

FOURTH DIVISION
September 26, 2013

No. 1-12-3026

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MBK SERVICES, INC.,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 08 CH 9509
)	
COLE TAYLOR BANK,)	
)	
)	
Defendant-Appellee,)	
)	
(Superior Mailing Services, Inc.;)	
Silverman Consulting, Inc.; and)	
Steven A. Nerger,)	Honorable
)	Thomas R. Allen,
Defendants).)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 **HELD:** The trial court's order granting summary judgment in favor of Cole Taylor is affirmed.

¶ 2 On March 12, 2008, Plaintiff MBK Services, Inc. (MBK) filed a verified complaint for injunctive relief against Superior Mailing Services, Inc. (SMS) to recover approximately \$1.7 million that SMS had received from the Government Printing Office (GPO).¹ When MBK learned that the funds it was seeking had been allocated to Cole Taylor Bank (Cole Taylor) after SMS defaulted on a loan, MBK filed a second amended verified complaint for imposition of constructive trust and other relief against SMS, Cole Taylor and other parties² seeking a constructive trust in the amount of approximately \$1.4 million.³ On May 31, 2012, defendant Cole Taylor filed a motion for summary judgment. On September 18, 2012, the trial court granted summary judgment in favor of Cole Taylor finding that Cole Taylor's perfected security interest in the \$1.4 million took priority over MBK's unsecured interest in the \$1.4 million. The trial court also found that there was no competent evidence to support (1) the

¹ This complaint contained four counts against SMS: (1) constructive trust, (2) fraud, (3) tortious interference with economic advantage, and (4) breach of contract.

² The other two named defendants are alleged assignees of SMS's assets, Steven A. Nerger and Silverman Mailing Services, Inc.

³ This complaint does not have any separate counts. It seeks relief in the form of a constructive trust, turn over of MBK property and any additional relief which is just.

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existence of MBK's alleged oral contract between MBK and SMS, (2) a fiduciary relationship between SMS and MBK arising from the oral contract or (3) MBK's theory of unjust enrichment. As such, the trial court found there was no evidence to support the imposition of a constructive trust. MBK appeals claiming that there were genuine issues of material fact as to the existence of an oral contract and constructive trust, which precluded summary judgment. For the reasons that follow, we affirm the trial court's order granting summary judgment in favor of Cole Taylor.

¶ 3 BACKGROUND

¶ 4 Plaintiff, MBK Services, Inc. (MBK) is an Illinois business engaged in the printing and direct mail marketing industries as both a broker and a sales agent. Richard Keefe (Keefe) is the Vice President and Senior Sale Engineer of MBK. Keefe's wife is the owner of MBK, and there are no other employees at MBK besides Keefe and his wife.

¶ 5 Defendant Superior Mailing Services, Inc. (SMS) is an Illinois corporation engaged in the business of providing mailing services.

¶ 6 On May 11, 2007, Cole Taylor Bank (Cole Taylor), which is in the business of retail and commercial banking, executed a loan to SMS in the amount of \$5.75 million which was evidenced by a revolving line of credit promissory note, an equipment term loan

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promissory note, and a term loan promissory note.

Contemporaneously with the loan, SMS executed a security agreement that provided Cole Taylor with a blanket security over substantially all of SMS's assets. On May 11, 2007, Cole Taylor filed a Uniform Commercial Code (UCC) Financial Statement with the Illinois Secretary of State that perfected its security interest in SMS's assets.

¶ 7 On May 23, 2007, Keefe, in his personal capacity, entered into an employment contract with SMS. The employment contract recognized his side business with MBK. According to the employment contract, Keefe was to act as a sales agent for SMS and in turn SMS paid Keefe a monthly salary of \$10,000 as well as 6% commission on receipts after accumulating \$2 million in net receipts. Keefe's specific responsibilities under the employment contract were to procure printing contracts from the Government Printing Office (GPO). After the GPO would release the details of a project, Keefe would gather the specifications and locate secondary vendors to do component work for SMS as the primary vendor.

