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IN THE COURT OF APPEALS OF INDIANA

JOHN V. LOUDERMILK, CONTINENTAL AMERICAN INSURANCE COMPANY,	)	
Appellants-Defendants, Counter-Plaintiffs,	)	
GENEVA P. LOUDERMILK, et al.,	)	
Appellants-Intervenors, Counter-Plaintiffs,	)	
vs.	)	No. 49A02-1006-PL-665
JET CREDIT UNION n/k/a CREDIT UNION 1,	)	
Appellee-Plaintiff, Counter-Defendant	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0402-PL-334

November 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

John Loudermilk, along with other co-defendants and interested intervenors (collectively, "Loudermilk") appeal the grant of partial summary judgment in favor of Jet Credit regarding their counterclaim for common law conversion. We affirm.

FACTS AND PROCEDURAL HISTORY

On August 22, 2003, Loudermilk resigned his position as Chief Executive Officer at Jet Credit. Before his resignation, Loudermilk requested the withdrawal of money from certain accounts on which he was a signatory or co-signatory. The total value of those accounts was $1,008,942.20. Jet Credit refused to release those funds because of its pending legal action against Loudermilk for conversion, deception, mischief, unjust enrichment, breach of fiduciary duties, civil conspiracy, fraud on a financial institution, veil piercing, replevin, and breach of contract.

On April 19, 2004, Loudermilk filed for a preliminary injunction, asking the trial court to order Jet Credit to release the account funds. On May 17, the trial court ordered Jet Credit to release the funds to Loudermilk. On May 21, Jet Credit released the principal from the funds, along with 2.45% annual interest earned, the same rate of interest paid to other Jet Credit account holders during that time period pursuant to the Credit Union account agreement.

On September 30, Loudermilk filed a counterclaim against Jet Credit for, among other things, criminal conversion and common law conversion. The trial court granted partial summary judgment in favor of Loudermilk regarding the criminal conversion claim, and our Court reversed the trial court's decision and remanded for further proceedings on the other

claims. *Jet Credit Union v. Loudermilk*, 879 N.E.2d 594 (Ind. Ct. App. 2008) (reversing grant of summary judgment to Loudermilk because the record contained no evidence Jet Credit had the criminal intent required for criminal conversion), *trans. denied*.

On February 3, 2010, the trial court granted partial summary judgment in favor of Jet Credit regarding the common law conversion claim. Loudermilk filed a motion to correct error, which the trial court denied. The trial court's decision as to the common law conversion claim is the subject of Loudermilk's current appeal.

DISCUSSION AND DECISION

Loudermilk argues the trial court erred in denying his motion to correct error. A trial court has broad discretion in ruling on a motion to correct error. *Volunteers of Am. v. Premier Auto Acceptance Corp*., 755 N.E.2d 656, 658 (Ind. Ct. App. 2001), *reh'g denied*, *trans. denied*. We will reverse only for an abuse of that discretion. *Id*. An abuse of discretion occurs if the decision was against the logic and effect of the facts and circumstances before the court or if the court misapplied the law. *Id*.

The validity of that denial depends on whether Loudermilk can demonstrate the trial court erred by granting partial summary judgment to Jet Credit. We review summary judgment under the following standard:

> A party is entitled to summary judgment upon demonstrating the absence of any genuine issue of fact as to a determinative issue unless the non-moving party comes forward with contrary evidence showing an issue of fact for trial. An appellate court reviewing a trial court summary judgment ruling likewise construes all facts and reasonable inferences in favor of the non-moving party and determines whether the moving party has shown from the designated evidentiary matter that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. But a *de novo* standard of review

applies where the dispute is one of law rather than fact.

Dugan v. Mittal Steel USA, Inc., 929 N.E.2d 184, 185-86 (Ind. 2010). That the parties have filed cross-motions for summary judgment does not alter our standard of review, and we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *T-3 Martinsville, LLC v. U.S. Holding, LLC*, 911 N.E.2d 100, 109 (Ind. Ct. App. 2009), *trans. denied*.

