IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
GENERAL DIVISION

First Merchants Bank,	:	
Plaintiff,	:	**Case No. 18-CV-009775**
vs.	:	**Judge Jeffrey M. Brown**
Richard Allen Group, et al.,	:	
Defendants.	:	

DECISION AND ENTRY GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

BROWN, J.

This matter is before the Court on the Motion for Summary Judgment filed by Plaintiff First Merchant Bank ("Bank") seeking judgment against Defendants Richard Allen Group, LLC ("the Group"), Leroy Johnson Jr. ("Johnson") and James E. Richardson ("Richardson") on all five Counts in its Complaint. Defendants Johnson and Richardson filed their Memo Contra the Bank's motion and the Bank filed its Reply. Defendant the Group did not file any Memo Contra with the Court.

For the reasons explained below, the Court finds portions of the Bank's motion well taken and portions not well taken. Consequently, the Bank's motion is **GRANTED** in part and **DENIED** in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Bank's complaint alleges that it was defrauded out of a $100,000 loan by the Group, Richardson and Johnson. Specifically, the Bank alleges that the Group, Richardson and Johnson all fraudulently claimed to be authorized representatives of The Third Episcopal District of the African Methodist Episcopal Church ("the Church") who had the authority to pursue and enter

into a loan. Complaint, ¶2. The Bank alleges that on April 23, 2018, Johnson executed a promissory note on behalf of the Church in the amount of $100,000. Complaint, ¶6. The Bank alleges that there was a default on the loan because it was not repaid. Complaint, ¶7. Finally, the Bank alleges that the Group, Richardson and Johnson received the proceeds and the benefit of the loan that was never repaid. Complaint, ¶13. Even though the Group, Richardson and Johnson all deny these allegations in their respective Answers, they have all made certain admissions which prove fatal to their case, as described below.

On August 11, 2020, the Bank served its Second Set of Requests for Admissions upon the Group, upon Johnson and upon Richardson.[1] Each set of requests asked for answers within 28 days of service and asked that the answers be provided to the Bank's counsel, in accordance with Civ. R. 36.

Specifically, these requests for admissions sought the following:

> The AME Church never authorized or approved the Richard Allen Group to serve as the financial arm of the AME Church. Group's requests No. 1; Richardson's requests No. 1; Johnson's requests No. 5.
>
> Defendants Leroy Johnson, Jr., the Richard Allen Group, or James E. Richardson, IV were never authorized or approved by the AME Church to obtain the loan which is the subject of this case from First Merchants Bank on behalf of the AME church. Group's requests No. 2; Richardson's requests No. 2; Johnson's requests No. 6.
>
> The information Defendants Leroy Johnson, Jr., the Richard Allen Group, or James E. Richardson, IV provided to First Merchants Bank that they were authorized to apply and obtain a loan on behalf of the AME Church, was false. Group's requests No. 3; Richardson's requests No. 3; Johnson's requests No. 7.
>
> Defendants Leroy Johnson, Jr., the Richard Allen Group, or James E. Richardson, IV failed to exercise reasonable care or competence in communicating false information to First Merchants Bank.

[1] The requests for admissions will be identified as follows: Group's requests; Johnson's requests; and Richardson's requests.

Group's requests No. 4; Richardson's requests No. 4; Johnson's requests No. 8.

Defendants Leroy Johnson, Jr., the Richard Allen Group, or James E. Richardson, IV knew the information provided to First Merchants Bank regarding Defendants' relationship to the AME Church was false. Group's requests No. 5; Richardson's requests No. 5; Johnson's requests No. 9.

The false information provided by Defendants Leroy Johnson, Jr., the Richard Allen Group, or James E. Richardson, IV was material to First Merchants decision to extend a loan to the AME Church. Group's requests No. 6; Richardson's requests No. 6; Johnson's requests No. 10.

First Merchants Bank justifiably relied upon the false information Defendants Leroy Johnson, Jr., the Richard Allen Group, or James E. Richardson, IV provided when it extended a loan to the AME Church in the amount of $100,000.00. Group's requests No. 7; Richardson's requests No. 7; Johnson's requests No. 11.

