

No. 1-10-2986

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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BIJOUTERIE INTERNATIONAL, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 07L388
	)	
CLEAR CHANNEL OUTDOOR, INC. and	)	
CLEAR CHANNEL COMMUNICATIONS, INC.,	)	
	)	The Honorable
Defendants-Appellees.	)	Lee Preston
	)	Judge Presiding.

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PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Sterba concurred in the judgment.

**ORDER**

*Held:* The trial court properly granted defendants' motions for summary judgment as to plaintiff's conversion claim where plaintiff failed to demand the return of its property. As a result, the court also properly entered summary judgment against plaintiff's civil conspiracy claim predicated on conversion. In addition, the trial court correctly granted the summary judgment motion of defendant Clear Channel Communications, Inc. as to plaintiff's breach of contract claim where plaintiff could not show defendant was a party to the contract. The trial court erroneously granted the motion of defendant Clear Channel Outdoor, Inc. as to the breach of contract claim however, because the record did not unequivocally show an accord and satisfaction occurred.

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¶ 1 This appeal arises from a dispute regarding plaintiff Bijouterie International, Inc.'s billboard sign. Plaintiff filed a complaint against defendant Clear Channel Outdoor, Inc. (Outdoor) and defendant Clear Channel Communications, Inc. (Communications), raising claims for breach of contract, conversion and civil conspiracy to convert. The trial court granted defendants' motions for summary judgment. On appeal, plaintiff asserts the trial court erred in granting defendants' motions as to each cause of action. We affirm in part, reverse in part and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 We recite only those facts necessary to an understanding of this appeal. In 1992, plaintiff owned a billboard sign located at 647 West Grand Avenue in Chicago, Illinois. In April 1992, plaintiff, through its president Christopher Mandoline, entered into a written lease agreement with Scadron Enterprises (Scadron),<sup>1</sup> pursuant to which, Scadron would obtain advertisers for the east face of the sign, and both entities would receive certain percentages of advertising payments. Scadron was required to pay plaintiff 83.333% of all net media advertising dollars on the first of each month following Scadron's receipt of advertising dollars. If the monthly rental payment due exceeded \$6,666, plaintiff would pay Scadron a bonus. If any advertising agreement would result in a monthly rental payment of less than \$4,000, plaintiff's

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<sup>1</sup>It appears that at some point, Scadron Enterprises became Scadron Outdoor Advertising, LLC, or that the former entity transferred its lease rights to the latter. We refer to both entities as Scadron.

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prior approval was required. In addition, the agreement stated that at plaintiff's request, Scadron would provide documentation of its advertising agreements, and further provided a procedure for the termination or continuance of the agreement in the event that no advertising copy was displayed for a consecutive 90-day period. They subsequently came to an oral agreement regarding the west face of the sign on the same terms but later orally agreed to equally share net media advertising dollars. According to plaintiff, they also orally agreed that an advertisement for Mandoline's Allstate agency would be displayed in the absence of a paying advertiser.

¶ 4 In November 1992, plaintiff and several individuals formed Bijouterie Limited Partnership (the partnership). According to plaintiff, it contributed the sign and became the sole general partner but Scadron's obligations continued to run to plaintiff. On January 21, 2004, Scadron assigned its lease rights. The parties dispute however, whether Scadron assigned its rights to Outdoor, the corporation, or an outdoor division of Communications. On January 28, 2004, Scadron and Thomas Walsh, then vice president of "Clear Channel Outdoor," sent plaintiff a letter stating that "Clear Channel Outdoor a division of Clear Channel Communications" acquired Scadron's lease rights. The letter, which was written on "Clear Channel Outdoor" letterhead, stated that "Clear Channel" would honor all lease terms. Plaintiff and Outdoor subsequently corresponded in a series of letters regarding plaintiff's dissatisfaction with Outdoor's use of the sign, alleged lack of compliance with lease terms and insufficient rental payments. Plaintiff's correspondence occurred through attorney David Harding, although it is not always clear that Harding purported to represent plaintiff, as opposed to the partnership.

¶ 5 On January 19, 2005, Harding wrote to Chris McCarver, regional vice president of

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Outdoor in Minneapolis, Minnesota, complaining that "Clear Channel" had rented out the sign in a larger package without providing information regarding the relative values of all signs in the package. Harding complained that his client had not received contract information until after advertising periods or prior notice of low rent advertising. In addition, he observed that plaintiff had not been informed of periods in which no advertising would be displayed and advertisements were not removed after contracts had lapsed. Harding further objected to "Clear Channel's" display of advertisements for its radio stations in the absence of paying advertisers.

¶ 6 Harding wrote a letter to Outdoor's offices in Phoenix, Arizona and San Antonio, Texas, and apparently to Outdoor's agent in Springfield, Illinois on April 29, 2005. The parties dispute whether this letter was mailed. In any event, Harding stated that "Clear Channel Outdoor, Inc." had been assigned Scadron's contract with his client but had failed to perform as required. Harding stated, "my client has elected to terminate the contract for your willful default" and concluded, "we must part ways, effective upon receipt of this letter by you." It appears to be undisputed that the parties' conduct regarding the sign did not change after this date. On August 1, 2005, Harding wrote to the same offices. He referred to his unanswered January 2005 letter but not the April 2005 letter. He again complained about "Clear Channel's" performance and stated that if "Clear Channel's" calculations through May 31, 2005, were reliable, his client had been shorted \$125,113.06.

