summary judgment, Kentuckiana argues that there are no genuine issues of material fact concerning its ownership of the K/H Payments. In support of this proposition, it cites the depositions of Ross and Dugan, wherein each acknowledged that the K/H Payments were owed to Kentuckiana. This evidence does not support the key foundation for Kentuckiana's principal theories of conversion, conspiracy to convert, and aiding and abetting of conversion. The key foundation would be that Kentuckiana had an ownership interest in the K/H Payments. But there is an important legal difference – decisive in this case – between being *owed* money and *owning* money. The undisputed facts show that Kentuckiana would not have a viable conversion claim against SCNW, let alone against the defendants who provided services to SCNW.

Kentuckiana has conflated these two different legal concepts, as is evident in its brief: "Kentuckiana Healthcare's ownership of the K/H Payments is further evidenced by the fact that Sage created a special account payable on the Facility's general ledger entitled 'Prior Owner' and prepared monthly updates which reflected its accounting for the receipt of such Payments." This evidence shows what is not disputed, that the K/H Payments were *owed* to Kentuckiana by SCNW. It does not show that Kentuckiana *owned* the K/H Payments, *i.e.*, that it had a property interest in the K/H Payments above and beyond the interest of any other creditor.

Money is a peculiar sort of property because it is almost always completely fungible. When one pays money to a merchant and then receives a refund of that money, it is not the same physical bills that are returned but simply an equivalent amount of cash. For that reason, special legal rules apply when one seeks the return of money under a theory of conversion. In general, money is an intangible and therefore is not subject to a claim for conversion. *Horbach v. Kaczmarek*, 288 F.3d 969, 978 (7th Cir. 2002) (under Illinois law, affirming dismissal of conversion claim under Rule 12(b)(6) where there was no specific, segregated fund or specific coins or bills at issue); see *Allied Investment Corp. v. Jasen*, 731 A.2d 957, 966 (Md. 1999) (collecting cases).

An exception to this general rule applies when a plaintiff can prove that the defendant converted specifically segregated or specifically identifiable funds. *Eggert v. Weisz*, 839 F.2d 1261, 1264 (7th Cir. 1988) (applying Illinois law and affirming judgment for defendant notwithstanding the verdict). The exception applies because when money is specifically segregated or identified, the money begins to take on the properties of ordinary chattel that can be the subject of conversion and a conversion action. Some courts have gone so far as holding that money can be the subject of conversion only when it is specifically identifiable by having been physically marked or held in a separate physical location. *Hensley v. Poole*, 910 So.2d 96, 101 (Ala. 2005) ("Only when money is 'earmarked' or otherwise identifiable, such as enclosed in a container like a bag or chest, does an action lie for conversion of money.").

Although Indiana courts have not gone so far as to require that money be physically earmarked to be the proper subject of a conversion claim, they have held that the money must have chattel-like properties: "Although money may be the subject of an action for conversion, it must be capable of being identified as a special chattel." *Stevens v. Butler*, 639 N.E.2d 662, 666 (Ind. App. 1994), citing *Kopis v. Savage*, 498 N.E.2d 1266, 1270 (Ind. App. 1986).

In *Kopis*, a seller of realty refused to return a buyer's deposit when their real estate deal fell through. The money had not been segregated by being deposited into an escrow account or by being delivered to a third party for safekeeping, nor had the parties agreed to segregate the deposit. Instead, the seller commingled the money with other accounts and simply refused to refund the money when the deal collapsed. The trial court had found the defendant liable for criminal conversion, but the appellate court reversed as a matter of law. The appellate court held that there was no cause of action for conversion against Kopis, the seller. Although Kopis was legally obliged to repay $40,000, the appellate court held that Kopis' action did not constitute conversion because the buyer maintained no property interest in the $40,000 after giving it to Kopis. The court was "unable to find anything in the agreement which suggests Kopis was under any obligation to return *the specific* $40,000 which Savage had given him." *Kopis*, 498 N.E.2d at 1270 (emphasis in original).

Stevens also involved the failure of a real estate broker to refund earnest money deposits made by potential purchasers of property but commingled with other funds. The *Stevens* court, relying on *Kopis*, held as a matter of law that the broker's refusal to refund the purchasers' deposits did not constitute conversion. *Stevens*, 639 N.E.2d at 666-67. The appellate court said:

> Without a more specific identification of the funds to be returned and without a clearer statement of the parties' intention that the funds be separated in some manner, the defendants' refusal to return the deposit was a failure to pay a debt which generally does not support a finding of conversion.