Defendants have not repaid the proceeds that were received under the First Merchants Bank loan which is the subject of this case. Group's requests No. 8; Richardson's requests No. 8; Johnson's requests No. 12.

There is no evidence the Richard Allen Group was the financial arm of the AME Church. Group's requests No. 9; Richardson's requests No. 9; Johnson's requests No. 13.

Mjolnir Development Group is a fictitious name registered by the Richard Allen Group. Group's requests No. 10; Richardson's requests No. 10; Johnson's requests No. 14.

All of the proceeds from the First Merchants Bank loan which is the subject of this case went to either the Richard Allen Group or Leroy Johnson, Jr. Group's requests No. 11; Richardson's requests No. 11; Johnson's requests No. 15.

None of the proceeds from the First Merchants Bank loan which is the subject of this case benefitted the AME Church. Group's requests No. 12; Richardson's requests No. 12; Johnson's requests No. 16.

Neither the Group, Richardson nor Johnson answered any of these requests for admissions.

On September 11, 2020, the Bank filed its motion for summary judgment, seeking judgment against the Group, Richardson and Johnson on all five claims in its complaint.

On November 13, 2020, Richardson and Johnson filed a joint Memo Contra the Bank's motion. The Group did not file any response to the Bank's motion.

On November 20, 2020, the Bank filed its Reply to the Memo Contra of Johnson and Richardson.

The matter has been fully briefed and is now ripe for adjudication.

II. SUMMARY JUDGMENT STANDARD

Summary judgment was established through Civ.R. 56(C) as a procedural device designed to terminate litigation when there is no need for a formal trial. *See Norris v. Ohio Std. Co.*, 70 Ohio St.2d 1, 433 N.E.2d 615 (1982). Under Civ.R. 56, summary judgment is proper when "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

The party moving for summary judgment must inform the trial court of the basis for the motion and point to parts of the record that demonstrate the absence of a genuine issue of material fact, *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996), and it must do so in the manner required by Civ.R. 56(C). *Castrataro v. Urban*, 10th Dist. Franklin No. 03AP-128, 2003-Ohio-4705, ¶ 14 (2003). The moving party cannot discharge that burden through conclusory allegations that its opponent cannot prove its case and, instead, must "specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the nonmoving party has no evidence

to support the nonmoving party's claims." *Mercer v. Wal-Mart Stores, Inc.*, 10th Dist. Franklin No. 13AP-447, 2013-Ohio-5607, ¶ 11 (2013).

Where the moving party meets its initial burden, the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E). Civ.R. 56(E) provides that when a motion for summary judgment is otherwise properly supported under division (C) of Rule 56, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *See, e.g., Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus.

With this standard in mind, the Court now addresses the merits of the Bank's motion for summary judgment.

III. DISCUSSION

A. Effect of Admissions

Civ. R. 36(A) provides, in part, that a "party may serve upon any other party a written request for the admission * * * of the truth of any matters within the scope of Civ.R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact…." Pursuant to Civ.R. 36(A)(1), the matter is "deemed admitted unless, within a period designated in the request, not less than twenty-eight days after service of the request" the party to whom the request is directed serves upon the requesting party a written answer or objection to the request. *See also Cleveland Trust Co. v. Willis*, 20 Ohio St. 3d 66, 67, 485 N.E.2d 1052, 1053 (1985) ("Civ. R. 36 requires that when requests for admissions are filed by a party, the opposing party must timely respond either by objection or answer. Failure to respond at all to the requests will result in the requests becoming admissions."); *Thomas v. Netcare Corp.*, 2018-Ohio-3462,

10th Dist. No. 17AP-705, ¶13 (2018) ("Unanswered requests for admissions are self-executing; that is they are deemed admitted and become the facts of the case.").

In this case, the Group, Richardson and Johnson all failed to respond to the Bank's requests for admissions. Thus, all of those requests are admitted and, as explained below, result in summary judgment being awarded to the Bank on its fraudulent misrepresentation, conversion and unjust enrichment claims.

