

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

LEWIS GENE WAMBSGANZ :
Plaintiff : **CASE NO. 2011 CVH 00456**
vs. : **Judge McBride**
FREDERICK C. LAYPOOL : **DECISION/ENTRY**
Defendant :

Richard B. Uhle, attorney for the plaintiff Lewis Gene Wambsganz, 285 East Main Street, Batavia, Ohio 45103.

Becker & Cade, Dennis A. Becker, attorney for the defendant Frederick Laypool, 526 Wards Corner Road, Suite A, Loveland, Ohio 45140.

This cause came before the court for trial on January 11, 2012. At the conclusion of the trial, the court took the issues raised at trial under advisement.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

In 2001, the plaintiff Lewis Wambsganz assembled a motorcycle from various parts. A few of those parts were manufactured Harley-Davidson and the rest were made by other manufacturers. In an attempt to avoid collection of delinquent taxes on several outstanding tax liens, Wambsganz transferred title to the motorcycle to his then-girlfriend Angela Larkin.

The relationship between Wambsganz and Angela Larkin ended in or around December 2009. Due to a large amount of debt in her name, Angela Larkin began looking for a buyer for the motorcycle. Her brother Richard Larkin asked the defendant Frederick Laypool if he might be interested in the motorcycle and introduced Laypool to Angela. Richard Larkin and Laypool had known each other for several years and had worked on a few jobs together.

Laypool told Angela that he would be interested in purchasing the motorcycle for an investment. Angela agreed to sell it for \$2,000, but Laypool suggested that she attempt to sell it elsewhere to see if she could get a higher price. Ms. Larkin posted "for sale" signs in Indiana where she resided and also listed the motorcycle for sale for \$15,000 at an auction house but she only received one offer for \$4,000 from a buyer who later backed out of the deal.

In November 2010, Angela Larkin sold the motorcycle to Laypool for \$2,000. She gave him possession of the motorcycle at that time and the money was exchanged. The motorcycle was not operable at that time so it was put on a trailer and brought to Laypool's house by Richard Larkin. However, because she had recently moved to

Indiana and many of her possessions were still in boxes, Angela was unable to find the title at that time.

There were numerous mechanical problems with the motorcycle at the time it was purchased, such as an oil leak and a crack in the gas tank. Laypool had the motorcycle brought back to Richard Larkin's auto repair shop where it remained for months at a time while it was being repaired.

On January 7, 2011, Angela Larkin wrote out a receipt for the transaction that occurred in November, although the receipt erroneously used the May 2010 date as the actual date of sale.¹ The receipt was signed by both Angela and Frederick (Charles) Laypool. On that same date, Angela gave Laypool the title to the motorcycle.

Thereafter, on January 19, 2011, Laypool had title to the motorcycle transferred to his name.²

Prior to the transfer of title, on January 10, 2011, Wambsganz received a default judgment in Clermont County Common Pleas Case Number 2010 CVH 2171 finding that Wambsganz was entitled to possession of the motorcycle at issue in this case.³

The default judgment entry orders the Clerk of Courts to transfer title of the motorcycle to Wambsganz or, if Larkin sold or otherwise disposed of the motorcycle, granted a monetary judgment in the amount of \$65,000 plus interest.⁴

Sometime after January 10, 2011, Wambsganz went to Laypool's home, accompanied by a police officer, to obtain possession of the motorcycle but was unable to speak with Laypool himself because he was not home at that time. A letter was

¹ Defendant's Exhibit A.

² Plaintiff's Exhibit 4.

³ Plaintiff's Exhibit 3.

⁴ Id.

written dated March 11, 2011 by the plaintiff's counsel on behalf of the plaintiff, offering to pay Laypool \$2,000 for the motorcycle and, if that offer was not accepted, threatening to file suit.⁵ Laypool testified that he did not receive the letter. The present suit was filed on March 14, 2011.