¶ 8 According to Keefe and MBK, sometime in June 2007, MBK and SMS entered into an oral contract. Pursuant to the oral contract, bids on GPO business would be submitted by MBK under the SMS name. MBK was responsible for locating and retaining

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vendors to perform the services necessary to fulfill the contracts. SMS was to collect payments from the GPO, deduct SMS's own charges from the amount collected and then transfer the remaining balance to MBK to pay its vendors and retain its profits.

¶ 9 Keefe secured five GPO contracts on behalf of SMS between July 19, 2007 and October 4, 2007 before he was terminated on October 18, 2007. The memorandum that terminated Keefe's employment with SMS stated that Keefe was no longer permitted to commit SMS to future GPO contracts, but that he would continue to work on those five projects that he had already secured, and he would receive a 5% commission on the net revenue collected by SMS for his services. In February 2008, Keefe proposed a new agreement with SMS whereby MBK would be recognized as an independent sales agent, however this agreement was never signed.

¶ 10 Between January 23, 2008 and April 8, 2008, the GPO deposited a total of \$2,116,530.54 into SMS's checking account for work done on the GPO contracts. Upon receiving these payments, SMS claimed that it was entitled to retain approximately \$628,000.⁴ SMS did not make any payments to MBK from the money paid on the GPO contracts.

⁴ MBK argues that the amount of funds SMS was entitled to was closer to \$550,000.

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¶ 11 In February of 2008, SMS breached its obligations under the loan agreement with Cole Taylor by failing to make certain required payments on time. Cole Taylor notified SMS of its default and then exercised its right to accelerate the principle amount and interest due under the loan agreement. As a result, on May 8, 2008, SMS made an assignment for the benefit of its creditors and on May 23, 2008, sold all its assets, which amounted to approximately \$3 million. Because Cole Taylor had the only perfected interest in the proceeds of the sale, and because the amount SMS owed Cole Taylor exceeded \$3 million, all of the proceeds from the asset sale were conveyed to Cole Taylor in exchange for a release of its lien on SMS's assets.

¶ 12 On March 12, 2008, MBK filed a verified complaint for injunctive relief against SMS to recover approximately \$1.7 million that SMS had received from the GPO. When MBK learned that the funds it was seeking had been allocated to Cole Taylor after SMS defaulted on its loan, MBK filed a second amended verified complaint against SMS, Cole Taylor and other parties seeking a constructive trust in the amount of approximately \$1.4 million. On May 31, 2012, defendant Cole Taylor filed a motion for summary judgment. On September 18, 2012, the trial court granted summary judgment in favor of defendant Cole Taylor finding that Cole Taylor's perfected security interest in the

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\$1.4 million took priority over MBK's unsecured interest in the \$1.4 million dollars. The trial court also found that there was no competent evidence to support MBK's alleged oral contract between MBK and SMS, fiduciary relationship between SMS and MBK and theory of unjust enrichment to support the imposition of a constructive trust. MBK appeals claiming that there were genuine issues of material fact as to the existence of an oral contract and constructive trust, which precluded summary judgment. For the reasons that follow, we affirm the trial court's order granting summary judgment in favor of Cole Taylor.

¶ 13 ANALYSIS

¶ 14 Summary judgment is appropriate in those cases where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). Our supreme court has explained that summary judgment is favored as a mechanism to achieve the expeditious termination of litigation, while recognizing that it is a drastic measure reserved for cases in which "the right of the moving party is clear and free from doubt." (Internal quotation marks omitted.) *Midwest Decks, Inc. v. Butler & Baretz Acquisitions, Inc.*, 272 Ill. App. 3d 370, 375 (1995). "Although a plaintiff is not required to prove his [or

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her] case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Id.* at 355.