B. Negligent and Fraudulent Misrepresentation

The Bank has claimed both fraudulent and negligent misrepresentation. However, the Bank cannot prevail on both of these Counts; it must prevail on one or the other because a party cannot recover under theories of both fraud and negligence based upon the same course of conduct. *See, e.g., Tighe v. Diamond* (1948), 149 Ohio St. 520, 80 N.E.2d 122:

> As long as the element of inadvertence remains in conduct it is not wilful. (citation omitted). Negligence and wilfulness are mutually exclusive terms, implying radically different mental states. (citation omitted). Negligence implies a failure to comply with an indefinite rule of conduct in the circumstances of any particular case. It does not involve intent or a conscious purpose to do a wrongful act or to omit the performance of a duty. Intent, purpose or design need not be proven.

Id. at 525. Thus, fraud involves intent, purpose, or knowledge of willfulness. Negligence, on the other hand, does not involve any of these states of mind.

Moreover, where fraud and negligent misrepresentation are based on the same set of facts or circumstances, a successful fraud claim would necessarily prevail over the negligent misrepresentation claim:

> Unlike fraudulent misrepresentation, which requires intent to deceive, negligent misrepresentation only requires good faith coupled with negligence. (citation omitted). Liability for negligent misrepresentation is based upon the negligence of the actor in failing

> to exercise reasonable care or competence in supplying correct information.

Marasco v. Hopewell, 2004-Ohio-6715, 2004 Ohio App. LEXIS 6233, at ¶53 (2004). This is so because "if fraud is proved, then the claim of negligent misrepresentation is necessarily subsumed thereby." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 149, 684 N.E.2d 1261 (8th Dist. 1996). Consequently, if the Bank proves its fraudulent misrepresentation claim, its negligent misrepresentation claim becomes moot.

In the case of *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 55, 514 N.E.2d 709, 712 (1987), the Supreme Court of Ohio identified the six elements necessary to prove a claim for fraud:

> The elements of an action in actual fraud are: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) 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, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

See also Applegate v. Northwest Title Co., 10th Dist. No. 03AP-855, 2004-Ohio-1465, at ¶13 (2004) ("The elements of a cause of action for fraudulent misrepresentation are: (a) a representation, or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) 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, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation, and (f) a resulting injury proximately caused by the reliance.").

In this case, the Group's, Richardson's and Johnson's failure to answer the Bank's requests for admissions means they have admitted all of the elements of fraudulent misrepresentation.

Specifically, Defendants have admitted: they made representations to the Bank in the form of having authority to enter into and execute on behalf of the Church a loan of $100,000; these representations were material to the Bank in issuing the loan; they knew these representations were false; they intended the Bank to rely on these representations; this reliance by the Bank was justified; and they have not made any payments on the loan resulting in injury to the Bank. Accordingly, the Group, Richardson and Johnson have engaged in fraudulent misrepresentation.

The Bank also asks for treble damages on its fraudulent misrepresentation claim pursuant to R.C. 2315.21(C)(1). That section provides, in part, that punitive or exemplary damages are not recoverable from a defendant in a tort action unless BOTH of the following apply:

> (1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.
>
> (2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

In this case, the trier of fact, i.e., the Court, has not returned a verdict or made any determination of the total damages recoverable by the Bank. Those issues remain for trial. As a result, treble damages are not allowed at this time.

Consequently, the Bank is entitled to summary judgment on its fraudulent representation claim. Accordingly, this portion of the Bank's motion is **GRANTED**. That portion of the Bank's motion that deals with negligent misrepresentation is **DENIED** as **MOOT**. The portion of the Bank's motion that seeks treble damages is **DENIED**.

C. Conversion

The Supreme Court of Ohio has long held that "conversion is 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." *Joyce v. General Motors Corp.*, 49 Ohio St. 3d 93, 96, 551 N.E.2d 172, 175 (1990). " The elements of conversion include: (1) the plaintiff had ownership or right of possession of the property at the time of conversion, (2) the defendant's conversion by a wrongful act or disposition of plaintiff's property or property rights, and (3) damages resulted therefrom." *Navidea Biopharmaceuticals, Inc. v. Capital Royalty Partners II, L.P.*, 10th Dist. No. 19AP-825, 2021-Ohio-808, ¶83, 170 N.E.3d 472 (2021). The Bank's claim for conversion meets all these elements.