¶ 7 On September 13, 2005, Jeffrey Welch, real estate supervisor for Outdoor in Chicago, wrote to Harding, acknowledging the August 2005 letter, but not the April 2005 letter. Welch stated that based on Outdoor's review of actual sales contracts, it determined that plaintiff was

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entitled only to \$35,283.25 for the period of May 2004 through July 2005. Welch also stated, "[i]f you are in agreement with our calculations for the subject period reviewed \*\*\* please advise and we shall submit a request for the issuance of a supplemental lease rental payment to your Client in the amount of \*\*\* (\$35,283.25)." Welch explained that several lease factors could not be set up in Outdoor's accounting system and stated, "[a]s for the lease agreement itself, we believe at this time that it would be in the best interest of both parties to end our tenancy and terminate the lease agreement effective December 31<sup>st</sup> 2005." Welch explained that this date would allow "Clear Channel" to honor its remaining contracts and permit plaintiff "to shop the use of the sign faces to other entities." Welch further stated that Outdoor would entertain a new lease under more favorable conditions to Outdoor effective January 1, 2006.

¶ 8 On October 21, 2005, Harding responded to Welch, stating that plaintiff's calculations regarding the amounts due were based on actual use of the sign and that plaintiff never consented to any free or discounted use. He also stated that the advertising contracts provided by Outdoor did not reflect the value of plaintiff's sign relative to other signs sold in the same package and explained that when advertising was displayed beyond the contract period, "Clear Channel" gained good will at plaintiff's expense. Harding acknowledged Outdoor's statement that \$35,283.25 would "be paid when we agree that it is all that is owed," but stated, "[t]his is more than a little chilling." He also stated that "[w]e would welcome a simplified agreement, but we cannot consent to terminate the current agreement until new terms are in place." Harding further stated that "Clear Channel's default in its obligations \*\*\* does not afford Clear Channel a basis for termination. In any case, the proposal to terminate is disingenuous."

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¶ 9 On August 8, 2006, Harding again wrote to Welch and stated as follows:

"By letter of September 13, 2005, you admitted that, through May 31, 2005, Clear Channel had shorted my client \$35,283.25, but refused to pay unless we agreed that that was all that was due. Payment has not been received, and Clear Channel has made no effort to alleviate the many difficulties \*\*\* which we noted."

Harding reiterated certain complaints and stated, "we are terminating the lease, effective upon your receipt of this notice. We can give you three weeks (21 days) within which to remove your advertising copy." Harding concluded, "[a]t this point, you may remove your copy at your option but it remains only for Clear Channel to pay my client the balance due under our contract - \$198,498.45 - by August 29, 2006." On September 20, 2006, Outdoor's San Antonio office issued a check to the partnership for \$35,283.25. Plaintiff's account number and "05/01/04-07/31/05" were written on the reference line but no language appeared on the check indicating it was offered in full satisfaction of plaintiff's claim. The check was subsequently deposited.

¶ 10 Plaintiff commenced this action in January 2007 and the trial court granted plaintiff leave to file its second amended verified complaint in October 2008. In support of count I for breach of contract, plaintiff alleged that Scadron assigned its rights to Communications, which acquired those rights in its "Clear Channel Outdoor division." Plaintiff also alleged that in 2005, either the outdoor division was "spun off" as the corporation Outdoor or, Communications assigned the lease from its outdoor division to Outdoor. Plaintiff alleged that defendants failed to pay it \$164,295.34 which was owed under the lease agreements for the period between the Scadron

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assignment and August 31, 2006. As to count II alleging conversion, plaintiff added that beginning in June 2004, "whichever of the defendants controlled plaintiff's sign" converted it by among other things, displaying advertisements for Communications' radio stations, including plaintiff's sign in packages at understated values, refusing to provide contracts in support of rental subjects, renting the sign for less than \$4,000 without prior consent and withholding payment of sums admitted to be due. Plaintiff also alleged that "[o]n August 8, 2006, having been unable to convince the defendants to limit and conform their use of the sign to the terms of the lease, plaintiff demanded return of both faces of the sign by letter." Plaintiff further alleged it was entitled to \$420,941.39 and punitive damages. In support of count III claiming civil conspiracy to convert, plaintiff alleged that "[b]ased on information supplied by defendants since the commencement of this action, on January 21, 2004, SCADRON assign its rights under the lease to CC OUTDOOR." Plaintiff added that beginning in June 2004, defendants, "each having separate corporate existence," conspired to convert plaintiff's sign "through an agreement, the details of which are known only to them." Plaintiff sought the same damages as in count II.

¶ 11 In their answers, defendants stated that Scadron assigned its lease rights to Outdoor, rather than Communications, and denied that Communications "spun off" Outdoor as a separate corporation or that Communications assigned its lease interest from its outdoor division to Outdoor in 2005. Defendants also denied that they converted plaintiff's sign through the acts enumerated in the complaint or that an additional sum was owed to plaintiff. They further denied the majority of allegations in support of plaintiff's conversion claim and civil conspiracy claim. Outdoor raised accord and satisfaction as an affirmative defense, while Communications

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alleged as an affirmative defense that it was not a party to the contracts forming the basis of the complaint. Plaintiff filed a reply denying defendants' affirmative defenses.