¶ 15 Summary judgment orders are reviewed *de novo*. *Arra v. First State Bank & Trust Co.*, 250 Ill. App. 3d 403, 406 (1993). We may affirm a trial court's ruling on any grounds supported by the record. *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 626 (1997). For the reasons that follow, we affirm the trial court's ruling granting summary judgment in favor of Cole Taylor.

¶ 16 Here, the trial court granted Cole Taylor's motion for summary judgment because it found that Cole Taylor had a perfected security interest in SMS's assets that took priority over MBK's unsecured interest in those assets. The court further found that there were no issues of material fact in the case and no evidence to support the existence of an oral contract or a fiduciary relationship arising therefrom and, accordingly, that there were no facts to support the imposition of a constructive trust. We affirm the trial court's ruling because MBK was estopped from denying Cole Taylor's secured interest in the \$1.4 million. Therefore, whether there was an oral contract between MBK and SMS is not an issue of fact material to the issues presented here because Cole Taylor is entitled to judgment in

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either case.

¶ 17 Article 9 of the UCC governs secured transactions and provides "a comprehensive scheme for the regulation of security interests in personal property and fixtures." 810 ILCS 5/9-101, Comment (West 2008). The goal of Article 9 is to establish a simple and uniform structure within which secured financing transactions can be conducted. 810 ILCS 5/9-101, Comment (West 2008). In addition, Article 9 is meant to protect creditors by providing them with greater security than they had under pre-Code laws. *Midwest Decks, Inc.*, 272 Ill. App. 3d at 376. Section 1-103 of the Illinois UCC states that the UCC is to be liberally construed in order to promote its underlying purposes and policies, which are (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions. 810 ILCS 5/1-103(a) (West 2008). With few exceptions, Article 9 applies to "any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts * * *." *Midwest Decks, Inc.*, 272 Ill. App. 3d at 376; See 810 ILCS 5/9-102(1) (a) (West 2008).

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¶ 18 Three prerequisites must be met in order to create a security interest which "attaches" and is enforceable against the debtor or a third party: (1) the collateral must be in the possession of the secured party or the debtor must sign a security agreement which describes the collateral; (2) value must be given; and (3) the debtor must have rights in the collateral. 810 ILCS 5/9-203 (West 2008). The UCC does not define the phrase "rights in the collateral", but it is generally recognized that rights in the collateral may be sufficient if: the debtor has possession and title to the goods (*Central National Bank v. Worden-Martin, Inc.*, 90 Ill. App. 3d 601, 604 (1980)); the true owner consents to the debtor's use of the collateral as security; **or if the true owner is estopped from denying the creation of the security interest because "he has allowed another to appear as the owner, or as having full power of disposition over the property, so that an innocent person is led into dealing with such apparent owner[]."** (Internal quotation marks omitted.) (Emphasis added.) *In re Pubs, Inc. of Champaign*, 618 F.2d 432, 437-38 (7th Cir. 1980) (applying Illinois law); *Midwest Decks, Inc.*, 272 Ill App. 3d at 376-77.

¶ 19 Here, we find that, assuming *arguendo* MBK is the "true owner" of the \$1.4 million, MBK is estopped from denying Cole Taylor's security interest in the \$1.4 million. According to the

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alleged terms of the June 2007 oral contract, MBK allowed SMS to collect money directly from the GPO and deposit that money directly into SMS's checking account as if SMS was the owner of that money. In addition, MBK gave SMS full power and disposition of the money that was deposited into SMS's checking account. Accordingly, because MBK allowed SMS to appear as the owner of the funds and gave SMS full power over the disposition of those funds, MBK is estopped from denying Cole Taylor's perfected security interest in the \$1.4 million.

¶ 20 Further, MBK did nothing to ensure that its claimed interest in the \$1.4 million was protected and known to other parties. MBK did not set up an escrow account, did not perfect or secure its interest in the money, did not attempt to put the terms of the oral contract into writing, and did not take any measure to protect its interest in the proceeds from the goods.⁵ As such, when Cole Taylor perfected its security interest in SMS's assets on May 11, 2007, in exchange for a \$5.75 million loan, it had no way of ever knowing, or finding out in the future, that MBK had any type of claimed interest in SMS's assets.

