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**IN THE
COURT OF APPEALS OF INDIANA**

ALAN KEARNS,)
)
Appellant-Intervening Plaintiff-)
Intervention Counter-Defendant,)
and)
)
TECHNOLOGY & NETWORK)
SPECIALISTS, INC.,)
)
Appellant-Defendant,)
)
vs.)
)
TECHNOLOGY AND NETWORK SERVICES,)
)
Appellee-Plaintiff-Intervention)
Counter-Plaintiffs.)
and)
)
JOHN PAYNE,)
ROBERT E. WALLACE,)
)
Appellee-Intervention Defendants-)
Intervention Counter-Plaintiffs.)

No. 29A02-0512-CV-1217

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
The Honorable David K. Najjar, Magistrate
Cause No. 29D03-0408-PL-726

July 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Intervening Plaintiff and Counter-Defendant, Alan Kearns (Kearns), along with Appellant-Defendant, Technology & Network Specialists, Inc. (TN Specialists) (collectively, Appellants), appeal the trial court's judgment and award of treble damages to Appellee-Plaintiff and Intervening Counter-Plaintiff, Technology and Network Services (TN Services), and Appellees-Intervening Defendants and Intervening Counter-Plaintiffs, John Payne (Payne) and Robert Wallace (Wallace) (collectively, Appellees).

We affirm in part, reverse in part, and remand with instructions.

ISSUES

Appellants raise five issues on appeal, which we restate as the following two issues:

- (1) Whether the trial court erred in finding that TN Specialists and Kearns, individually, committed criminal conversion against TN Services; and
- (2) Whether the trial court erred in failing to make particular Findings of Fact.

FACTS AND PROCEDURAL HISTORY¹

The State of Indiana developed a program to provide Internet access and related services to the State's Women, Infant and Children Program (WIC Program). Initially, the State contracted with Covanys to provide the services. Covanys then subcontracted a portion of the services to Wallace's company, QUIK Internet (QUIK). QUIK further subcontracted the broadband services to TN Specialists, a company owned equally by Payne and Kearns. Subsequently, on October 16, 2003, Wallace, Payne, and Kearns entered into an Agreement, thereby creating TN Services, each with a one-third ownership interest. Every month, the three individuals received approximately one-third of TN Services' net profit from servicing the WIC Program.

However, as early as February of 2004, TN Specialists began paying lesser amounts to TN Services than the amounts pursuant to the parties' agreement. In addition, during the parties' association, Kearns and Payne decided to purchase a boat for use by TN Specialists. Due to Payne's poor credit, TN Specialists obtained a loan in Kearns' name to finance its purchase of the boat. Both TN Specialists and TN Services contributed monthly payments to the boat, claiming it as a business expense. In the summer of 2004, Wallace learned that TN Specialists and Kearns were fraudulently billing the State by double-charging the State for services through Covanys. Thereafter, Wallace states that he terminated the TN Services agreement for cause, but continued to

¹ We hereby deny Appellants' Motion to Strike Brief of Appellee, John Payne. However, we do admonish Payne for submitting a Brief that fails to comply with the Indiana Appellate Rules in several respects. In particular, we advise Payne to consult Ind. Appellate Rules 43 and 46(8)(a).

work with Payne to provide services under the State's original contract with Covansys until the Covansys contract expired in August of 2004.

On August 20, 2004, TN Services filed a Complaint for Temporary Restraining Order (TRO) and Breach of Contract against TN Specialists and numerous other defendants, including Sprint and Verizon Wireless. On the same date, the trial court issued a TRO. On September 9, 2004, Kearns filed a Complaint against Appellees, alleging breach of fiduciary duties, conversion, unjust enrichment, and offenses against property. On October 7, 2004, Kearns' Complaint was consolidated with the Complaint filed by TN Services. On October 25, 2004, Appellees filed an Answer and Counterclaim against Kearns. On November 17, 2004, Kearns filed his Answer to the Counterclaim.