¶ 12 During discovery, the parties deposed Mandoline, who testified that Scadron assigned its lease rights to Outdoor. He also testified regarding his dissatisfaction with defendants' use of the sign and insufficient payments. Mandoline did not tell anyone at Outdoor to stop using the sign and acknowledged that in calculating what was owed under the lease, he may have made certain mistakes which he attributed to the lack of information from defendants. Mandoline identified the September 2006 check but testified that he did not know what it related to because there was no detail. He further testified as follows:

"Q. Now, when you received this check, did you recognize this amount as the amount that was referenced by Mr. Welch in his letter?

A. I don't recall.

Q. Do you recall if you recognized that amount as the amount referenced by Mr. Harding in the letter dated August 8, 2006?

A. Looking at the letter, I do.

MR. HARDING [plaintiff's attorney]: I think his question was did you.

A. At the time?

Q. Yes.

A. I probably assumed it, but I don't remember."

When Mandoline received the check, he called David, apparently referring to Harding, and asked whether it should be deposited. Mandoline apparently told Harding that the check did not say

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"payment in full and final" and that there was no settlement agreement. Harding then told Mandoline to deposit the check. Mandoline did so believing a dispute remained.

¶ 13 The parties also deposed Blake Custer, who became the general manager of Outdoor Chicago in 2009. He testified that the Chicago office controlled about 7500 displays, approximately 1% of which were not owned by Outdoor. Custer testified that only he, the real estate department and possibly an accounting employee would know who owned a given sign and all signs controlled by Outdoor were used the same way, regardless of who owned them. Custer further testified regarding an "EBIT" agreement, a non-revenue policy, pursuant to which, a radio company apparently owned by Communications would pay to produce a sign and Outdoor would provide unsold sign space on which to display the advertisement. The policy provided an opportunity to make "the plant," apparently referring to the sign, look better. Outdoor would also occasionally leave advertising up after a contract had expired because Outdoor did not want blank sign faces. Lease calculations for Communications' displays on plaintiff's sign were calculated based on the lease terms, which included a minimum rent amount. Custer testified that when plaintiff's sign was packaged with other signs, "the package would be \*\*\* segmented equally across the designated grouping of units \*\*\* so that there would be a proportionate share for each individual landowner as it relates to their specific lease and it relates to the amount that the contract designates."

¶ 14 During Welch's deposition, he testified that Walsh, Outdoor's previous vice president of real estate, negotiated the asset purchase agreement with Scadron. Walsh instructed Welch to pay plaintiff the minimum \$4,000 when "Clear Channel" radio advertisements were posted on

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plaintiff's sign. At some point, Welch was instructed to prepare an internal notice, which is included in our record and stated that EBIT was not to be displayed on certain signs subject to percentage of rent lease agreements or Outdoor would have to compensate the landlords. Walsh also instructed Welch to calculate payments to plaintiff by giving all packaged signs equal weight, as reflected in the sum referred to in the September 2005 letter. Welch testified this was true for every group sale involving plaintiff's sign, regardless of location, size or the amount of traffic passing the packaged signs. He subsequently testified that he did not know how payments involving packaged signs were ordinarily calculated. When asked whether the September 2006 check contained any indication that it was offered in full satisfaction of Outdoor's dispute with plaintiff, Welch testified, "[j]ust an attachment to the letter." Welch also apparently identified the April 2005 letter, and testified that he saw it shortly after it was dated.

¶ 15 During his deposition in May 2010, Hamlet Newsom, Communications' vice president, testified that "Clear Channel Worldwide" was a name used by Communications and certain subsidiaries from 2001 through 2004 or 2005. He also testified that Communications was incorporated in Texas in 1974 and "[u]ntil July 30, 2008, it was the ultimate parent company for several lines of business, \*\*\* and through the Outdoor division, we have an outdoor billboard \*\*\* business." Newsom explained that Communications owned Clear Channel Holdings, Inc., which in turn owned 100% of the Class B stock of Clear Channel Outdoor Holdings, Inc. (Outdoor Holdings). The initial public offering of Outdoor Holdings took place on November 11, 2005, and the public owned 100% of Outdoor Holdings Class A stock. In addition, Outdoor Holdings, formerly Eller Media Corporation, owned 100% of Outdoor, which was formerly

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called Eller Media Company. Newsom further testified, "[i]f you think about pre-IPO, Outdoor was just a division wholly-owned by Communications." Newsom explained that there was no operational overlap between defendants' operations however, because Communications' radio stations, TV stations and "Outdoor division" were operated on a decentralized basis. Newsom identified what appears to have been the "EBIT" agreement, which he testified was an agreement between Communications and Outdoor Holdings on behalf of its subsidiaries such as Outdoor. Pursuant to that agreement, if Communications spent at least \$10,500,000 in cash on "outdoor inventory," Communications may be permitted to post advertising on displays owned by the aforementioned entities. Outdoor would receive cash for doing so. Newsom identified an affidavit he executed three years earlier in May 2007. The affidavit provided a similar explanation of the corporate structure and denied that Scadron's lease rights were assigned to Communications in January 2004, or that Outdoor was spun off as a separate company in 2005. Newsom's affidavit concluded that Communications had no substantive connection to plaintiff's cause of action against Outdoor. Notwithstanding this representation, Newsom continued to testify that he had never seen the first complaint and saw the second amended complaint a week before his deposition.