Id. at 667. In reversing a grant of summary judgment for the plaintiff, the *Stevens* court reasoned "as in *Kopis*, Stevens' refusal to refund the purchasers' deposits amount [sic] to a refusal to pay her debts. However, her actions do not support a claim for conversion as a matter of law." *Id.*

Indiana courts have adopted the general rule that when there is no obligation to return identical money, but only the relationship of debtor and creditor, an action for conversion of money will not lie against a debtor. *Huff v. Biomet, Inc.*, 654 N.E.2d 830, 836 (Ind. App. 1995) ("The refusal to pay a debt will generally not support a conversion action."), abrogated on other grounds by *St. Vincent Hospital and Health Care Center, Inc. v. Steele*, 766 N.E.2d 699 (Ind. 2002); *National Fleet Supply, Inc. v. Fairchild*, 450 N.E.2d 1015, 1019 (Ind. App. 1983) ("where there is simply the refusal to pay a debt no action for conversion will lie."), abrogated on other grounds by *Mitchell v. Mitchell*, 695 N.E.2d 920 (Ind. 1998).

Facts that would support an action for conversion of money can be found in *Midland-Guardian Co. v. United Consumers Club, Inc.*, 502 N.E.2d 1354 (Ind. App. 1987) (distinguishing *Kopis*). In *Midland-Guardian*, Midland purchased installment contracts from United Consumers Club but retained a percentage of the purchase price in a holdback reserve account. The holdback reserve account belonged to United Consumers Club. Midland could use the funds only to charge back uncollectible contracts. In affirming the trial court's finding of criminal conversion and denying a rehearing on that issue, the court held that Midland could be found liable for criminal conversion of money where Midland exercised unauthorized control over funds in the holdback account. The holdback reserve agreements did not create an obligation to repay a debt, but rather placed Midland in a position of responsibility to return the remainder of separately identified accounts at an appropriate time. *Id.* at 1355.

The more common situation is also illustrated by *Excel Industries, Inc. v. Signal Capital Corp.*, 574 N.E.2d 946 (Ind. App. 1991). In *Excel Industries*, defendant finance company Signal Capital refused to return the deposit that had accompanied Excel's credit application when Excel decided to seek financing elsewhere. The credit application provided that Signal 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 Signal's refusal to refund Excel's 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.

Returning to the undisputed facts of this case, the K/H payments that Kentuckiana seeks to recover were not segregated into a separate account, as Kentuckiana points out numerous times in its brief, and had none of the chattel-like properties necessary to turn them into the sort of property that could be the subject of conversion. The K/H payments, made up of funds received from Medicare, Medicaid, and other third-party sources, were commingled with other revenue in the Facility's general operating account. And no contract required even SCNW to segregate the K/H payments, let alone required Fourth Street or Sage to do so. Hence, as in *Excel Industries*, the K/H payments "had ceased to be a separate, specifically identifiable chattel" and Kentuckiana "no longer had a property interest in the specific funds deposited." *Excel Industries*, 574 N.E.2d at 948.

Further unlike the situation in *Midland-Guardian*, there was no business relationship whatsoever between Kentuckiana and either Sage or Fourth Street that might have created an obligation to segregate the K/H payments for the benefit of Kentuckiana. Instead, the lease between Kentuckiana and Randolph Nursing addressed the issue, and did not require segregation of such payments.

Section 18(c) of the lease agreement between Randolph Nursing and Kentuckiana described each party's obligations upon termination of the lease:

> (c) LESSEE shall cooperate fully in the transfer of any provider numbers of the facility for purposes of billing third party payors such as Medicaid and Medicare to the LESSOR or LESSOR'S agent and both parties agree that all payments received after termination shall be apportioned between the respective parties based on dates of service and the termination date.

Section 18(c) applied when Kentuckiana was evicted from the Facility on June 30, 2002 for failure to pay rent. Section 18(c) recognized that there would be payments owed to Kentuckiana after it surrendered the premises. Rather than requiring even Randolph Nursing (let alone SCNW or its outside contractors) to segregate such payments, the lease provided only that those payments would be *apportioned* between Randolph Nursing and Kentuckiana, that is, in the manner of an ordinary debt. Nowhere in the lease agreement between Randolph and Kentuckiana is there language requiring segregation of the K/H payments from the rest of the Facility's revenues. If there had been such language, perhaps that obligation might have been assumed by SCNW in some manner as a new lessee, but in no event did Fourth Street or Sage have any such obligation to Kentuckiana.

