

Defendants-Appellants Frank Splittorff (“Splittorff”) and Piece of America, L.P. (“POA”) appeal the trial court’s judgment in favor of Plaintiff-Appellee Gray Loon Outdoor Marketing Group, Inc. (“Gray Loon”).¹ We affirm.

Defendants-Appellants raise three issues for our review, which we consolidate and restate as:

- I. Whether the trial court erroneously created a forfeiture not provided for in the contract between the parties when it found that Gray Loon was not liable for conversion of POA’s property.
- II. Whether the trial court erroneously enforced a nonexistent change order.

This case was tried as a bench trial, and the trial court made findings of facts and conclusions of law. Pertinent findings and conclusions are incorporated into the statement of facts below.

Gray Loon is an advertising agency that provides marketing and communication services, including interactive website design. In August of 2003, Gray Loon was contacted by Gloria Wood, a POA representative, regarding a proposal for the development of a website. POA was a limited partnership attempting to market one-inch by one-inch pieces of property in all fifty states, and it wanted a website which would allow customers to purchase these properties on-line. Purchasers of the property would receive a deed for the property and a book about the state where property was located. (Trial Court’s Finding of Fact #6). Splittorff, Dennis Conwell, and Robert Aswell were

¹ Dennis Conwell was also a defendant below. However, the trial court did not enter judgment against him, and he is not a party to this appeal.

POA's general partners, and they determined that novelty packages would be sold online for \$49.95. (Trial Court's Findings of Fact ##5 and 6).

After a meeting with POA's general partners, Gray Loon sent a web development estimate to POA on September 22, 2003, which was accepted by Conwell on behalf of POA. Conwell informed Gray Loon that it was imperative that the website be completed by December of 2003 because there would be radio advertising being broadcasted on the East Coast at that time. (Trial Court's Finding of Fact #8).

Gray Loon immediately began developing the website, and during the development process it provided POA with access to enable POA to provide feedback. Gray Loon timely completed the website under the contract and put the site online. (Trial Court's Finding of Fact #9). POA, which had previously made a fifty percent down payment, paid the remainder of the \$8,500 contract price. (Trial Court's Findings of Fact ##7 and 9). In 2004, however, POA requested new functionality and new features on the website, including the capability for customers to make two payments of \$24.95. (Trial Court's Findings of Fact ##10 and 11). There was no discussion of the cost of such changes at the time, and as was its practice in ongoing business relationships, Gray Loon proceeded to make changes to the website without first issuing an estimate. Gray Loon subsequently billed for this work in the amount of \$5,224.50. (Trial Court's Finding of Fact #14).

When POA failed to pay the invoice for the modifications done at its direction, Gray Loon contacted Conwell who stated that he had no issues with the invoice but needed more time to pay. (Trial Court's Finding of Fact #15). During July, August, and

September of 2004, Gray Loon placed the completed website online, and per agreement, billed POA a monthly hosting fee of \$75.00. The hosting fees had previously been paid by Gray Loon, and POA failed to pay the invoice. (Trial Court's Finding of Fact #16).

In August of 2004, Conwell advised Gray Loon that he was no longer managing the website project and that Splittorff was now POA's contact person. Even though there were numerous conversations between Splittorff and Gray Loon about the failure to pay for the modifications and the hosting fees, POA failed to submit payment. (Trial Court's Findings of Fact ##17 and 18). Finally, in September of 2004, Gray Loon sent a letter by certified mail to advise POA that if payment was not made by October 6, 2004, Gray Loon would take the website off the internet. Payment was not made, and Gray Loon shut down the website. (Trial Court's Finding of Fact #19).

Gray Loon filed a suit for non-payment of the services rendered in the modification of the website and of the hosting fees. (Trial Court's Finding of Fact #20). Thereafter, POA filed a counter-claim alleging that Gray Loon "unlawfully misappropriated and refused to allow [POA] the benefit of property and services for which it has paid prior to the arising of the within dispute," an action which POA characterized as criminal and common law conversion. POA argued that it was entitled to treble damages, costs, expenses, and attorney fees under Ind. Code § 34-24-3-1. (Appellant's App. at 17-18; Trial Court's Finding of Fact #21). POA also alleged that Gray Loon tortiously interfered with POA's business relationships with customers, prospective customers and clients. (Appellant's App. at 18; Trial Court's Finding of Fact

#21). The trial court concluded that no conversion occurred and that there was no evidence of tortious interference. POA and Splittorff now appeal.