¶ 16 On July 9, 2010, Outdoor filed a motion for summary judgment (735 ILCS 5/2-1005 (West 2010)) and a memorandum in support thereof. Outdoor argued that as to plaintiff's breach of contract claim, an accord and satisfaction was completed when plaintiff deposited the September 2006 check. Outdoor argued there was a *bona fide* dispute regarding the amount due, Outdoor offered to pay plaintiff \$35,283.25 to settle the claim in full and plaintiff acknowledged

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in its October 2005 and August 2006 letters that Outdoor's offer was conditional. Outdoor also argued that summary judgment was warranted as to conversion because plaintiff consented to Outdoor's use of the sign through the lease agreements, did not have an unconditional right to immediate possession of the sign and did not demand that the sign be returned but rather, rejected Outdoor's offer to terminate the lease agreements. In addition, Outdoor asserted that summary judgment was warranted as to plaintiff's civil conspiracy claim because there was no agreement between defendants to convert plaintiff's property and plaintiff could not show that a conversion occurred. Attached to the memorandum were several of the aforementioned documents and deposition transcripts, as well as Welch's "Takedown Order," requiring all "Clear Channel owned vinyls" to be removed from plaintiff's structure by August 31, 2006. Also attached was a redacted copy of the asset purchase agreement, which stated that the agreement was between the members of Scadron and "CLEAR CHANNEL OUTDOOR, INC., a Delaware corporation."

¶ 17 Communications also moved for summary judgment, adopting Outdoor's arguments but adding that Communications could not be liable for breach of contract because it was not a party to the subject lease agreements. Communications alleged that while Outdoor, a Delaware corporation, was a party to the lease agreements through the Scadron assignment, Communications, a Texas corporation, was a separate corporate entity. Among the items attached were search results apparently printed from the Texas Secretary of State website, the Delaware Secretary of State website and Westlaw, collectively showing that Communications was incorporated in Texas on April 9, 1974, and that Outdoor was incorporated in Delaware on

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August 15, 1995. Search results from the Illinois Secretary of State website similarly showed that Outdoor, previously called Eller Media Company, was a Delaware corporation.

¶ 18 In response, plaintiff argued, in pertinent part, that Communications was a party to the contract based on the January 2004 letter and Newsom's testimony, both of which referred to Outdoor as a "division" of Communications. Plaintiff also relied on Newsom's testimony that "Clear Channel Worldwide" was a name used by both Communications and its subsidiaries. In addition, plaintiff argued that accord and satisfaction had not occurred because Outdoor's payment was not offered in good faith and additional unpaid amounts accrued between September 2005 and August 2006. Plaintiff argued that because Outdoor sent the September 2006 check without plaintiff's assent to Outdoor's condition, the condition was waived. Plaintiff further argued that Outdoor failed to include a conspicuous statement indicating payment was offered in full satisfaction on the check or in an accompanying writing. As to conversion, plaintiff argued it was not required to show that it demanded the return of its property. Because plaintiff did not receive notice of what amounts it would be paid until after each advertising period had passed, plaintiff did not know whether defendants were using the sign at an understated charge until their use was complete. Plaintiff also stated that it made demands in the April 2005 and August 2006 letters. As to the conspiracy claim, plaintiff essentially argued that defendants had an agreement to convert plaintiff's sign based on the EBIT agreement. Several of the aforementioned documents were attached as well as a check issued to plaintiff on June 23, 2004, in the amount of \$12,999.48. The check was issued by "Clear Channel Management Services, LP-Outdoor" and displayed the "Clear Channel Worldwide" logo. Similar to the

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September 2006 check, plaintiff's account number and "05/01/04-05/31/04" were written on the reference line.

¶ 19 In reply, Outdoor added, in pertinent part, that plaintiff had not shown Outdoor acted in bad faith and it did not matter that the September 2005 letter and September 2006 check were sent separately. As to the conversion claim, Outdoor argued that assuming the April 2005 letter was mailed, the parties continued to operate pursuant to their existing agreements. Outdoor further argued plaintiff's conspiracy claim failed because any effect the Ebit agreement had on plaintiff's sign was inadvertent and plaintiff could not show the underlying conversion occurred.

¶ 20 During arguments at a hearing on September 13, 2010, defendants added that plaintiff was bound by its admission in its second amended complaint that it demanded the return of its sign on August 8, 2006, rather than in April 2005, because the complaint was verified. The trial court then granted defendants' motions for summary judgment, finding that Communications was not a party to any contract and an accord and satisfaction occurred as to Outdoor because plaintiff understood Outdoor's offer was conditioned on an agreement that the sum paid was the total sum due. The court also found it did not matter that the September 2005 letter and September 2006 check were sent separately. As to conversion, the court found Outdoor was authorized to use the sign and plaintiff failed to demand possession of the sign until August 2006. Because plaintiff could not demonstrate conversion, the court also found plaintiff could not establish civil conspiracy based on conversion.

¶ 21

## II. ADMISSIBILITY OF THE EVIDENCE

¶ 22 On appeal, plaintiff first asserts that several exhibits relied on by defendants in support of their motions for summary judgment were inadmissible and thus, cannot be considered.