The relationship between Fourth Street and SCNW, on the other hand, was governed by the Management Services Agreement. Section 1.06 of that agreement governed the deposit and disbursement of funds. It stated that the Facility's revenue was to be deposited into bank accounts controlled by SCNW and that SCNW controlled disbursements from those accounts:

> 1.06 Deposit and Disbursement of Funds.
>
> All receipts and monies arising from the operation of the Facility shall be deposited in bank accounts to which representatives of Owner [SCNW] are signatories. Owner shall disburse and pay from such bank accounts all costs and expenses of the Facility, and Manager [Fourth Street] shall prepare checks for such disbursements by Owner. Owner shall maintain in such bank accounts, at all times, an adequate supply of funds to permit prompt payment of payrolls, taxes and other trade obligations of the Facility.

Section 1.04 of the Management Services Agreement provided that all aspects of Fourth Street's management of the Facility were subject to the supervision of SCNW:

> 1.04 Authority; Limitation of Liability; Indemnification Obligations
>
> (a) Authority. Manager [Fourth Street] shall be subject to the supervision of and review by Owner [SCNW] with respect to determining all operating policies of the Facility, including, without limitation, policies in the areas of personnel, staffing, clinical programs, and marketing. In addition, subject to the supervision and review of Owner, Manager shall participate in the financial management of the Facility, including, without limitation, decisions regarding accounts receivable, and appropriate bad debt write-offs.

Since Dr. Bacala was the sole member of SCNW, Sections 1.04 and 1.06 essentially meant that Fourth Street's management of the Facility was subject to the supervision of Dr. Bacala and that Dr. Bacala ultimately controlled the disbursement of funds from the Account.

Similarly, the agreement between Sage and SCNW narrowly circumscribed Sage's duties and did not include the authority to determine what disbursements would be made from the Account to pay which creditors in what amounts. SCNW and Dr. Bacala retained that ultimate control over the business.

Accordingly, the undisputed facts show that neither Fourth Street nor Sage had an obligation to segregate the K/H payments from the Facility's other revenues, and Kentuckiana had no property interest in the K/H payments. Kentuckiana was certainly a creditor of SCNW with respect to those payments, but it had no more privileged status. Hence, Kentuckiana's claim for conversion must fail because there was no identifiable property to convert. For the same reasons, Kentuckiana's claims for misappropriation, conspiracy to commit conversion, and aiding and abetting conversion must fail. Defendants are entitled to summary judgment on these claims.

II. *Constructive Trust and Fraudulent Misrepresentation*

Kentuckiana argues that the defendants were constructive trustees of the K/H payments. Under Indiana law, a "constructive trust is a fiction of equity, devised for the purpose of making equitable remedies available against one who through fraud or other wrongful means acquires property of another. Thus, fraud, either actual or constructive, is a prerequisite to the imposition of a constructive trust." *Shafer v. Lambie*, 667 N.E.2d 226, 230 (Ind. App. 1996), citing *Huff v.*

Biomet, Inc., 654 N.E.2d at 837. To establish a valid claim of actual fraud, "the complaining party must prove there was a material misrepresentation of past or existing fact made with knowledge or reckless ignorance of its falsity, and the misrepresentation caused reliance to the detriment of the person relying upon it." *American United Life Ins. Co. v. Douglas*, 808 N.E.2d 690, 701 (Ind. App. 2004), citing *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. App. 1998).

Constructive fraud, much like a constructive trust, "arises by operation of law from a course of conduct, which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the actual intent to defraud." *In re Bender*, 844 N.E.2d 170, 182 (Ind. App. 2006), citing *Drudge v. Brandt*, 698 N.E.2d 1245, 1250 (Ind. App. 1998). "A plaintiff alleging the existence of constructive fraud has the burden of proving the existence of a duty owing by the party to be charged to the complaining party due to their relationship, and the gaining of an advantage by the party to be charged with fraud." *Cash in a Flash, Inc. v. McCullough*, 853 N.E.2d 533, 538 (Ind. App. 2006), citing *In re Bender*, 844 N.E.2d at 182. Generally, this requires the plaintiff to prove it had a fiduciary or fiduciary-like relationship with the defendant. *Id.*, citing *In re Bender* at 182. The court in *Bender* found a fiduciary relationship sufficient to establish constructive fraud and impose a constructive trust where the personal representative of a testator's estate transferred estate assets to himself rather than to the testator's son, who was the beneficiary of the testamentary trust.