When a court has made specific findings of fact and conclusions of law, we may affirm the judgment on any legal theory supported by the findings. *Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30, 36 (Ind. Ct. App. 2002), *trans. denied*. In reviewing the judgment, we first must determine whether the evidence supports the findings and second, whether the findings support the judgment. *Id.* The judgment will be reversed if it is clearly erroneous. *Id.* Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. *Id.* To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility. *Id.* While findings are reviewed under the clearly erroneous standard, we do not defer to the trial court's conclusions of law, which are reviewed *de novo*. *Fobar v. Vonderahe*, 771 N.E.2d 57, 59 (Ind. 2002).

I.

POA notes that the agreement between the parties provides that Gray Loon's work product was owned by POA. POA contends that the trial court's judgment disregards the parties' agreement and engrafts a provision that causes the \$8,500 paid for the original website to be forfeited. POA emphasizes that forfeiture provisions must be clearly expressed in a contract, and, if there is any doubt, the court favors a construction that avoids forfeiture. POA also argues that "in light of the trial court's error in holding that

[POA's] property should be forfeited, [Gray Loon's] retention of such property constitutes statutory and common law conversion. . . ." (Appellants' Brief at 6).

In its order, the trial court noted that conversion occurs when a party appropriates another's personal property for the former's own use and benefit. *See Dominiack Mechanical, Inc. v. Dunbar*, 757 N.E.2d 186, 188 (Ind. Ct. App. 2001). The trial court also noted that conversion occurs when a party destroys another's personal property. *See id.*

The trial court concluded that the changes to the website were made at POA's request for the purpose of enhancing the website and giving it additional capabilities. (Trial Court's Conclusion of Law #8). In this process, the original digital files were altered to create the requested website, and the digital files that POA originally paid for were incorporated into the new website. In this manner, the original digital files were "destroyed." The trial court reasoned that because the "destruction" through incorporation of the original digital files took place at POA's behest, Gray Loon could not be found liable for converting the original files by either appropriation or destruction of POA's personal property. Stated differently, the trial court's judgment acknowledged that "forfeiture" of the \$8,500 invested in the original website was occasioned by POA, not Gray Loon. We see no engrafted forfeiture provision here. Furthermore, we cannot say that the trial court erred in concluding that there was no conversion under the facts of this case.

POA argues that the "destruction" of the original digital files would have been avoided if Gray Loon would have copied and saved the original files and then modified

the copy. Although this approach was possible, Gray Loon was not directed to do so and it modified the original website per its standard procedure. POA introduced no evidence to show that Gray Loon's procedure was contrary to trade usage or to show that Gray Loon's procedure was contrary to POA's request for modification of the website. The trial court did not err in concluding that Gray Loon's standard procedure of complying with a customer's request is not tortious.

II.

POA contends that the "purported change order" pertaining to the modification of the website was unenforceable because there was no written contract between the parties and because POA never agreed to the cost of the modifications. POA argues that Gray Loon should have informed POA of the cost before performing the requested modifications.

Initially, we note that the original contract for the creation of the website had been completed and the contract price paid before the requests for modification of the product were made. According to the initial contract, POA became the owner of the website upon payment. Thereafter, POA requested the modifications of the website. Strictly speaking, this request was not a "change order" because there was no change to the initial contract; instead, the request was for the modification of a previously constructed product.

We further note that even though the cost of creation of a new website exceeded \$500.00, POA cannot avail itself of the protection provided by the Statute of Frauds. The oral agreement between the parties is enforceable under Ind. Code § 26-1-2-

201(3)(a) because the website was specially modified for POA and is not suitable for sale to others in the ordinary course of Gray Loon's business. Also, the oral agreement is enforceable under Ind. Code § 26-1-2-201(3)(b), which provides that an oral agreement is enforceable "if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made. . . ." Here, POA admitted in both its answer and in Conwell's and Splittorff's testimonies that it requested the creation of a new website. Furthermore, Conwell and Splittorff both admitted that Gray Loon created the new website at Conwell's behest.

The parties' failure to establish price at the time of the agreement does not render the contract unenforceable. Ind. Code § 26-1-2-305 governs contracts in which the price is not settled. Given the fact that the only evidence presented was that the price was \$5,224.50, we cannot say that the trial court was clearly erroneous in assigning that price. Even though it may have been a better practice for Gray Loon to inform POA of the cost before performing the requested modifications, we cannot say that the failure to do so should render the contract unenforceable.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.