

IN THE COURT OF APPEALS OF IOWA

No. 8-085 / 07-1019

Filed April 9, 2008

NORTH POINTE INSURANCE COMPANY,
a Michigan insurance corporation,
Plaintiff-Appellant,

vs.

UNIVERSAL PREMIUM ACCEPTANCE
CORPORATION,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

The plaintiff appeals from the order granting summary judgment against
their action to impose a constructive trust or equitable lien. **AFFIRMED.**

Joseph MacLean of Law Office of Joseph C. MacLean, P.L.L.C.,
Bloomfield Hills, Michigan, and Deborah Tharnish of Davis Law Firm, Des
Moines, for appellant.

Brian Rickert, Des Moines, and Keith Shuttleworth of Shuttleworth Law
Firm, L.L.C., Overland Park, Kansas, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

North Pointe Insurance Company (North Pointe) appeals from the order granting summary judgment against their action to impose a constructive trust or equitable lien on funds paid to Universal Premium Acceptance Corporation (UPAC) as a result of the allegedly fraudulent acquisition of certain assets. We affirm.

Background Facts and Proceedings.

North Pointe is a Michigan insurance company that writes property and casualty insurance, including dram shop insurance. In 1997,¹ North Pointe and DMIG, Inc., an Iowa company whose principal is Dan Mauro, entered into an agency agreement under which DMIG would sell dram shop insurance in Iowa. DMIG sold the policies through its existing network of sub-agents and was responsible for collecting the policy premiums, and then forwarding the premiums to North Pointe. North Pointe was responsible for issuing the policies and paying out claims under them. During their relationship, North Pointe's receivable balance grew quickly, and as of January 2000, DMIG was indebted to North Pointe for approximately \$482,000 in unpaid premiums. That figure rose to \$735,000 by June of that year.

While DMIG's agency relationship with North Pointe was ongoing, it also had a business relationship with UPAC, a premium finance company, in which it received draft-writing authority to access UPAC's funds to finance premiums for companies seeking dram shop coverage. However, DMIG fraudulently set up

¹ This agreement was initially between North Pointe and Mauro-McCargar Insurance Group, but in 1998 was revised to substitute DMIG for Mauro-McCargar.

non-existent business entities as purported insureds, obtained monies from UPAC meant to finance insurance premiums, then reported the businesses as having gone out of business (with UPAC simply writing off the losses), and kept the sums advanced by UPAC. As of February 2000, DMIG was indebted to UPAC in the amount of \$367,000.

On April 21, 2000, Edward Mauro, Dan's brother, incorporated the Mauro Insurance Group, Inc. (MIG). On June 15, 2000, MIG and DMIG entered into an asset purchase agreement whereby MIG was to purchase DMIG. As part of the agreement, DMIG agreed to pay UPAC \$170,000 toward its indebtedness to UPAC. DMIG remained obligated for \$100,000 of the balance toward UPAC and MIG assumed responsibility for the unpaid balance of just over \$77,000. Eventually DMIG and MIG both defaulted on the agreement. Litigation ensued in 2002, and UPAC received \$100,000 in settlement for its claims against MIG, DMIG, Dan Mauro, and Anna Mauro.

In February 2001, North Pointe terminated its agency agreement and filed suit against DMIG and its various officers and employees in the United States District Court for the Southern District of Iowa. It eventually obtained a judgment in the amount of \$633,595.39 for breach of the agency agreement. This amount remains unpaid and owing.

On January 17, 2006, North Pointe filed this action against UPAC to impose a constructive trust, or in the alternative an equitable lien, on the assets that UPAC received as a result of the allegedly wrongful acquisition by UPAC of assets that were held for the benefit of North Pointe. North Pointe claimed it was owed premiums by DMIG, that those premiums constituted trust funds, and that

they were improperly acquired by UPAC by virtue of certain transactions involving it, DMIG, and MIG. The court later granted UPAC's motion for summary judgment and dismissed North Pointe's action. North Pointe appeals.

Summary Judgment.