Specifically, plaintiff challenges the admissibility of the redacted asset purchase agreement, a printout from the Texas Secretary of State website, a printout from the Delaware Secretary of State website, Westlaw search results, Newsom's May 2007 affidavit, a document apparently pertaining to Outdoor's internal records, a copy of the front of the September 2006 check and the takedown order. Because plaintiff failed to object to the admissibility of the majority of the aforementioned exhibits and otherwise failed to obtain rulings on its objections, plaintiff's arguments are forfeited. See *Feldscher v. E & B, Inc.*, 95 Ill. 2d 360, 364-66 (1983) (a party who fails to obtain a ruling on its objection to the admissibility of evidence regarding a summary judgment motion forfeits the objection); see also *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 383 (2008) (the party objecting to the sufficiency of an affidavit pursuant to Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) carries the burden of challenging the affidavit in the trial court and obtaining a ruling thereon). We further note however, that plaintiff represents it has never seen the entire asset purchase agreement. On November 6, 2009, the trial court ordered the parties to meet by November 20, 2009, "to show plaintiff the redacted information in the 'Asset Purchase Agreement' is not related to his client." Plaintiff has not cited to any place in the record clearly demonstrating that such a meeting did not occur. Accordingly, we find plaintiff's representation to be entirely disingenuous.

III. BREACH OF CONTRACT

¶ 24 Next, plaintiff asserts the trial court erred in granting summary judgment as to his breach of contract claim. Specifically, he argues that defendants did not demonstrate that an accord and satisfaction occurred with Outdoor and there is a genuine issue of material fact regarding whether Communications was a party to the asset purchase agreement. We review an order granting summary judgment *de novo*. *Steiner Electric Co. v. Nuline Technologies, Inc.*, 364 Ill. App. 3d 876, 880 (2006). We must consider the depositions, affidavits, exhibits, admissions and pleadings on file and strictly construe them against the moving party. *F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, LLC*, 372 Ill. App. 3d 89, 93 (2007). If fair-minded persons could draw differing inferences from the undisputed facts, summary judgment is not appropriate. *Soderlund Brothers, Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 614 (1996). In addition, "[s]ummary judgment is particularly inappropriate where \*\*\* the parties seek to draw inferences on questions of intent." (Internal quotation marks omitted.) *Rumford v. Countrywide Funding Corp.*, 287 Ill. App. 3d 330, 335 (1997) (quoting *Giannetti v. Angiuli*, 263 Ill. App. 3d 305, 312-13 (1994)). Summary judgment will be properly granted however, when all of the aforementioned items on file, when viewed in the light most favorable to the nonmovant, show that no genuine issue exists as to any material fact so that the movant is entitled to judgment as a matter of law. *Steiner Electric Co.*, 364 Ill. App. 3d at 880.

¶ 25 To demonstrate a breach of contract, a plaintiff must show the existence of a contract, the plaintiff's performance of all contractual obligations, the defendant's breach of that contract and

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resulting damages. *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (2004). In addition, accord and satisfaction may be raised defensively in an action arising from a contract. *A.F.P. Enterprises, Inc. v. Crescent, Inc.*, 243 Ill. App. 3d 905, 911 (1993). The law pertaining to accord and satisfaction has been codified in the Uniform Commercial Code (UCC). *MKL Pre-Press Electronics/MKL Computer Media Supplies, Inc. v. La Crosse Litho Supply, LLC*, 361 Ill. App. 3d 872, 877 (2005) (citing 810 ILCS 5/3-311 (West 2002)). Section 3-311 of the UCC states in pertinent part as follows:

"(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that *the instrument or an accompanying written communication contained a conspicuous statement* to the effect that the instrument was tendered as full satisfaction of the claim.

\*\*\*

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation knew that the instrument was tendered in full

satisfaction of the claim." (Emphasis added.) 810 ILCS 5/3-311 (West 2006).

Even following the enactment of section 3-311, cases have consistently relied on common law in analyzing accord and satisfaction. *MKL Pre-Press Electronics/MKL Computer Media Supplies, Inc.*, 361 Ill. App. 3d at 877.

¶ 26 Accord and satisfaction requires (1) a *bona fide* dispute, (2) an unliquidated sum, (3) consideration, (4) a shared and mutual intent of the parties to compromise the claim at issue, and (5) the execution of the agreement. *Saichek v. Lupa*, 204 Ill. 2d 127, 135 (2003). Because of the contractual nature of accord and satisfaction, the parties' intent is of central importance.

*Saichek*, 204 Ill. 2d at 135. Intent may be inferred from the parties' conduct. *MKL Pre-Press Electronics/MKL Computer Media Supplies, Inc.*, 361 Ill. App. 3d at 878. Nonetheless, if a debtor seeks the benefit of an accord and satisfaction, it is incumbent that his tender of payment be made in a manner such that an explicit understanding between the parties can be inferred from the facts. *A.F.P. Enterprises, Inc.*, 243 Ill. App. 3d at 914. Where an honest dispute exists regarding the amount owed between the parties and the debtor tenders an amount with the explicit understanding that such payment is full payment of all demands, the creditor's acceptance and negotiation of that sum constitutes accord and satisfaction. *MKL Pre-Press Electronics/MKL Computer Media Supplies, Inc.*, 361 Ill. App. 3d at 877. Where a creditor keeps a debtor's reduced payment with either actual or constructive knowledge of the condition, he has accepted the debtor's offer and the original debt has been settled for the reduced amount. *MKL Pre-Press Electronics/MKL Computer Media Supplies, Inc.*, 361 Ill. App. 3d at 878.

