GARRETT COCHRAN POST 1	:	IN THE COURT OF COMMON PLEAS OF
AMERICAN LEGION HOME ASSOC.,	:	LYCOMING COUNTY, PENNSYLVANIA
and	:	JURY TRIAL DEMANDED
OLD LYCOMING TOWNSHIP	:	
VOLUNTEER FIRE COMPANY,	:	
Plaintiffs	:	
	:	
vs.	:	NO. 02-01,890
	:	
CAMERON McQUILLEN and	:	
SUNOK McQUILLEN,	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: March 17, 2004

OPINION and ORDER

Before the Court for determination are Defendant Sunok McQuillen's (Sunok) Motion for Summary Judgment against Plaintiff Old Lycoming Township Volunteer Fire Company (Old Lycoming) filed October 15, 2003 and Motion for Summary Judgment against Plaintiff Garrett Cochran Post I American Legion Home Association (Garrett Cochran) filed October 15, 2003. The Court will deny both motions.

The present case began by the filing of two separate complaints. Old Lycoming filed a Complaint under docket number 02-01,890 on October 16, 2002. Old Lycoming then filed an Amended Complaint on December 20, 2002. Garrett Cochran filed a Complaint under docket number 03-00,132 on January 27, 2003. Both cases were consolidated under docket number 02-01,890 by an Order of this Court dated June 20, 2003.

Both Old Lycoming and Garrett Cochran operate bingo and small games of chance at their respective locations. These games generate a significant amount of money for Old Lycoming and Garrett Cochran. Cameron McQuillen (Cameron) entered into an oral

contract with Old Lycoming and Garrett Cochran to operate and supervise the games for them. He was responsible for collecting the money paid by the patrons. Old Lycoming and Garret Cochran have alleged that the revenue from these games decreased during the time that Cameron was in charge. Old Lycoming and Garrett Cochran have asserted that Cameron and Sunok have been living beyond their means by purchasing expensive items, remodeling their home, purchasing an interest in a bar/restaurant, and maintaining gambling accounts. It is both their contention that McQuillens have taken the money that was collected during the games and converted it to their own private use without authority or consent.

Old Lycoming and Garrett Cochran have asserted three causes of action against the Defendants in their respective Amended Complaint and Complaint. Both have asserted theft and conversion, constructive trust, and fraudulent conveyance claims against the Defendants. Sunok has filed the motions for summary judgment that are presently before the Court on the basis that Old Lycoming and Garrett Cochran have failed to produce evidence necessary to support their causes of action.

Sunok argues that the evidence produced so far only demonstrates two things. One, that she had no part in the alleged activities of her husband with respect to the bingo and games of chance. Second, that any conversion of funds was without her knowledge since Cameron did the banking and she did not notice any irregularity in the family finances. To support her argument, Sunok cites to her answers to the interrogatories of Old Lycoming and Garrett Cochran, the police report of Agent Ritter, and her deposition testimony.

In response, Old Lycoming argues that there are genuine issues of fact still outstanding, which preclude the entry of summary judgment, and that it has produced evidence

to support its claims. Old Lycoming asserts that there is evidence that Defendants worked the games collecting the money, the revenue from the games decreased while Defendants worked the games, and that Defendants spent money in excess of their income. Similarly, Garrett Cochran argues that there is evidence Cameron converted the money from the games without authority and that Sunok accepted gifts, house payments, and money for gambling accounts knowing that her husband's income could not support these expenditures. Furthermore, Garrett Cochran asserts that Cameron was acting as Sunok's agent when he used the converted funds to purchase two automobiles, a one half interest in a bar/restaurant, and to remodel their home.