Here, the undisputed facts show that none of the elements of actual or constructive fraud are met. There was no business relationship between Kentuckiana and any of the defendants. Defendants made no promises to Kentuckiana, let alone a material misrepresentation of past or existing fact. Since there was no such promise or misrepresentation, there also was no reliance by Kentuckiana, and no constructive trust can be imposed under this theory. Similarly, unlike the situation in *Bender*, there was no fiduciary or fiduciary-like relationship between the parties that would support a finding of constructive fraud. There is no evidence that would support the imposition of a constructive trust on this theory. Defendants are entitled to summary judgment on Kentuckiana's claims for a constructive trust and fraudulent misrepresentation.

III. *Breach of Fiduciary Duty*

In its motion for summary judgment, Kentuckiana asserted: "In all respects, Kentuckiana Healthcare's fiduciary duty claim goes hand-in-hand with its constructive trust and conversion claims, as the same operative facts underlie all three claims." In this Kentuckiana is correct. Just as its constructive trust and conversion claims must fail, its breach of fiduciary duty claim must also fail.

Under Indiana law "a confidential or fiduciary relationship exists when confidence is reposed by one party in another with resulting superiority and influence exercised by the other." *Estates of Kalwitz v. Kalwitz*, 717 N.E.2d 904, 914 (Ind. App. 1999), accord *Kreighbaum v. First National Bank & Trust*, 776 N.E.2d 413, 419 (Ind. App. 2002). Kentuckiana fails to offer any evidence showing that it reposed confidence in SCNW, let alone in any of the defendants it seeks to hold liable for SCNW's debts. Without the requisite confidential relationship, there could be no fiduciary duty under these facts, and hence no breach of fiduciary duty. Defendants are entitled to summary judgment on this claim.

IV. *Unjust Enrichment*

Kentuckiana claims that the receipt of the K/H Payments by SCNW has unjustly enriched the defendants. Unjust enrichment is an equitable doctrine also referred to as constructive contract, quasi-contract, and *quantum meruit*. *Kelly v. Levandoski*, 825 N.E.2d 850, 860 (Ind. App. 2005), citing *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991). Under Indiana law, "for recovery under *quantum meruit*, it must be demonstrated that a benefit was rendered to another party at the express or implied request of that party, that allowing the defendant to retain the benefit without paying for it would be unjust, and that the plaintiff expected payment." *Troutwine Estates Development Co. v. Comsub Design and Engineering, Inc.*, 854 N.E.2d 890, 897 (Ind. App. 2006), citing *Kelly v. Levandoski*, 825 N.E.2d at 861.

An important element of an unjust enrichment claim is that the party receiving the benefit must have requested the benefit. "A party who has not expressly or impliedly requested the benefit is under no obligation to pay for the benefit." *Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296, 1303 (Ind. App. 1997), citing *Olsson v. Moore*, 590 N.E.2d 160, 163 (Ind. App. 1992). If a homeowner returns home one day to a freshly painted house, she cannot be forced to pay for the work under a theory of unjust enrichment unless she had requested that the house be painted.

Since it is an equitable doctrine, another important element of an unjust enrichment claim is that the party receiving the benefit acted wrongfully. "Absent a wrong, intervention by equity is inappropriate." *Indianapolis Raceway Park, Inc. v. Curtiss*, 386 N.E.2d 724, 726 (Ind. App. 1979). In deciding unjust enrichment cases, Indiana courts "place appropriate emphasis on whether the [party receiving the benefit] acted wrongfully or engaged in misleading conduct which resulted in *unjust enrichment*." *Id.* at 727. "The pivotal concept of 'unjust enrichment' is the occurrence of a wrong or something unjust." *Savoree v. Industrial Contracting & Erecting, Inc.*, 789 N.E.2d 1013, 1020 (Ind. App. 2003), citing *Indianapolis Raceway Park*, 386 N.E.2d at 726-27.

The undisputed facts of this case prevent Kentuckiana from recovering under a theory of unjust enrichment. It is true that the defendants were paid for their services. They were paid out of the SCNW bank account, which included commingled funds that were owed to Kentuckiana. Only in that highly attenuated and indirect way could it be suggested that the defendants were enriched by Kentuckiana's efforts. The undisputed facts show that the defendants did not ask for Kentuckiana's efforts and did not engage in any wrongdoing that would make any supposed "enrichment" unjust. There was no business relationship between Kentuckiana and the defendants. Defendants made no express or implied request for the services that Kentuckiana performed. Such a request would have been impossible in this case. Kentuckiana performed the last of its services months before Sage and Fourth Street were even hired by SCNW. See *Garage Doors of Indianapolis*, 682 N.E.2d at 1303 (seller of garage door opener who was not paid could not recover from homeowners' successor in interest under a theory of unjust enrichment: "Absent some indication or allegation that [defendant] Goff expressly or impliedly requested the benefit from Garage Doors, the claim for unjust enrichment fails.").