¶ 27 Here, the trial court erred in granting summary judgment in favor of Outdoor based on

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accord and satisfaction. Specifically, the record does not show the parties had a mutual intent to compromise plaintiff's claim. In September 2005, Outdoor, through Welch, sent plaintiff a letter disagreeing with plaintiff's calculations and stated that plaintiff was entitled to \$35,283.25 for the period of May 2004 through July 2005. Welch also stated, "[i]f you are in agreement with our calculations for the subject period reviewed \*\*\* please advise and we shall submit a request for the issuance of a supplemental lease rental payment to your Client in the amount of \*\*\* (\$35,283.25)." Thus, Outdoor's offer to issue the check was conditioned on plaintiff's agreement that Welch's calculations were correct. In Harding's October 2005 letter, he acknowledged Outdoor's conditional offer but stated, "[t]his is more than a little chilling." In August 2006, almost a year after Welch's September 2005 letter, Harding again wrote to Welch, stating that "[b]y letter of September 13, 2005, you admitted that, through May 31, 2005, Clear Channel had shorted my client \$35,283.25, but refused to pay unless we agreed that that was all that was due. Payment has not been received." Harding ended the letter by stating, "it remains only for Clear Channel to pay my client the balance due under our contract- \$198,498.45 - by August 29, 2006." Accordingly, plaintiff rejected Outdoor's conditional offer. See *D'Agostino v. Bank of Ravenswood*, 205 Ill. App. 3d 898, 902 (1990) (a rejected offer will not be revived by a later acceptance). Notwithstanding plaintiff's rejection, Outdoor sent plaintiff a check for \$35,283.25 the following month.

¶ 28 Contrary to Outdoor's suggestion, Mandoline did not admit in his deposition that he understood the check to be offered in full satisfaction of plaintiff's claim. Mandoline testified he did not know what the check related to because there was no detail. In addition, he did not

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remember whether he had recognized that the check was for the amount referred to in Welch's September 2005 letter, although he had probably assumed the check was for the same amount referred to in Harding's August 2006 letter. When Mandoline received the check, Harding told him to deposit it because it did not say "payment in full and final" and there was no settlement agreement. Mandoline testified that he deposited the check, believing that a dispute remained. Construing the testimony against Outdoor, the movant, Mandoline's testimony at best showed that he was not entirely certain whether he recognized the amount on the check as the same amount referred to in prior letters, and in any event, did not believe the check was offered in full satisfaction of plaintiff's claim. Furthermore, we agree with Mandoline's assessment that the check contained no conspicuous statement indicating the check was offered in full satisfaction of plaintiff's claim.

¶ 29 The check's reference to the period of May 2004 through July 2005 does not constitute such a conspicuous statement but rather, is merely a notation regarding the period for which payment is due. We also observe that the check issued by Outdoor to plaintiff in June 2004 similarly noted the period for which the check was issued. Thus, it appears that Outdoor included the period for which the check was issued as a matter of general practice, rather than as a means to indicate that a particular check was offered in full satisfaction of a disputed claim. In any event, it appears reasonable that plaintiff would not have understood the reference to mean that the check was offered in full satisfaction of plaintiff's claim, if other checks had referred to a specific period and plaintiff had already rejected Outdoor's conditional offer.

¶ 30 We further reject Outdoor's assertion that the requisite conspicuous statement in full

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satisfaction was included in an accompanying document, Welch's September 2005 letter. As stated, in order for section 3-311(b) to discharge plaintiff's claim, Outdoor must show the "instrument or an accompanying written communication" contained the requisite conspicuous statement. 810 ILCS 5/3-311(b) (West 2006)). Notwithstanding this requirement, Outdoor essentially contends it was unnecessary for the accompanying letter to actually accompany the check, relying on *IFC Credit Corp. v. Bulk Petroleum Corp.*, 403 F.3d 869 (2005). Outdoor's reliance on *IFC Credit Corp.* is misplaced.

¶ 31 In *IFC Credit Corp.*, the endorsement area on the back of the subject check stated "payment in full of lease and purchase option 5613500." In addition, the invoice attached to the check stated, "pay off lease 5613500," and an accompanying letter stated, "payment in full of the lease and the purchase option" and that "acceptance of this check represents full satisfaction of the obligation." *IFC Credit Corp.*, 403 F.3d at 871-72. Ultimately, the Seventh Circuit Court of Appeals, in affirming the trial court's summary judgment order based on accord and satisfaction, stated that it was unpersuaded by the argument that the letter and check were improperly mailed separately and found that this "minor factual quibble" was irrelevant to the principle that the recipient of a *conspicuously-marked* tender proposing an accord and satisfaction cannot keep the tender while contending that no accord and satisfaction occurred. *IFC Credit Corp.*, 403 F.3d at 873-75.

¶ 32 In contrast to the present case, the check at issue in *IFC Credit Corp.* contained a conspicuous statement that it was offered in full satisfaction of the relevant claim. Thus, it was unnecessary for the letter to be sent with the check in order for the creditor to understand that the

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check was conditionally tendered on full satisfaction. Here however, the check itself did not contain such a conspicuous statement. Accordingly, it was necessary for the check to be accompanied by a letter containing a conspicuous statement in order for Outdoor to reap the benefit of an accord and satisfaction. We categorically reject Outdoor's contention that the September 2006 check was "accompanied" by the September 2005 letter sent a year earlier. In any event, we reiterate that plaintiff had rejected the offer contained in that letter before the check was sent.