We review rulings on motions for summary judgment for correction of errors at law. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005). A motion for summary judgment should be granted when there is no genuine issue of material fact for trial, and the movant is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). In ascertaining whether there is a genuine issue of material fact, we review the record in the light most favorable to the non-moving party. *Schoff v. Combined Ins. Co.*, 604 N.W.2d 43, 45 (Iowa 1999).

Analysis.

As noted, North Pointe's action sought the establishment of either a constructive trust, or in the alternative, an equitable lien on certain assets held by UPAC. The two concepts are similar. Generally speaking, a constructive trust is a remedy, applied for purposes of restitution, to prevent unjust enrichment. It is an equitable doctrine. *Slocum v. Hammond*, 346 N.W.2d 485, 493 (Iowa 1984). In *Loschen v. Clark*, 256 Iowa 413, 419, 127 N.W.2d 600, 603 (1964), the Iowa Supreme Court approved the following definition:

A constructive trust is a creature of equity, defined . . . as a remedial device by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest. So, the doctrine of constructive trust is an instrument of equity for the maintenance of justice, good faith, and good conscience, resting on a sound public policy requiring that the

law should not become the instrument of designing persons to be used for the purpose of fraud.

The constructive trust remedy may be imposed where a defendant has profited inequitably at the expense of a plaintiff. *Neimann v. Butterfield*, 551 N.W.2d 652, 654 (Iowa Ct. App.1996); *In re Estate of Farrell*, 461 N.W.2d 360, 361 (Iowa Ct. App.1990). Yet if mere wishes or expectations of a party may provide the basis for an unjust enrichment claim, the potential for using constructive trusts would be virtually unlimited. See *In re Estate of Peck*, 497 N.W.2d 889, 890 (Iowa 1993).

Constructive trusts fall into three categories: (1) those arising from actual fraud; (2) those arising from constructive fraud (appropriation of property by fiduciaries or others in confidential relationships); and (3) those based on equitable principles other than fraud. *Id.*; *Slocum*, 346 N.W.2d at 493; *Loschen*, 256 Iowa at 419-20, 127 N.W.2d at 603. One seeking the remedy must establish the right by clear, convincing, and satisfactory evidence. *Slocum*, 346 N.W.2d at 493; *Copeland v. Voge*, 237 Iowa 102, 107, 20 N.W.2d 2, 5 (1945). The distinguishing feature of the constructive trust is that it arises by construction of the court, and ordinarily the result is reached regardless of and contrary to any intention to create a trust. *Slocum*, 346 N.W.2d at 493; *Westcott v. Westcott*, 259 N.W.2d 545, 547 (Iowa Ct. App. 1977).

An equitable lien is a remedial alternative to a constructive trust. *In re Receivership of Hollingsworth*, 386 N.W.2d 93, 96 (Iowa 1986). An equitable lien is a restitution concept applied by courts of equity to avoid injustice. *Tubbs v. United Cent. Bank, N.A.*, 451 N.W.2d 177, 185 (Iowa 1990) (citing

Restatement of Restitution § 161, at 650-52 (1937)). It may be “implied and declared by a court of equity out of general considerations of a right and justice as applied to the relations of the parties and the circumstances of their dealings.” *Tubbs*, 451 N.W.2d at 185 (quoting *Farmers & Merch. Bank v. Comm’r of Internal Revenue*, 175 F.2d 846, 849 (8th Cir. 1949)). The right to acquire an equitable lien may be cut off by the superior rights of innocent third parties, such as a good faith purchaser for value who takes the property without notice of the lien. *Cox v. Waudby*, 433 N.W.2d 716, 720 (Iowa 1988).

Under the amended agency agreement between North Pointe and DMIG, all premiums DMIG collected from its insureds or agents were to be paid to North Pointe within sixty days of receipt. Specifically, North Pointe’s constructive trust claim is based on UPAC’s receipt from DMIG and MIG of funds that allegedly belonged to North Pointe because the funds allegedly were paid by North Pointe insureds. No specific dollar figure is claimed; however, on appeal, North Pointe focuses on two payments to UPAC, \$53,041.72 paid in early 2000 and \$170,000 paid under the asset purchase agreement. The district court concluded North Pointe could not prove its constructive trust claim because it failed to show that insurance premiums collected by DMIG passed to the possession of UPAC. North Pointe now claims the court erred in imposing a “tracing requirement” on the funds received by UPAC pursuant to the asset purchase agreement.