A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted "when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The movant has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " 'in the light most favorable to the non-moving party accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences.'" ***Godlewski***, 597 A.2d at 107 (quoting ***Hower v. Whitmak Assoc.***, 538 A.2d 524 (Pa. Super. 1988)). Summary judgment will only be entered in cases that "are free and clear from doubt" and any "doubt must be resolved against the moving party." ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Summary judgment may be properly entered if the evidentiary record "either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense." ***Rauch***, 783 A.2d at 823-24; *see also*, Pa.R.C.P. 1035.2. If the defendant is the moving party bringing the motion under Pa.R.C.P. 1035.2(2), then "he may make the showing necessary to support the entrance of summary judgment by pointing to material which indicates that the plaintiff is unable to satisfy an element of his cause of action." ***Id***. at 824. "Conversely, the [plaintiff] must adduce sufficient evidence on an issue essential to [his] case and on which [he] bears the burden of proof such that a jury could return a verdict favorable to the [plaintiff]." ***Ibid***. If the plaintiff fails to establish a *prima facie* case, then summary judgment is proper as a matter of law. ***Ack. v. Carrol Township***, 661 A.2d 514, 516 (Pa. Cmwlth. 1995).

The Court will examine each of the plaintiffs' counts to determine whether they have established *prima facie* cases for their claims against Sunok.

Addressing the theft and conversion count first, the Court finds that Old Lycoming and Garrett Cochran have produced evidence to establish a *prima facie* case of conversion against Sunok. Conversion is a tort where "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 or without lawful justification. ***Pittsburgh Constr. Co. v. Griffith***, 843 A.2d 572, 581 (Pa. Super. 2003). To bring a claim for conversion, the plaintiff must have had "actual or constructive possession, or an immediate right to possession of the chattel at the time of the conversion***."*** ***Eisenhauer v. Clock Towers Assoc.***, 582 A.2d 33, 35 (Pa. Super. 1990). Money may be the subject of conversion. ***Pittsburgh Constr. Co.***, 843 A.2d at 572.

Conversion requires that the exercise of control over the chattel must be intentional, but it does not require specific intent to commit a wrong. ***L.B. Foster Co. v. Charles Caracciola Steel and Metal Yard Inc.***, 777 A.2d 1090, 1095 (Pa. Super. 2001); ***Underhill Coal Mining Co. v. Hixon***, 652 A.2d 343, 345 (Pa. Super. 1994). The requisite intent is the "intent to exercise dominion or control over the goods which is in fact inconsistent with the plaintiff's rights …." ***Shonberger v. Oswell***, 530 A.2d 112, 114 (Pa. Super. 1987). As such, one who takes or receives property from a converter is also a converter and must answer in damages to the true owner. *See*, ***Underhill Coal Co.***, 652 A.2d at 345. One who takes or receives property from a thief obtains no rights to the property. *See*, ***L.B. Foster Co.***, 777 A.2d at 1095.

Old Lycoming and Garrett Cochran have produced circumstantial evidence that could lead to the conclusion that either or both Cameron and Sunok took money from the games of chance. Cameron collected the money for Old Lycoming and Garrett Cochran's games during the period of mid-1999 until the end of 2001. During this time, Sunok occasionally worked at Old Lycoming and Garrett Cochran selling pick ticket games. During this period, Plaintiffs suffered a decrease in the revenues from their games.

At the same time, Plaintiffs have produced evidence that both McQuillens appeared to have an unexplained upturn in their fortunes. Two vehicles were purchased in 2001-- a Jeep Cherokee and a $48,000 Chevrolet Corvette. McQuillens made $78,000 worth of renovations to their home in during the time period in which Cameron worked the games. In August of 2002, McQuillens purchased a one half interest in the Allegheny House, a bar/restaurant, in Jersey Shore Pennsylvania for $25,000. From June 1999 until December

2000, approximately $12,700 was wired from Sunok's account at the Wyrope Williamsport Federal Credit Union to her mother in South Korea. Sunok also had gaming accounts at Foxwoods' casino, Bali's casino in Atlantic City, and a casino on the Native American reservation in Oneida, New York. In the year 2001, Sunok lost $8,081 gambling at Bali's. All this while, Sunok was unemployed and Cameron's hours working as a sewing machine mechanic at Glamorize were cut back.