On August 31, 2005, a bench trial was held. At the conclusion of the trial, the trial court ordered the parties to submit proposed findings of fact and conclusions of law. On November 23, 2005, the trial court issued its Findings of Fact and Judgment, stating:

FINDINGS OF FACT AND CONCLUSIONS THEREON

1. The State of Indiana [(the State)] contracted with Covansys to provide Internet access and related services (the "Network Services") for the State's Women, Infant and Children Program ("WIC Program").
2. [Wallace] and his company, [QUIK] Internet [(QUIK)] subcontracted with Covansys to provide the Network Services for the WIC Program.
3. Wallace and [QUIK] then subcontracted [TN Specialists] to provide the Network Services for the WIC [P]rogram. Specifically, [QUIK] continued to provide the dial-up portion of the Network Services and TN Specialists [provided] the broadband portion of the Network Services. The broadband portion of the Network Services was more profitable than the dial-up portion.

4. TN Specialists is jointly and equally owned by [Payne] and [Kearns].
5. At Wallace's request and because TN Specialists had the more profitable portion of the Network Services, Wallace, Payne, and Kearns began associating together to provide the Network Services for the WIC Program.
6. Subsequent to [QUIK] entering into its contract with Covansys, [QUIK] became [TN Services]. The proposed corporate By-Laws for TN Services establish Wallace, Payne, and Kearns as the shareholders of TN Services, each with a one[-]third ownership interest in the company. In October 2003, Wallace and Kearns executed the TN Services' By-Laws. Payne did not sign the document.
7. Despite Payne having not signed TN Services' By-Laws, Wallace, Kearns, and Payne continued to associate with one another as TN Services pursuant to the terms of the By-Laws, with each of them receiving one[-]third of TN Services' profits generated by providing the Network Services for the WIC Program. This amount was about [\$5,000.00] per person per month.
8. By virtue of the parties' relationships, all three individuals owed each other duties of utmost honesty, loyalty, good faith, and fair dealing.
9. Beginning in February [of] 2004 and continuing until the agreements between TN Services and TN Specialists were terminated in August of 2004, TN Specialists did not pay to TN Services the full amounts due pursuant to the agreements each month. A total of \$6,500.00 due to TN Services was converted by TN Specialists.
10. TN Services is entitled to recover treble damages for the funds converted by TN Specialists.
11. During the period of time that TN Services was under its contract with Covansys and providing services to [the State] through its WIC [P]rogram, several instances of fraudulent acts were committed against the State with regard to services provided by TN Services through their association with TN Specialists. Specifically, broadband lines were routed incorrectly and the State was being billed for services it was not receiving.

12. During the pendency of this action, Wallace and TN Services have expended funds to salvage telephone/internet lines, and in some cases reconnect the same in order to avoid disconnection of the WIC [P]rograms' systems. Wallace and TN Services have also been required to post a bond to insure their actions consistent with the [c]ourt's orders. These sums are due to the actions of Kearns and TN Specialists, and should be reimbursed.
13. Payne and Kearns decided to purchase a boat to use while entertaining TN Specialists' clients.
14. Because Payne had poor credit, TN Specialists obtained a loan to purchase the boat in [Kearns'] name. Wallace subsequently agreed that Kearns should be reimbursed this expense from the profits of the partnership.
15. From August 2002 until August 2004, TN Specialists and TN Services made the \$237.66 monthly loan payments on the boat, listing the same as a business expense. No payments have been made by the partnership since that time. Kearns has made all the payments and he should be reimbursed for those. The total amount is \$3,089.58. The boat should be sold. Until it is sold TN Services should keep [current] all payments remaining on the boat loan. In the event that the boat sells for less than is owed on it, TN Services shall pay said deficiency.
16. Based upon the conflicting evidence, the [c]ourt cannot find by a preponderance of the evidence [] that any of the parties can prevail on any other of their claims.
17. The [c]ourt did previously find, that due to Payne's contempt of the [c]ourt's discovery orders, Payne would be responsible for Kearns' attorney fees. The [c]ourt assesses the value of such contempt at \$7,500.00 which shall be payable to John Morse.

. . . Judgment is entered in favor of TN Services and [Wallace] and against [Kearns] and TN Specialists in the amount of \$19,500 (\$6,500.00 x 3).

