

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KEY CORPORATE CAPITAL, INC., SUCCESSOR	:	CIVIL ACTION
BY MERGER TO KEYCORP LEASING, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID A. TILLEY,	:	
PENNCO MACHINE, INC.,	:	
BOSTON MACHINERY, INC., and	:	
PENNCO MACHINE, LLC,	:	
	:	
Defendants.	:	No. 04-1652

**MEMORANDUM**

This case arises from two separate incidents. The first involves the sale of Key Corporate Capital, Inc.'s equipment by Pennco Machine, Inc. ("PMI"), and David A. Tilley, principal of PMI, to Boston Machinery, Inc. ("BMP") for \$80,000.00. Key alleges that PMI and Tilley kept the proceeds of the sale. The second incident involves an alleged settlement agreement between Key and Tilley. According to the terms of the agreement, Key was not to file suit against PMI and Tilley if Tilley paid Key the \$80,000.00 in installments, plus interest. However, Tilley never made any of the payments. Key now raises conversion claims against PMI and Tilley and an officer participation claim against Tilley based on the first incident. With respect to the second occurrence, Key contends that Tilley is liable for breach of the settlement agreement.

On September 14, 2004, Key filed a motion for summary judgment against PMI and Tilley, arguing that it is entitled to judgment on the conversion and officer participation claims arising from the first occurrence and on the breach of agreement claim arising from the second incident. Based on the reasoning below, I find that Key is entitled to judgment on the conversion

and officer participation claims. I further find that Key is entitled to recover the \$80,000.00, plus interest and costs, as a matter of law.

## **I. BACKGROUND**

Key filed this action against Tilley, PMI, BMI, and Pennco Machine, LLC (“PML”) on April 15, 2004. Key alleges that in July 2001, it purchased a machine designed to cut or drill metal from PMI. Key then leased the equipment to New Holland North America (“NHNA”). The lease matured in July 2002, and NHNA returned the equipment to PMI. In December 2002, PMI and Tilley sought Key’s permission to sell the equipment to BMI. Key agreed to the proposed transaction, contingent upon receipt of proceeds in the amount of \$80,000.00. PMI and Tilley then gave BMI the equipment for \$80,000.00, but PMI and Tilley never gave Key the \$80,000.00. BMI later resold the equipment to an unknown party.

On January 7, 2004, Tilley entered into a settlement agreement with Key. The agreement indicated that Key would not file suit against Tilley and PMI if Tilley paid Key the \$80,000.00, plus interest, in monthly installments. Tilley, however, never made any payments.

Key argues, among other things, that PMI and Tilley are liable for conversion and that Tilley is liable for officer participation because of PMI and Tilley’s failure to turn the \$80,000.00 over to Key. Key also argues that Tilley is liable for breaching the settlement agreement. Key demands judgment against the defendants in the amount of \$80,000.00, plus interest and costs.

On September 14, 2004, Key filed a motion for summary judgment against PMI and Tilley on the conversion claim and against Tilley on the officer participation claim because, according to Key, PMI and Tilley admit that Key owned the equipment; PMI and Tilley sought Key’s permission to sell the equipment; Key agreed to the sale of the equipment, contingent upon

its receipt of \$80,000.00; and PMI and Tilley received \$80,000.00 for the equipment but did not turn the money over to Key. Key also moves for summary judgment on the breach of settlement agreement claim. According to Key, Tilley admits that Key and Tilley entered into a settlement agreement, agreeing that Tilley would pay Key the \$80,000.00 in installments, plus interest, in lieu of litigation. Moreover, Tilley admits that Key never received any payments pursuant to the agreement.

## **II. STANDARD OF REVIEW**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, 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.” F.R.C.P. 56(c). In deciding a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the nonmoving party. Boyle v. County of Allegheny, Pennsylvania, 139 F.3d 386, 393 (3d Cir. 1998). There is a genuine issue of fact if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

If the party moving for summary judgment is the defendant, or the party without the burden on the underlying claim, the moving party has no obligation to produce evidence negating the nonmoving party’s case. National State Bank v. Federal Reserve Bank, 979 F.2d 1579, 1581-82 (3d Cir. 1992). The moving party only has to point to the lack of any evidence supporting the nonmoving party’s claim. Id. at 1582. However, where, as here, the moving party is the plaintiff, or the party bearing the burden of proof at trial, the standard is more stringent. Id. The moving party must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial. See id. In other words, when the moving party has the burden

of proof at trial, that party must establish that, on all of the essential elements of its case, no reasonable jury could find for the nonmoving party. In re Bressman, 327 F.3d 229, 238 (3d Cir. 2003). If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party responds with probative evidence demonstrating the existence of a triable issue of fact. Id.