¶ 33 As stated, the parties' intent is of central importance. Whereas here, there was no conspicuous statement referring to full satisfaction appearing on the check or accompanying it, a year passed between the conditional offer and the issuance of the check, plaintiff rejected that offer in the interim and plaintiff's president claimed that he did not believe the check to be offered in full satisfaction of plaintiff's claim, Outdoor has not shown both parties intended to compromise plaintiff's claim. We further observe that Welch's September 2005 letter and 2006 check referred to a period ending in July 2005, whereas plaintiff has alleged breach of contract occurring even after that date. Thus, even if an accord and satisfaction occurred, it would not have applied to plaintiff's entire breach of contract claim. Accordingly, the trial court erred in determining Outdoor demonstrated it was entitled to summary judgment as a matter of law based on accord and satisfaction.

¶ 34 We also find however, that the trial court properly granted summary judgment in favor of Communications because plaintiff cannot show Communications was a party to the contract at issue. The original lease agreements were between only plaintiff and Scadron. The asset

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purchase agreement shows that Scadron transferred its lease rights to Outdoor, rather than Communications. Plaintiff cannot demonstrate that Outdoor and Communications are the same entity. The Texas Secretary of State website showed that Communications was incorporated in Texas in 1974, while the Delaware Secretary of State website showed that Outdoor was incorporated in Delaware in 1995. Accordingly, they are separate corporations. That Communications is an indirect parent company of Outdoor does not change the result. See *Gass v. Anna Hospital Corp.*, 392 Ill. App. 3d 179, 184-85 (2009) (a parent corporation is generally not liable for its subsidiaries' acts).

¶ 35 Plaintiff contends that the January 2004 letter sent to plaintiff by Scadron and Walsh stated that Scadron assigned its rights not to Outdoor, but to Communications, "which acquired SCADRON'S rights in its Clear Channel Outdoor division," and thus, the record shows the assets were originally assigned to a "division" of Communications called "Outdoor." Plaintiff similarly relies on Newsom's deposition testimony that Communications had an "Outdoor division." Contrary to plaintiff's suggestion, their use of the word "division" is entirely consistent with Outdoor being an indirect subsidiary of Communications. In addition, the error in the meaning plaintiff ascribes to "division" in this instance is clearly demonstrated by the fact that the asset purchase agreement, the only agreement pertaining to the transfer of lease rights to plaintiff's sign, transferred those rights to Outdoor, the corporation which had been in existence since 1995. Furthermore, plaintiff's assertion that "Communications stood before Bijouterie and identified itself as the contracting party" is not supported by the record. The letter informing plaintiff of the assignment of assets was signed by the vice president of Outdoor, not Communications, and

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plaintiff has presented no evidence that Communications was even aware of the letter.

¶ 36 Plaintiff further argues that because checks it received bore the heading "Clear Channel Worldwide," which Newsom testified was a name used by Communications *and* its subsidiaries, defendants have admittedly behaved as the same entity. Plaintiff argues that defendants "have behaved, revealing nothing of their alleged separateness to Bijouterie, so as to bar themselves from claiming otherwise," citing only to *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147 (2006). Plaintiff has not identified what principle in *York* it relies on. Assuming plaintiff refers to apparent agency, it did not raise this in its complaint or response to the summary judgment motions. *Benson v. Strafford*, 407 Ill. App. 3d 902, 919 (2010) (an argument not raised by a party in the trial court cannot be raised for the first time on appeal, even in the context of a summary judgment). In any event, "[a]pparent authority in an agent is the authority which the principal knowingly permits an agent to assume, or the authority which the principal holds the agent out as possessing." *York*, 222 Ill. 2d at 184. At best, the use of the "Worldwide" name suggests these entities were within the same corporate family, not that Communications permitted Outdoor to hold itself out as Communications' agent. In addition, the record shows plaintiff understood "Worldwide" to refer to Outdoor. Mandoline testified that Scadron assigned its interests to Outdoor and Harding generally corresponded with Outdoor. Harding also stated in his April 2005 letter that "Clear Channel Outdoor, Inc." had been assigned Scadron's contract. Even when construing the record in plaintiff's favor, there is no question that Scadron's assets were assigned only to Outdoor. Because plaintiff cannot show Communications was a party to a contract with plaintiff, there was no contract for Communications to breach. Accordingly,

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Communications was entitled to summary judgment as a matter of law.

¶ 37

#### IV. CONVERSION

¶ 38 Plaintiff further asserts the trial court erred in granting defendants' motion for summary judgment as to conversion. To demonstrate conversion, a plaintiff must generally show that (1) it has the right to the property at issue; (2) it has an absolute and unconditional right to the immediate possession of such property; (3) the plaintiff has demanded possession of the property; and (4) the defendant wrongfully and without authorization assumed dominion, control or ownership over the property. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114 (1998); *Howard v. Chicago Transit Authority*, 402 Ill. App. 3d 455, 461 (2010). Notwithstanding the aforementioned case law, this court has not always required a plaintiff to show demand and refusal. See *A.T. Kearney, Inc. v. International, Inc.*, 132 Ill. App. 3d 655, 664 (1985) (cases are divided as to whether demand and refusal are always a necessary element of conversion). In cases where the court does not require demand and refusal, the defendant has either sold or disposed of the property in some manner so that he no longer possesses such property. *A.T. Kearney, Inc.*, 132 Ill. App. 3d at 664 (citing *Monroe County Water Cooperative v. City of Waterloo*, 107 Ill. App. 3d 477, 481 (1982)). In those cases, demand would be futile. *A.T. Kearney, Inc.*, 132 Ill. App. 3d at 664.