. . . Judgment is entered in favor of TN Services and [Wallace,] and against [Kearns] and TN Specialists in the amount of \$1,200.00 (\$750.00 reconnection fees and \$450.00 replevin bond premiums). Total Judgment in favor of TN Services and [Wallace,] and against

[Kearns] and TN Specialists is \$20,700.00 with prejudgment interest accruing from August 20, 2004, until paid, at the rate of 8% per year.

. . . Judgment is entered in favor of [Kearns] and against [Wallace] and TN Services in the amount of \$3,089.58 with prejudgment interest accruing from August 20, 2004, until paid, at the rate of 8% per year.

. . . the boat at issue in this matter shall be sold, either at auction, or to a purchaser at a price agreed upon by all parties. The costs of the auction shall be borne by TN Services. TN Services shall be responsible for any and all payments remaining on the boat until such time as the boat is sold and title transferred. In the event the boat is sold for less than is owed on the boat, TN Services shall be responsible for paying any remainder.

. . . [Payne] shall pay to John Morse the amount of \$7,500.00 as sanctions for his contempt in this action. Such amount shall be entered as a judgment of record and shall accrue interest, until paid, at the rate of 8% per year.

(Appellant's App. pp. 10-14).

Kearns and TN Specialists now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

When the trial court enters findings of fact and conclusions thereon, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. *Cash in a Flash, Inc./Hobart v. Hoffman*, 841 N.E.2d 644, 647 (Ind. Ct. App. 2006). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* We neither

reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. *Id.*

II. *Criminal Conversion and Treble Damages*

A. *TN Specialists' Liability*

First, disputing the existence of the *mens rea* element of conversion, TN Specialists asserts that the evidence is insufficient to prove that it knowingly or intentionally converted money owed to TN Services. At most, TN Specialists contends it breached its contract with TN Services. Therefore, TN Specialists argues that the trial court erred in awarding treble damages to TN Services.

Ind. Code § 35-43-4-3 provides that “[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor. “A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.” I.C. § 35-41-2-2(a). “A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” I.C. § 35-41-2-2(b). Further, I.C. § 35-43-4-1(b) provides, in pertinent part, that a person’s control over property of another person is “unauthorized” if it is exerted without the other person’s consent, in a manner or to an extent other than that to which the other person has consented, or by promising performance that the person knows will not be performed. *See* I.C. §§ 35-43-4-1-(b)(1), (2), and (6). Finally, under I.C. § 34-24-3-1, a person who proves the elements of criminal conversion by a preponderance of the evidence can recover up to three times the

actual damages, the costs of the action, and reasonable attorney's fees. *Jamrosz v. Resource Benefits, Inc.*, 839 N.E.2d 746, 758 (Ind. Ct. App. 2005), *trans. denied*.

As to the *mens rea* component of conversion, this court has previously observed, “the *mens rea* requirement ‘differentiates criminal conversion from the more innocent breach of contract or failure to pay a debt situation that the criminal conversion statute was intended to cover.’” *Jamrosz*, 839 N.E.2d at 759 (quoting *Whitaker v. Brunner*, 814 N.E.2d 288, 297 (Ind. Ct. App. 2004), *trans. denied*). “The legislature did not intend to criminalize bona fide contract disputes.” *Jamrosz*, 839 N.E.2d at 759 (quoting *Greco v. KMA Auto Exch., Inc.*, 765 N.E.2d 140, 147 (Ind. Ct. App. 2002)).

Our review of the record in front of us leaves us with a murky picture of the agreed payment arrangement between TN Specialists and TN Services. In the Professional Services Agreement between the two corporations, we find no language pertaining to any monthly payment requirement to TN Services. For certain, all we can gather is that Wallace, Payne, and Kearns each had one-third interest in TN Services. In addition, testimony in the record suggests that TN Specialists was to distribute a \$5,000 monthly payment to each of TN Services' members, but beginning in early 2004, TN Specialists paid TN Services less than the apparently agreed-upon sum of \$5,000 per month.