### **III. DISCUSSION**

“Conversion is a tort by which the defendant deprives the plaintiff of his right to a chattel or interferes with the plaintiff’s use or possession of a chattel without the plaintiff’s consent and without lawful justification.” Pittsburgh Const. Co. v. Griffith, 834 A.2d 572, 581 (Pa. Super. 2003). A plaintiff has a cause of action in conversion if he had actual or constructive possession of a chattel at the time of the alleged conversion. Id. Money may be the subject of conversion, but the failure to pay a debt is not conversion. Id. “[A]n officer of a corporation who takes part in the commission of a tort by the corporation is personally liable” for the tortious activity. Wicks v. Milzoco Builders, Inc., 470 A.2d 86, 90 (Pa. 1983).

Here, Key has provided evidence that PMI and Tilley, principal of PMI, deprived Key of its right to \$80,000.00 without Key’s consent and without lawful justification. Specifically, Patricia M. Norwood, a senior equipment analyst for Key who dealt with PMI and Tilley, stated in an affidavit that Tilley contacted her and asked her for authority to sell the equipment on Key’s behalf. Norwood Affidavit, at 1. Norwood stated that she agreed to allow Tilley to sell the equipment on behalf of Key, contingent upon Key’s receipt of \$80,000.00. Id. Larry Young, Tilley’s attorney, later called Norwood and indicated that Tilley sold the equipment but was not going to turn the \$80,000.00 over to Key. Id. Based on the foregoing, I find that Key has

established all of the essential elements of its conversion and officer participation claims.

PMI and Tilley argue that this case arises from a breach of contract and not from a tort and that Pennsylvania courts preclude plaintiffs from recasting ordinary breach of contract claims into tort claims. See Pittsburgh Const. Co., 834 A.2d at 582 (stating that a claim should be limited to a contract claim when the parties' obligations are defined by the terms of a contract and not by the larger social policies embodied by the law of torts). Thus, according to PMI and Tilley, Key's conversion and officer participation claims are barred. PMI and Tilley also note that the failure to pay a debt is not conversion, see id. at 581, supra, and that they did not convert the \$80,000.00.

Here, PMI and Tilley's obligation to turn the proceeds of the sale of the equipment over to Key arose from the first incident described above and did not involve a contract. The settlement agreement was entered into only after PMI and Tilley failed to turn the \$80,000.00 over to Key. Consequently, because PMI and Tilley's original obligation to give Key the proceeds of the sale of the equipment did not arise from a contract, their argument that Key's tort claims are barred must fail.

When the moving party establishes all of the elements of its claims, it is entitled to summary judgment unless the nonmoving party responds with probative evidence demonstrating the existence of a triable issue of fact. Bressman, 327 F.3d at 238, supra. Here, PMI and Tilley have not responded with evidence disputing Key's evidence that PMI and Tilley deprived Key of its right to the \$80,000.00 without Key's consent and without lawful justification. Furthermore, PMI and Tilley have not presented any evidence that the \$80,000.00 was a debt. Accordingly, I find that Key is entitled to judgment on the conversion and officer participation claims and that

Key is entitled to recover the \$80,000.00, plus interest and costs, as a matter of law.<sup>1</sup>

#### **IV. CONCLUSION**

I find that Key has established all of the essential elements of its conversion claims against PMI and Tilley and its officer participation claim against Tilley. PMI and Tilley, however, have not responded with any probative evidence disputing the elements of the conversion and officer participation claims. Key is, therefore, entitled to judgment on those claims. Moreover, Key is entitled to recover the \$80,000.00, plus interest and costs, as a matter of law.

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<sup>1</sup> Because I find that Key is entitled to recover the \$80,000.00, plus interest and costs, as a matter of law based on my finding that Key is entitled to judgment on the conversion and officer participation claims, I need not determine whether Key is entitled to judgment on the breach of contract claim.

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PENNCO MACHINE, LLC,	:	
	:	
Defendants.	:	No. 04-1652

**ORDER OF JUDGMENT**

AND NOW, this 20<sup>th</sup> day of December, 2004, it is hereby ORDERED that JUDGMENT

IS ENTERED in favor of Key Corporate Capital, Inc. and against David A. Tilley and Pennco Machine, Inc. in the amount of \$80,000.00, plus interest and costs. It is further ORDERED that the Clerk of Court shall CLOSE this case for statistical purposes.

/s/  
LAWRENCE F. STENGEL, J.