Further, Sage and Fourth Street were paid for services that they legitimately performed under contracts with SCNW. The defendants cannot be said to have been unjustly enriched any more than the nurses, administrators, or other employees of SCNW who were paid out of the SCNW bank account, or any other vendors of SCNW who were paid out of the SCNW account. Because Kentuckiana cannot meet its burden under its theory of unjust enrichment, the defendants are entitled to summary judgment on this issue.

V. *Accounting*

In its complaint, Kentuckiana sought an accounting from Fourth Street, Sage, Ross, and Dugan because of their "use and disposition" of the K/H payments. Kentuckiana has not cited any law or facts to support this claim. "An action to require an accounting is equitable in nature and has for its purpose the striking of a balance between parties in a fiduciary relationship with each other and enforcing payment of the difference, if any, to the party entitled thereto." *Atwood v. Prairie Village, Inc.*, 401 N.E.2d 97, 100 (Ind. App. 1980). Further, a "mere creditor . . . has no right to compel his debtor to account in equity in the absence of any trust relationship between them." *Kimes v. City of Gary*, 66 N.E.2d 888, 893 (Ind. 1946). As discussed above, the undisputed facts show there was no fiduciary or trust relationship between Kentuckiana and the defendants. Kentuckiana stood as a mere creditor of SCNW with respect to the K/H payments. Kentuckiana is not entitled to an accounting, and the defendants are entitled to summary judgment on this claim.

VI. *Punitive Damages and Negligence*

Under Indiana law, "[a]n award of punitive damages may be awarded upon clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing." *Bell v. Clark*, 653 N.E.2d 483, 490 (Ind. App. 1995). In its motion, Kentuckiana stated: "An award of punitive damages . . . is appropriate against the Defendants because Ross and Dugan, as agents of Fourth Street and Sage, knew the K/H Payments were owed to Kentuckiana Healthcare, and yet failed to fulfill their legal duties as constructive trustees." As discussed above, the defendants were not constructive trustees, had no legal duty to Kentuckiana, and did not act in a fraudulent manner. On this record, an award of punitive damages could not be supported under any legal theory.

In its complaint, Kentuckiana further sought relief on the theory that the defendants were negligent in failing to deliver to it the K/H payments. Kentuckiana does not, however, cite any law or facts in its motion to support this claim. The undisputed facts establish instead that these defendants owed no duty to Kentuckiana to reimburse it for the K/H Payments. Where there is no duty, there can be no breach and therefore no negligence. *McDonald v. Lattire*, 844 N.E.2d 206, 213 (Ind. App. 2006), citing *Helton v. Harbrecht*, 701 N.E.2d 1265, 1267 (Ind. App. 1998). The defendants are entitled to summary judgment on Kentuckiana's punitive damages and negligence claims.

VII. *Third-party Beneficiary Contract Theory*

Kentuckiana also has sought relief under a theory that it was a third-party beneficiary of SCNW's contracts with the defendants. Kentuckiana again failed to cite any law or facts to support this strange claim. Under this theory, Kentuckiana argues that Fourth Street and Sage, in making their contracts with SCNW, "implicitly, if not explicitly, intended to benefit Kentuckiana Healthcare with respect to the receipt and disposition of the [K/H payments]" and that "Fourth Street and Sage breached their respective contracts by failing to remit the [K/H payments] to Kentuckiana Healthcare." Under Indiana law,

> [t]o enforce a contract under [an intended third-party beneficiary theory], the claimant must show 1) a clear intent by the parties to the contract to benefit the third party, 2) a duty imposed on one of the contracting parties in favor of the third party, and 3) performance of the contract.

Daimler Chrysler Corp. v. Franklin, 814 N.E.2d 281, 286 (Ind. App. 2004) citing *Angell Enterprises, Inc. v. Abram & Hawkins Excavating Co.*, 643 N.E.2d 362, 365 (Ind. App. 1994).

Here, the contracts between SCNW and defendants Fourth Street and Sage do not mention Kentuckiana at all and no evidence shows any intent to benefit Kentuckiana. Kentuckiana could not have been an intended third-party beneficiary of the contracts. The defendants are entitled to summary judgement on this issue.

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment (Docket No. 86) is DENIED. As the plaintiffs cannot meet their burden under any of their theories, the defendants' motion for summary judgment (Docket No. 89) is GRANTED. The court will enter final judgment for defendants.

So ordered.

Date: March 22, 2007

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

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