To succeed on a tort claim of common-law conversion, Loudermilk and his co-defendants will have to prove: "(1) they are the owners of the Loudermilk Accounts and have an immediate, unqualified right to possession which rests on a superior claim of title; (2) Jet converted or withheld the Loudermilk Accounts in defiance of their rights; and (3) they suffered damages as a result of Jet's conversion." (Br. of Appellant at 14) (citing *Yoder Feed Service v. Allied Pullets, Inc.*, 171 Ind. App. 692, 695-96, 359 N.E.2d 602, 604 (Ind. Ct. App. 1977)). Jet Credit argues Loudermilk failed to create a genuine issue of material fact about whether he suffered damages, and thus summary judgment in Jet Credit's favor was proper. We agree.

Loudermilk's claim of damages rests on his assertion he was due prejudgment interest on the amount in his Jet Credit accounts during the time they allegedly were converted.[1] He bases this claim on the availability of prejudgment interest in a tort claim[2] action pursuant to

[1] Pursuant to Ind. Code § 28-7-1-26, which was in effect in 2003 but has since been repealed, Jet Credit could hold Loudermilk's account funds for up to sixty days following his request for withdrawal. Thus, Loudermilk's common law conversion claim asserts Jet Credit was unauthorized to hold the money for the seven months between the end of the period allowed by statute and the date he received the funds pursuant to the trial court's order.

[2] Loudermilk also seems to indicate he is due prejudgment interest pursuant to Ind. Code § 24-4.6-1-102,

Ind. Code § 34-51-4-1.[3] However, Ind. Code § 34-51-4-6 states prejudgment interest is not available if

> within one (1) year after a claim is filed in the court, or any longer period determined by the court to be necessary upon a showing of good cause, the party who filed the claim fails to make a written offer of settlement to the party or parties against whom the claim is filed[.]

There is no evidence Loudermilk made a settlement offer at any time during the seven years this matter was pending, and Jet Credit designated an affidavit indicating Loudermilk had not submitted a settlement offer prior to the cross-motions for summary judgment at issue in this appeal. Therefore, Loudermilk is not entitled to prejudgment interest in his tort claim. *See Simon Prop. Grp., L.P. v. Brandt Const., Inc.*, 830 N.E2d 981, 993-94 (Ind. Ct. App. 2005) (affirming denial of prejudgment interest because Simon failed to make the settlement offer required by Ind. Code § 34-51-4-6), *trans. denied*.

As that is the only basis he asserts for the damages allegedly incurred, his claim for common law conversion fails.[4] *See Universal C.I.T. Credit Corp. v. Shepler*, 164 Ind. App. 516, 329 N.E.2d 620, 624 (Ind. Ct. App. 1975) (tort claim requires actual damages or loss incurred and may not be speculative), *reh'g denied*. Thus, Loudermilk has not demonstrated

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which provides for prejudgment interest in contract claims. However, as Loudermilk himself asserts, this is not a contract action, it is a tort action, and thus that statute does not apply.

[3] That statute provides: "This chapter applies to any civil action arising out of tortious conduct." Ind. Code § 34-51-4-1.

[4] We note Loudermilk also claims he suffered damages he testified were "speculative" based on his "usual investments in purchasing and buying and selling properties," "new ventures that need to be accomplished," and "some construction ideas on the various properties owned by this corporation." (App. at 516.) As damages in tort claims must be based on the actual damage or loss incurred and may not be speculative, *Universal C.I.T. Credit Corp. v. Shepler*, 164 Ind. App. 516, 329 N.E.2d 620, 624 (Ind. Ct. App. 1975), *reh'g denied*, that argument also fails.

error in the court's grant of partial summary judgment in favor of Jet Credit or in the court's denial of his motion to correct error. Accordingly, we affirm.[5]

Affirmed.

BAKER, J., and BRADFORD, J., concur.

[5] Loudermilk also asserts the trial court erred when it denied his request for attorney's fees. Ind. Code § 34-52-1-1(b) indicates "the court may award attorney's fees as part of the cost to the prevailing party," and Loudermilk is not the prevailing party, we find no error.