As far as money coming into the McQuillen household, their average gross income based on joint tax returns from 1999 and 2000 was $30,298.42. While employed by Old Lycoming and Garret Cochran to run the games, Cameron was paid fifty dollars per night working approximately five nights per week. When Sunok worked for Old Lycoming and Garret Cochran selling pick ticket games she earned forty dollars a night.

While there is no certain bet that Cameron and/or Sunok took the money that was collected during the games, it would be a reasonable wager that a fact-finder would reasonably conclude that one or both took the money in light of the expenditures versus the income of McQuillens during this time period and the unaccounted for game revenue. Specifically, pertaining to Sunok, evidence of Plaintiffs supports three theories under which she could be held liable for conversion.

The first is that she actually, physically took the money from Old Lycoming and Garret Cochran games. Sunok worked at both establishments selling pick ticket games. Based on the evidence, it is possible that she took the money she collected and applied it toward the various expenditures. This could establish a conversion claim against Sunok.

Sunok could also be liable for a conversion by exercising control over funds converted by her husband. It could be that Cameron is the sole individual responsible for taking the money from Old Lycoming and Garret Cochran, and that Sunok had no part in the theft. Regardless, Sunok could still be liable. For example, Sunok could have used the converted funds while she gambled at one of the casinos. In this instance Sunok may not have intended to steal the money, but that is irrelevant. The only intent that matters is the intent to exercise control over the property and treat it as if it were hers. If Sunok used the funds for gambling or towards any other of the expenditures, then she could be liable in conversion because this would be depriving Old Lycoming and Garret Cochran of their right to the money.

The final theory of liability is that of agency. Garret Cochran argues that agency is presumed when the converted money was used to purchase two automobiles, a one half interest in a bar/restaurant, and to remodel the McQuillens' home. There is a "presumption with respect to property held by the entireties that either spouse has the power to act for the other without specific authority so long as the benefit of the action inures to both." ***Bradney v. Sakelson***, 473 A.2d 189, 191 (Pa. Super. 1984). This presumption may be rebutted by evidence that the spouse was not authorized to act for the other. ***J.R. Christ Constr. Co. v. Olevsky***, 232 A.2d 196, 199 (Pa. 1967).

However, the presumption does not apply. In a conversion action, the focus is on the property that has been taken or interfered with. Any agency liability must be based on actions taken with respect to that property. The money taken from the games at Old Lycoming and Garrett Cochran is not entireties property; therefore, it is not subject to the presumption.

However, that does not end the inquiry of agency liability concerning the conversion claims. The relationship of husband and wife does not automatically confer upon one the power to act for the other. ***Lapio v. Robbins***, 729 A.2d 1229, 1234 (Pa. Super. 1999). But, the relationship is of such a nature " 'that circumstances which in the case of strangers would not indicate the creation of authority or apparent authority may indicate it in the case of husband and wife.'" ***Ibid.*** (quoting ***Tonuci v. Beegal***, 145 A.2d 885, 888 (Pa. Super. 1958)). The existence of agency may be implied from the attending circumstances and does not require evidence of an explicit, specific authorization. ***Ibid.*** For example, a "husband habitually permitted by his wife to attend to some of her business matters may be found to have authority to transact all of her business affairs. ***Ibid***.

Thus, Sunok could be liable for conversion if Cameron was acting as her agent when he converted the money taken from Plaintiffs. If Cameron normally made the decisions regarding the couple's money, then he could be regarded as having the authority to act on behalf of Sunok regarding the money. In her answers to interrogatories, Sunok stated that Cameron did all the banking, paid the bills, and wrote the checks. If Cameron used the stolen money to transact the couple's finances, then he would be converting it, as he would be exercising control over it as if it was his, and acting as Sunok's agent. This would make Sunok liable in conversion.

Therefore, Plaintiffs have produced sufficient evidence to make out a *prima facie* case of conversion against Sunok.