Laypool testified that he knew of the lawsuit prior to his purchase of the motorcycle but that he did not think it would affect his ability to buy the motorcycle because Angela Larkin had title to the motorcycle and the lawsuit had nothing to do with him personally.

LEGAL ANALYSIS

I. PLAINTIFF'S FIRST CAUSE OF ACTION

It is not entirely clear from the pleading what precise cause of action is set forth in the plaintiff's first claim. The claim does, however, mention fraud, so the court will start there.

In order to prove a claim for common-law fraud, a plaintiff must prove the following elements:

“(1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable

⁵ Plaintiff's Exhibit 6.

reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.”⁶

Clearly, as there is no representation, concealment of fact, reliance, etc. at issue in this case, this is not an action for common-law fraud. Therefore, the court will assume that the plaintiff intended to bring a claim for fraudulent transfer.

Pursuant to R.C. 1336.04:

“(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor;

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:

(a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;

(b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(B) In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:

(1) Whether the transfer or obligation was to an insider;

(2) Whether the debtor retained possession or control of the property transferred after the transfer;

⁶ *Marcus v. Seidner* (Oct. 31, 2011), 12th Dist. No. CA2010-12-103, 2011-Ohio-5592, ¶ 11, quoting *Sutton Funding, L.L.C. v. Herres*, 188 Ohio App.3d 686, 697, 936 N.E.2d 574, 2010-Ohio-3645, ¶ 49.

- (3) Whether the transfer or obligation was disclosed or concealed;
- (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
- (5) Whether the transfer was of substantially all of the assets of the debtor;
- (6) Whether the debtor absconded;
- (7) Whether the debtor removed or concealed assets;
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;
- (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.”

Furthermore, R.C. 1336.05 states as follows:

“(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(B) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the transfer was made to or the obligation was incurred with respect to an insider for an antecedent debt, the debtor was

insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.”

The court notes that the debtor at issue in this case is not the named defendant Frederick Laypool but is instead Angela Larkin. However, Angela Larkin was not named as a party to this lawsuit.

Under R.C. 1366.04(A)(1), the plaintiff must establish that the debtor (Angela Larkin) sold the motorcycle and provided title to Laypool with the actual intent to hinder, delay, or defraud Wambsganz (her creditor as of January 10, 2011). Therefore, the plaintiff has essentially asked this court to declare an act of Angela Larkin’s to be fraudulent without naming Larkin as a party and providing her with the opportunity to defend against that claim. This court does not believe that this is the proper manner with which to proceed with a fraudulent transfer claim and the court does not believe it is appropriate to examine the transfer and potentially make such a finding when Angela Larkin has not been made a party to this suit.

The court would also note that the case law indicates that if a plaintiff proves sufficient “badges of fraud” with regard to the subject transfer, “the burden of proof shifts *to the debtor* to prove that the transfer was not fraudulent.”⁷ This contemplates that the debtor would be a party to the action and have the opportunity to rebut a fraudulent transfer claim. As a result, Angela Larkin is a necessary party as to the claim of a fraudulent transfer, and for whatever reason, the plaintiff did not name her as a party.

The court does not believe it can make a finding on any fraudulent transfer claim when the debtor has not been made party to this suit and, as such, the court finds that the plaintiff has failed to meet his burden on this claim.

⁷ See, e.g., *Gevedon v. Ivey* (Dec. 5, 2003), 2nd Dist. No. 19893, 2003-Ohio-6621, ¶ 11.

Additionally, the court will note for the record that it cannot find that the sale of the motorcycle was made without receiving a reasonably equivalent value. The court did not find the plaintiff's testimony that the motorcycle is valued at \$65,000 to be credible.

While the plaintiff argues that he has a judgment for that amount, the court notes that this was a default judgment where the relief requested was automatically granted after the expiration of the answer period and there is no evidence of any factual assessment of value by that court. This court is not bound to value the motorcycle at the amount of the award in the default judgment entry.