First, the Bank was the owner of the loan proceeds until they were conveyed to the Group, Richardson and Johnson. However, the conveyance was effectuated under false or fraudulent pretenses due to the conduct of the Defendants. Consequently, the Group, Richardson and Johnson were not legally entitled to the loan proceeds. Once conveyed, however, the Group, Richardson and Johnson used the proceeds for their own purposes and did not pay back the loan, either in whole or in part. Therefore, the Bank has suffered damages as a result.

Accordingly, this portion of the Bank's motion is well taken and it is **GRANTED**.

D. Unjust Enrichment

In order to prevail upon a theory of unjust enrichment, a party needs to establish the following three elements: (1) a benefit conferred by the party upon a third party; (2) knowledge by the third party of the benefit conferred; and (3) retention of the benefit by the third party under circumstances where it would be unjust to do so without payment. *Pohmer v. JPMorgan Chase Bank, N.A.*, 2015-Ohio-1229, 10th Dist. No. 14AP-429, ¶19 (2015). *See also Turturice v. AEP*

Energy Servs., 2008-Ohio-1835, 10th Dist. No. 06AP-1214, at ¶24 (2008). However, when the unjust enrichment stems from a contract, recovery is usually prevented. "Because unjust enrichment * * * [is an] equitable [remedy, this doctrine does] not apply when a contract exists between the parties covering the same subject." *Pohmer, supra* at ¶21.

Nonetheless, where there is a written agreement, and in the absence of fraud, illegality or bad faith, a party is typically entitled to recovery only under the terms of the written agreement and not under a theory of unjust enrichment. *Aultman Hosp. Ass'n v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 55, 544 N.E.2d 920, 924 (1989). *See also Turturice v. AEP Energy Servs.*, 10th Dist. No. 06AP-1214, 2008-Ohio-1835, ¶ 24 (2008) ("the doctrine of unjust enrichment does not apply in the absence of fraud, bad faith, or illegality because where the relationship between parties is governed by an express contract, unjust enrichment is unavailable absent these additional factors."). This is so because an express contract and implied contract (i.e., unjust enrichment) "cannot coexist with reference to the same subject matter." *Weber v. Billman*, 165 Ohio St. 431, 437, 135 N.E.2d 866, 870 (1956).

In order to bar claims in equity, the express contract must govern the subject matter of the relief. *Ryan v. Rival Mfg. Co.*, 1st Dist. No. C-810032, 1981 Ohio App. LEXIS 14729, 1981 WL 10160 (1981) ("It is clearly the law in Ohio that an equitable action in quasi-contract for unjust enrichment will not lie when the subject matter of that claim is covered by an express contract or a contract implied in fat [sic]."); *Maghie & Savage, Inc. v. P.J. Dick, Inc.*, 10th Dist. No. 08AP-487, 2009-Ohio-2164, ¶ 33 – 34 (2009). In other words, the terms of an express contract determine the extent of a plaintiff's recovery, and prohibit any equitable relief, if the plaintiff cannot show bad faith, fraud, or some other illegality." *Cristino v. Adm'r, Ohio Bureau of Workers' Comp.*, 10th Dist. Franklin No. 12AP-60, 2012-Ohio-4420 at ¶ 24 (2012), citing *Bldg. Indus. Consultants,*

Inc., *supra*. *See also Aultman, supra*, at 55 ("In the absence of fraud, illegality or bad faith, the hospitals are entitled to compensation only in accordance with the terms of the written agreement.").

Applying these legal tenets to the facts of this case, the Court finds that the Bank has alleged and demonstrated fraud and illegal behavior. Because the Bank did not bring a breach of contract claim, it has a remedy in unjust enrichment. The contract between the parties was effectuated under false or fraudulent pretenses due to the conduct of the Defendants. Neither the Group, Richardson or Johnson were entitled to the loan proceeds. Once the proceeds were conveyed, however, the Group, Richardson and Johnson used the proceeds for their own purposes and did not pay back the loan, either in whole or in part. Therefore, the Group, Richardson and Johnson have all been unjustly enriched by their actions to the detriment of the Bank.

Consequently, the Court finds this portion of the Bank's motion well taken and it is **GRANTED**.