In order to establish such a trust, it is necessary that there be a res or specific fund on which the trust may be fixed. *Homolka v. Drahos*, 247 Iowa 525, 529, 74 N.W.2d 589, 591 (1956). One who seeks to establish such trust must actually identify his property which is the subject of the trust, or other property

into which it has passed, and that it is actually in the possession of the party sought to be charged. *Van & Storage Co. v. Iowa Mercantile Co.*, 189 Iowa 874, 179 N.W. 157, 159 (Iowa 1920). Our supreme court's decisions have somewhat alleviated the harshness of this tracing requirement by recognizing that, where the tracing of trust assets involves cash, "it is not incumbent on plaintiff to identify the particular funds, for, as money has no earmarks, this would be practically impossible." *Hanson v. Roush*, 139 Iowa 58, 60, 116 N.W. 1061 (1908). This recognition has caused some relaxing of the burden placed upon a party called upon to trace cash assets. The court has also said that "if property impressed with a trust has been 'traced' to the possession of the trustee, the burden is then upon him or his receiver to show that it did not result in augmentation of the estate." *Andrew v. State Bank*, 205 Iowa 1064, 1070, 217 N.W. 250, 253 (1928).

In granting summary judgment, the district court stated:

As applied to this case, this [the tracing requirement] would require [North Pointe] to show that insurance premiums collected by DMIG, Inc. passed to the possession of [UPAC]. This it has not been able to do. While it has established funds generally from DMIG, Inc. ended up in the possession of [UPAC], it has been unable to show that any of these monies came from premiums rightfully belonging to it. While there may be circumstances where the plaintiff could benefit from a presumption that funds held in trust for it by DMIG, Inc. were transferred to [UPAC] in the absence of direct evidence, there must be proof identifying the premium dollars rightfully belonging to [North Pointe] at the time the funds were transferred to [UPAC] In the absence of proof that DMIG, Inc. had in its possession funds properly held in trust for the plaintiff at the time it transferred funds to [UPAC, North Pointe] is not entitled to either the imposition of a constructive trust or an equitable lien over funds or property of [UPAC].

We conclude the tracing requirement remains viable in Iowa; however, the "relaxed" rules relating to cash do serve to ease North Pointe's burden because it

still must establish that some measure of its funds actually passed to the hands of UPAC through DMIG and MIG. Regarding the \$53,041.72 paid in early 2000, there is no evidence in the record that net premium dollars were present in that account. As UPAC points out, North Pointe could have reviewed the policies issued, the premiums associated with those policies and compared that information against DMIG's bank records for the relevant period, but failed to do so. Further, regarding the \$170,000 paid under the asset purchase agreement, this amount came to UPAC in the form of a wire transfer from an unknown bank account. Thus, there is no evidence of the source of these funds either. North Pointe also claims that because UPAC participated in the asset purchase agreement between DMIG and MIG, it should not benefit by securing a partial repayment of monies owed. However, with no proof of any fraud on the part of UPAC, North Pointe's assertion fails as UPAC was within its rights as a creditor to seek to protect its own financial interests. See *First State Bank v. Kalkwarf*, 495 N.W.2d 708, 712 (Iowa 1993) (discussing preferred creditor's actions in securing debt).

The mere fact that UPAC received some payments from DMIG/MIG is insufficient to support a constructive trust or equitable lien case. North Pointe must, with some concrete evidence, generate a material issue as to whether those payments came from collected premiums intended for North Pointe. It has failed in this burden. North Pointe's inability to distinguish the funds from which it seeks creation of a trust from all other non-trust funds in the Mauros' accounts is fatal to its constructive trust and equitable lien claims against UPAC. We

therefore affirm the order granting UPAC's motion for summary judgment.

AFFIRMED.