Now addressing the constructive trust count, the Court finds that Old Lycoming and Garret Cochran have produced evidence to establish a *prima facie* case for the imposition

of a constructive trust on funds held by Sunok. The imposition of a constructive trust is an equitable remedy. ***Yohe v. Yohe***, 353 A.2d 417, 420 (Pa. 1976). " 'A constructive trust arises where a person holds title to property is subject to an equitable duty to convey it to another on the grounds that he would be unjustly enriched if he were permitted to retain it.'" ***Koffman v. Smith***, 682 A.2d 1282, 1290-91 (***quoting Balazich v. Scranton***, 541 A.2d 1130, 1133 (Pa. 1988)).

Plaintiffs have produced sufficient evidence that would permit the imposition of a constructive trust on property held by Sunok. Plaintiffs have produced evidence that could establish that Cameron and/or Sunok converted money that was meant for Plaintiffs. As such, Sunok would have no right to any converted money or property bought with that money. Sunok would be unjustly enriched if she was allowed to retain possession of money/property she had no right to. Therefore, a constructive trust would be appropriate if the Plaintiffs can demonstrate that the money or property in Sunok's possession was in fact the converted property. Thus, the Motion for Summary Judgment in this regard is denied.

With respect to the fraudulent conveyance count, the argument advanced by Sunok is not an attack on Plaintiffs' ability to make out a *prima facie* case for a fraudulent transfer claim. Plaintiffs have brought a claim against Sunok under the Pennsylvania Unfair Fraudulent Transfer Act (PUFTA), 12 Pa.C.S.A. §5101-5110. Plaintiffs' theory under this count is that Cameron converted funds meant for Old Lycoming and Garrett Cochran. Once he did this Cameron became a debtor and Old Lycoming and Garrett Cochran creditors. Plaintiffs then alleged that Cameron transferred the converted funds to Sunok in the form of gifts, house payments, and money for gambling accounts to conceal the funds.

The PUFTA established circumstances when "transfers or obligations incurred by a debtor may be deemed to be fraudulent." ***K-B Bldg., Co. v. Sheesley Constr., Inc.***, 833 A.2d 1132, 1135 (Pa. Super. 2003). Once a creditor establishes the existence of a fraudulent transfer or obligation, the creditor may, *inter alia*, avoid the transfer or obligation, attach the transferred assets or other property of the transferee, obtain an injunction barring further transfers, or seek appointment of a receiver over the transferred assets." ***Id***. at 1135-36 (citing 12 Pa.C.S.A. §5107(a)). The PUFTA defines a fraudulent transfer in §5104. It states that:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) 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; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

12 Pa.C.S.A. §5104(a).

Sunok argues that Plaintiffs have not established a claim against her under the PUFTA. She contends that she did not know anything concerning deposits to bank accounts or

that any of her funds had been obtained surreptitiously. This argument is essentially an assertion of the defense set forth in §5108.

The defense provides an individual with a complete defense to a claim based on §5104(a)(1). 12 Pa.C.S.A. §5108, Committee Comment – 1993 (1). A transfer is not fraudulent under §5104(a)(1) "against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." 12 Pa.C.S.A. §5108(a). This is more an affirmative defense then a part of the plaintiff's cause of action regarding a fraudulent transfer. As it has nothing to do with the Plaintiffs' *prima facie* case for a fraudulent transfer cause of action, the Motion for Summary Judgment must be denied in this respect.

Accordingly, Sunok McQuillen's Motion for Summary Judgment is denied.

O R D E R

It is hereby ORDERED that Defendant Sunok 's Motion for Summary Judgment against Plaintiff Old Lycoming Township Volunteer Fire Company filed October 15, 2003 is DENIED.

It is hereby ORDERED that Defendant Sunok 's Motion for Summary Judgment against Plaintiff Garrett Cochran Post I American Legion Home filed October 15, 2003 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Joseph R. Musto, Esquire (Old Lycoming)
John R. Bonner, Esquire (Garrett Cochran)
Michael J. Zicolello, Esquire (C. McQuillen)
Richard A. Gahr, Esquire (S. McQuillen)
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)