However, we cannot agree with the trial court that this act constituted criminal conversion. Rather, money may be the subject of a conversion action only if it is “a determinate sum with which the defendant was entrusted to apply to a certain purpose.” *Tobin v. Ruman*, 819 N.E.2d 78, 89 (Ind. Ct. App. 2004), *reh'g denied, trans. denied*

(quoting *Huff v. Biomet, Inc.*, 654 N.E.2d 830, 836 (Ind. Ct. App. 1995)). Here, the business dealings between Wallace, Payne, and Kearns are so unclear and disjointed that we are unable to conclude that TN Services entrusted to TN Specialists any determinate amount of money. Instead, the money at issue in the present case was generated and possessed by TN Specialists. Any wrongful withholding of this money constitutes, at most, the failure to pay a debt, which does not amount to criminal conversion as a matter of law. *See Tobin*, 819 N.E.2d at 89. Therefore, we reverse the trial court's determination that TN Specialists committed criminal conversion against TN Services, and hold that TN Services is not entitled to treble damages. *See* I.C. § 34-24-3-1. Instead, under a breach of contract theory, the evidence demonstrates that TN Specialists owes \$6,500 to TN Services.

B. *Kearns' Personal Liability*

Kearns also brings to our attention that while the trial court, in its Findings and Judgment, concluded that TN Specialists converted \$6,500.00 owed to TN Services, it subsequently entered judgment against TN Specialists and Kearns *personally*, for the act of conversion. (Emphasis added). Since we have already concluded that the evidence fails to support the trial court's determination that TN Specialists committed criminal conversion, Kearns must be freed of this liability as well. In addition, even if we had agreed with the trial court's finding that TN Specialists converted funds owed to TN Services, we must agree with Kearns that it was improper for the trial court to additionally enter judgment personally against Kearns. Let us explain.

In general, individual shareholders are not personally responsible for the acts of a corporation unless the corporate entity is ignored. *Escobedo v. BHM Health Associates, Inc.*, 818 N.E.2d 930, 932-33 (Ind. 2004). Even so, when the corporate entity is ignored and the “corporate veil” pierced, each shareholder in the corporation is held jointly and severally liable for the business’s obligations. In the instant case, with no argument, evidence, or findings to suggest that TN Specialists’ corporate veil was pierced, Kearns, as an individual shareholder, could not have been held personally responsible for the obligations of TN Specialists. Furthermore, if such evidence had been presented, the trial court would have been required to hold Payne and Kearns jointly and severally liable for the conversion. Therefore, as to the issue of conversion, we also conclude that the trial court erred in entering judgment personally against Kearns. Thus, the only proper judgment is one for breach of contract against TN Specialists in its capacity as a corporation.

III. *Missing Findings of Fact*

Kearns and TN Specialists’ remaining arguments allege that the trial court erred in failing to make particular findings of fact. Specifically, Appellants contend that the trial court should have found that Kearns was entitled to reimbursement for certain expenses, that Wallace and Payne improperly withheld Kearns’ share of TN Services’ profits, and that Payne owed Kearns’ his share of TN Specialists’ profits. However, in our review, we determine only whether the evidence supports those findings actually made by the trial court. *See Balicki v. Balicki*, 837 N.E.2d 532, 535 (Ind. Ct. App. 2005), *trans. denied*. Our role is not to retry the case and make new findings. Furthermore, we find

that Appellants have offered no legal support for these alleged errors by the trial court. *See* Ind. Appellate Rule 46(8)(a). For these reasons, we conclude that all of these assertions fail.

CONCLUSION

Based on the foregoing, we conclude that the trial court improperly determined that TN Specialists and Kearns committed criminal conversion. As a result, we vacate the trial court's judgment against TN Specialists and Kearns, and its award of treble damages to TN Services. We remand this issue to the trial court with instructions to enter judgment against TN Specialists for breach of contract in the amount of \$6,500. We further conclude that the trial court did not fail to make additional Findings of Fact.

Reversed in part, affirmed in part, and remanded with instructions.

KIRSCH, J., and FRIEDLANDER, J., concur.