⁵ Also, as pointed out by Cole Taylor, MBK could have executed a joint venture agreement with SMS to share the profits from the GPO contract, and require SMS to designate the GPO payments as "held in trust." MBK could have mandated that SMS deposit the GPO payments in a bank account held jointly by MBK and SMS or negotiated a subordination agreement with Cole Taylor.

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¶ 21 Once MBK is estopped from denying Cole Taylor's perfected security interest in the \$1.4 million, this case becomes a case of UCC priorities. A security interest in most collateral is perfected by the filing of a financing statement with the Illinois Secretary of State. See 810 ILCS 5/9-302, 5/9-401(c) (West 2008). Once the interest in the original collateral is perfected, the security interest in the proceeds from the collateral is also perfected. 810 ILCS 5/9-306(2) (West 2008); *Midwest Decks, Inc.*, 272 Ill. App. 3d at 376. When security interests conflict, the first to attach takes priority and, as a general rule, the holder of a perfected security interest takes priority over the interests of unsecured creditors. 810 ILCS 5/9-312(5) (West 2008); *Herman v. First Farmers State Bank*, 73 Ill. App. 3d 475, 477 (1979). Thus, because Cole Taylor had a perfected security interest in the \$1.4 million as of May 11, 2007 and MBK had an unperfected and unsecured interest in the funds, Cole Taylor's interest takes priority over any interest MBK might have had in the \$1.4 million. See *In re White Farm Equipment Co.*, 63 B.R. 800 (1986) (recognizing the harsh result of the application of the UCC for an unsecured creditor where unsecured creditor returned inventory to the debtor, and before the debtor could pay for the inventory, the inventory was turned over to a secured creditor in a bankruptcy proceeding).

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¶ 22 Because we find that MBK was estopped from denying Cole Taylor's perfected security interest in the \$1.4 million, it follows that the question of whether there was an oral contract between MBK and SMS is no longer a material issue of fact as to any claims against Cole Taylor because Cole Taylor is entitled to judgment in either case. While it may be a genuine issue of fact with respect to claims made against other defendants, that issue is not before this court and it is unclear from MBK's second verified complaint what claims were made against each of the other defendants.

¶ 23 Furthermore, even if we assume *arguendo* facts existed to impose a constructive trust over the \$1.4 million, MBK's request that a constructive trust take priority over a innocent third party's perfected secured interest is not supported by Illinois law. Section 1-103 of the Illinois UCC is clear that:

"(b) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement

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its provisions." 810 ILCS 5/1-103(b) (West 2008).

Thus, the principles of equity are meant to supplement, not supplant, the provisions of the UCC. If we were to adopt MBK's theory that equitable constructive trusts take priority over perfected security interests, especially when the alleged constructive trust arose after the secured interest was perfected and when the perfected secured interest belongs to an innocent third party,⁶ we would be allowing the principles of equity to completely supplant and hold meaningless the priority provisions enumerated in the UCC.⁷ Along the same lines, adopting MBK's theory here would also run contrary to the stated purposes of the UCC, which are (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among

⁶ There is no evidence in the record and none of the parties suggest that Cole Taylor was involved in any type of wrongdoing with respect to its actions in this case. Further, the trial court found that "Cole Taylor could not know of any written agreement, oral agreement or fiduciary relationship or trust agreement that existed between MBK Services and Mr. Keefe as a principal and SMS."

⁷ "A fundamental policy of Article 9 of the UCC is to discourage secret liens ... A contrary decision would undercut this fundamental policy." *In re White Farm Equipment Co.*, 63 B.R. at 807.

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the various jurisdictions. 810 ILCS 5/1-103(a) (West 2008).

¶ 24 CONCLUSION

¶ 25 For the above reasons, we affirm the trial court's order granting summary judgment in favor of Cole Taylor.

¶ 26 Affirmed.