In this regard, collateral estoppel does not apply because Frederick Laypool was not a party to the case for which a default judgment was entered. Frederick Laypool testified to numerous mechanical problems with the motorcycle and that for much of the time the motorcycle has been in his possession it has not been able to be started and has been under an almost constant series of repairs. Angela Larkin testified that she attempted to sell the motorcycle for more than \$2,000 but that she received no offers except one offer for \$4,000 where the buyer later backed out of the sale. Neither Laypool nor Larkin specifically testified that they believed \$2,000 to be a fair value for the bike. Therefore, the court has essentially been left with no credible evidence before it by which to determine the value of the motorcycle. As such, the court does not find that the sale was made without receiving a reasonably equivalent value for the motorcycle.

II. CONVERSION

The plaintiff's second and final cause of action is for conversion. "The tort of conversion is defined as 'the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.'"⁸ "Where conversion is premised on the unlawful retention of property, the plaintiff must establish: '(1) he or she demanded the return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to deliver the property to its rightful owner.'⁹

The first question the court must look to is where the original taking of the property was lawful or unlawful. If the original taking was unlawful, the plaintiff need not establish a demand and refusal.¹⁰ If the original taking was lawful, demand and refusal are required elements.¹¹

The plaintiff received a default judgment stating that he was the rightful owner to the motorcycle at issue on January 10, 2011. When Frederick Laypool originally took possession of the motorcycle in November 2010, Angela Larkin held title to the bicycle. At that time, Laypool's possession on the motorcycle was not unlawful.

⁸ *Monea v. Lanci* (Nov. 30, 2011), 5th Dist. No. 2011CA00050, 2011-Ohio-6377, ¶ 70, quoting *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172.

⁹ *Fisher v. Clay* (Nov. 21, 2011), 11th Dist. No. 2011-T-0031, 2011-Ohio-6007, ¶ 22, quoting *Dice v. White Family Cos., Inc.*, 173 Ohio App.3d 472, 878 N.E.2d 1105, 2007-Ohio-5755, at ¶ 17, citing *Tabar v. Charlie's Towing Serv.* (1994), 97 Ohio App.3d 423, 427-428, 646 N.E.2d 1132.

¹⁰ See, e.g., *Kelly v. Kelly*, 163 Ohio App.3d 260, 837 N.E.2d 811, 2005-Ohio-4740, ¶ 21 (Ohio App. 2nd Dist., 2005).

¹¹ *Fisher*, supra.

Therefore, this action for conversion is based on the theory of unlawful retention and the plaintiff must establish demand and refusal. First, the plaintiff must establish that he demanded the property from Laypool. There was testimony that the plaintiff went to Laypool's home with a police officer to demand the property. However, Laypool was not home at the time and the plaintiff spoke only to the defendant's wife. The court finds that this indirect demand does not constitute a demand upon the possessor of the property.

A letter was written on March 11, 2011 requesting return of the motorcycle in exchange for \$2,000. The letter indicated that if the motorcycle was not returned to the plaintiff, he would file suit and Wambsganz testified that he authorized his attorney to write this letter to the defendant. However, the defendant testified that he did not receive the letter. While the court has a copy of a letter, it does not have any receipt indicating that it was sent or received. The court has no testimony before it that the letter was actually sent and the court does not believe it can simply make an assumption that the letter was mailed.

As a result, the court finds that the defendant has not established that he made a demand for the return of the motorcycle prior to filing the present action.

The court would note that, even if the plaintiff established that the letter was sent, which he did not, the letter was dated March 11th. It is necessary to allow at least two days (if not three) for the letter to make its way via regular U.S. Mail to the defendant. Therefore, at most the defendant would have received this letter the day prior to the suit being filed or the actual day the suit was filed. The court does not believe that any failure on the part of the defendant to respond the same day he received the letter or

within 24 hours is sufficient to establish a refusal on his part to return the property prior to the suit.

CONCLUSION

The court hereby finds for the defendant as to both of the plaintiff's claims against him.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 24th day of February 2012 to all counsel of record and unrepresented parties.