¶ 39 Plaintiff argues it was not required to show that it demanded the return of its property. Although the second amended complaint identified the allegedly converted property as the

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tangible sign, plaintiff argues that Outdoor converted the intangible advertising time on the sign faces. Plaintiff essentially argues that because it did not receive information regarding how its sign, and thus, the advertising time was used by defendants until after the advertising period was complete, plaintiff could not demand the return of its property, as plaintiff could not possibly get back its advertising time. Plaintiff raised a similar argument in response to defendants' summary judgment motions. Nonetheless, plaintiff did not raise a cause of action for the conversion of the intangible advertising time in its complaint. It follows that defendants' motions did not seek summary judgment as to such a cause of action and the trial court did not decide whether summary judgment would be appropriate as to such cause of action. Thus, plaintiff's argument is misplaced.

¶ 40 As to the conversion claim plaintiff did raise in its complaint, plaintiff cannot demonstrate that it should be excused from demanding the return of its sign because the record does not support a determination that demand would have been futile. The sign had not been disposed of or sold. In addition, there were difficulties between the parties and Outdoor offered in September 2005 to "end our tenancy and terminate the lease agreement," an offer which plaintiff rejected. Thus, it appears that Outdoor may have complied with a demand for the return of the sign prior to August 2006. When plaintiff did ultimately demand the return of its sign in August 2006, Outdoor complied in a timely fashion, further indicating that an earlier demand would not have been futile. *Cf. Monroe County Water Cooperative*, 107 Ill. App. 3d at 478, 481-82 (in an action for conversion of a system of waterlines, where the defendant had not offered to return the property, the court found that demand would have been futile because

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attempts to obtain meter readings from the defendant were unsuccessful). Although plaintiff asserts it did not know that defendants were converting its property until after each relevant advertising period had passed, surely plaintiff could see what advertising was publicly displayed on its sign. We observe that plaintiff's argument also suggests it was not concerned with Outdoor's exercise of control over the sign but rather, was merely concerned regarding whether plaintiff would be sufficiently paid for such use. See *Small v. Sussman*, 306 Ill. App. 3d 639, 648 (1999) (conversion claim was properly dismissed where, among other things, the plaintiff failed to allege that he demanded repossession of the property but instead, demanded more money). Thus, plaintiff cannot show that it was excused from demanding the return of its sign prior to August 2006 or that defendants refused to relinquish control of the sign when plaintiff did finally make a demand.

¶ 41 Plaintiff argues that it made a prior demand in the disputed April 2005 letter when Harding stated "we must part ways, effective upon receipt of this letter by you." According to plaintiff's second amended verified complaint however, "[o]n August 8, 2006, having been unable to convince the defendants to limit and conform their use of the sign to the terms of the lease, plaintiff demanded return of both faces of the sign by letter." Judicial admissions are formal admissions in the pleadings that withdraw a fact from issue. *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010). In addition, a party's admissions in a verified pleading are judicial admissions which bind the pleader. *Konstant Products, Inc.*, 401 Ill. App. 3d at 86. Thus, plaintiff is bound by its judicial admission that the demand occurred on August 8, 2006. We further observe that the statement in the April 2005

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letter can hardly be considered a clear demand for the immediate return of the sign to plaintiff's possession and control, and observe that plaintiff's conduct in subsequently rejecting Outdoor's September 2005 offer to terminate their relationship indicates that plaintiff repudiated any prior demand. Because plaintiff cannot show that defendants refused a demand to return the sign to plaintiff's control, defendants were entitled to summary judgment.

¶ 42

#### V. CIVIL CONSPIRACY

¶ 43 Finally, we find that the trial court properly granted defendants' motion for summary judgment as to plaintiff's civil conspiracy claim based on conversion. Civil conspiracy requires a combination of at least two individuals for the purpose of accomplishing through concerted action either an unlawful purpose or, a lawful purpose through unlawful means. *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 23 (1998). Civil conspiracy requires (1) an agreement between the conspirators to accomplish such a goal and (2) a tortious act committed in furtherance of their agreement. See *Reuter v. Mastercard International, Inc.*, 397 Ill. App. 3d 915, 927 (2010). In addition, the basis of a civil conspiracy claim that may result in a party having tort liability is not the mere combination of two or more persons, but rather, the wrongful act that was done pursuant to that agreement. See *Veazey v. LaSalle Telecommunications, Inc.*, 334 Ill. App. 3d 926, 933 (2002). Thus, "[i]n order to extend liability, there must be liability to extend." *Reuter*, 397 Ill. App. 3d at 928.

¶ 44 In light of our determination that the trial court properly granted summary judgment as to

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plaintiff's conversion claim, it follows that plaintiff cannot establish civil conspiracy predicated solely on the tort of conversion. Accordingly, defendants were entitled to summary judgment as to plaintiff's civil conspiracy claim.

¶ 45 For the foregoing reasons, we affirm the trial court's order entering summary judgment in favor of defendants as to plaintiff's claims for conversion and civil conspiracy. We also affirm the trial court's order to the extent it entered summary judgment in favor of Communications regarding plaintiff's breach of contract claim. We reverse and remand for further proceedings regarding plaintiff's breach of contract claim against Outdoor.

¶ 46 Affirmed in part; Reversed in part and remand.