E. Passing bad checks

The Bank claims that under R.C. 2307.61(A), it may bring a civil action to recover damages arising from Johnson's passing of a bad check. However, the Bank's reliance on R.C. 2307.61(A) is misplaced because the Court cannot find that a criminal act has occurred. Moreover, genuine issues of material fact exist which render it impossible to award judgment to the Bank on this issue.

R.C. 2307.61(A) provides, in part, that if:

> a property owner brings a civil action pursuant to division (A) of section 2307.60 of the Revised Code to recover damages from any person who willfully damages the owner's property or who commits a theft offense, as defined in section 2913.01 of the Revised Code, involving the owner's property, the property owner may recover…

under the provisions of (A)(1) and (2). Specifically, R.C. 2307.61(A)(1) provides for the recovery of compensatory damages (based on the value of the property damaged or stolen) while (A)(2) provides for the recovery of liquidated damages (again, based on the value of the property damaged or stolen). R.C. 2913.01(K), in turn, provides that "theft offense" includes, in part, a violation of R.C. 2913.11, passing bad checks.

By its plain and unambiguous language, R.C. 2307.60 creates a civil cause of action for damages resulting from any criminal act, unless otherwise prohibited by law. *Jacobson v. Kaforey*, 149 Ohio St. 3d 398, 2016-Ohio-8434, 75 N.E.3d 203, at ¶13 (2016). However, if there is no evidence that a criminal act was ever proven or found, R.C. 2307.60 is inapplicable. *Wildcat Drilling, LLC v. Discovery Oil & Gas*, LLC, 2018-Ohio-4015, 121 N.E.3d 65, ¶43, 7th Dist. No. 17 MA 0018 (2018). "In the absence of a finding that a criminal act has taken place, R.C. 2307.61 is not applicable and there is no basis for an award of treble damages." *Red Ferris Chevrolet, Inc. v. Aylsworth*, 2008-Ohio-4950, 9th Dist. No. 07CA0072 (2008), ¶14. The question thus becomes whether Johnson committed a "criminal act" when he presented a check to the Bank in an effort to make an initial payment on the loan.

As stated above, passing bad checks is a "theft offense" under R.C. 2913.11, which provides as follows:

> **(B)** No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, *knowing that it will be dishonored or knowing that a person has ordered or will order stop payment* on the check or other negotiable instrument. (Emphasis added).
>
> **(C)** For purposes of this section, *a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either* of the following occurs:
>
> **(1)** *The drawer had no account with the drawee at the time of issue or the stated date, whichever is later;*

> (2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, indorser, or any party who may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor.

In this case, there is no evidence before the Court whether or not Defendant Johnson knew that the $7,000.00 check he presented to the Bank would be dishonored. Also, there is no evidence before the Court to know whether Defendant Johnson did or did not have an account at the financial institution that issued the $7,000.00 check that was eventually presented to the Bank. Because of these uncertainties, genuine issues of material fact exist which render it impossible to award the Bank judgment on its passing bad checks claim.

Accordingly, this portion of the Bank's motion is **DENIED**.

V. CONCLUSION

Defendants' failure to answer the request for admission served upon them proves fatal to their cause. Because of this failure, Defendants have admitted to the Bank's claims of fraudulent misrepresentation, conversion, and unjust enrichment. The Bank's motion on these issues is therefore **GRANTED**.

However, genuine issues of material fact remain as to whether Johnson knew that the check he presented to the Bank would be dishonored, and whether Johnson was in fact an account holder at the financial institution that the check was drawn upon. For these reasons, the Bank's motion seeking judgment on its passing bad checks claim is **DENIED**.

Further, the Court, has not returned a verdict or made any determination of the total damages recoverable by the Bank. Those issues remain for trial. As a result, treble damages are not allowed at this time.

IT IS SO ORDERED.

Copies electronically to all counsel and Defendant Robinson.

A separate Order of Reference assigning this matter to Magistrate Pamela Browning for a damages hearing will issue shortly.

Franklin County Court of Common Pleas

Date: 08-27-2021

Case Title: FIRST MERCHANTS BANK -VS- LEROY JOHNSON JR ET AL

Case Number: 18CV009775

Type: SUMMARY JUDGMENT FOR PLAINTIFF

It Is So Ordered.

/s/ Judge Jeffrey M. Brown