STATE OF MINNESOTA
IN COURT OF APPEALS
A10-510

Lyon Financial Services, Inc.,
d/b/a U.S. Bancorp Business Equipment Finance Group and
d/b/a U.S. Bancorp Manifest Funding Services,
Respondent,

vs.

Bausch & Lomb Incorporated,
Appellant.

Filed November 16, 2010
Reversed
Schellhas, Judge

Lyon County District Court
File No. 42-CV-09-67

John D. Docken, Troy C. Kepler, Marshall, Minnesota (for respondent)

Gary W. Koch, Matthew C. Berger, Gislason & Hunter LLP, New Ulm, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Respondent sought to recover money it had paid to appellant due to the fraud of a third party. The district court entered summary judgment in respondent's favor under

theories of unjust enrichment and conversion. We conclude that respondent is equitably estopped from asserting its claims, and we reverse.

FACTS

Appellant Bausch & Lomb Inc. sells eye-care products, including laser vision-correction equipment, to health care professionals. The laser-surgery equipment sold by Bausch & Lomb generally requires that a separate "treatment card" be purchased from Bausch & Lomb for each individual procedure performed with the equipment.

Luna Health Management Inc. was a laser-surgery-equipment customer of Bausch & Lomb. Luna repeatedly fell behind on its treatment-card payments to Bausch & Lomb, and, on several occasions, Bausch & Lomb placed credit holds on Luna's account, prohibiting additional treatment-card deliveries until payments were made. Bausch & Lomb also eventually placed restrictions on Luna's account that required Luna to pay down part of its outstanding debt before placing additional treatment-card orders.

On or about June 21, 2007, Luna told Bausch & Lomb that it had secured venture-capital funding from Banner Physicians Capital Inc. and put Bausch & Lomb in touch with Banner to obtain payment of Luna's debt. At the time, Luna had outstanding invoices with Bausch & Lomb totaling $135,328. On June 21, Banner told Bausch & Lomb that it would forward payment of $135,328 to Bausch & Lomb to cover Luna's outstanding debt.

On June 22, 2007, Banner assigned its rights and obligations under an Equipment Finance Agreement (EFA) between it and Michigan Glaucoma Institute P.C. (MGI) to respondent Lyon Financial Services Inc., d/b/a U.S. Bancorp Business Equipment

Finance Group and U.S. Bancorp Manifest Funding Services. The EFA provided for the financing of medical equipment purchased by MGI but did not reflect the principal purchase price of the equipment.

In connection with the assigned EFA, Lyon received what appeared to be a Bausch & Lomb invoice for the equipment covered by the EFA. The purported invoice reflected a total amount due of $135,328. Lyon mailed a check, dated June 25, 2007, to Bausch & Lomb for $135,328 to cover what it believed to be the amount due on the purported invoice. But pursuant to the terms of its written agreement with Banner, Lyon designed the check so that it appeared to be from Banner—the check prominently bore Banner's name and address in the upper left corner and mentioned Lyon nowhere.[1] When Bausch & Lomb received the check, it believed the check was from Banner and applied the money to Luna's $135,328 debt.

This scenario repeated itself three times. On July 13, 2007, Banner assigned an EFA between it and Rinku M. Dutt, M.D., to Lyon. Lyon received a purported Bausch & Lomb invoice in the amount of $115,000 for the equipment covered by the Dutt EFA, and mailed a check, dated July 13, 2007, to Bausch & Lomb for $115,000. Again, Lyon

[1] The agreement provided: "[Banner] desires that [Lyon] shall advance the purchase price of such Lease Equipment to the supplier or manufacturer as appropriate on behalf of [Banner] but in a draft showing [Banner] as the maker thereof" so that "the supplier does not know the identity of, or the Assignment of the Equipment from [Banner] to [Lyon]." Under the U.C.C., a "maker" is a person identified in a *note* as a person undertaking to pay; a person ordering payment in a *draft*, on the other hand, is known as a "drawer." Minn. Stat. § 336.3-103(a)(5), (7) (2008). "An instrument is a 'note' if it is a promise and is a 'draft' if it is an order." Minn. Stat. § 336.3-104(e) (2008). "If an instrument falls within the definition of both 'note' and 'draft,' a person entitled to enforce the instrument may treat it as either." *Id.*

designed the check to appear that it was from Banner. Bausch & Lomb accordingly applied the money to Luna's $115,000 outstanding bill for April 2007 treatment-card fees.

On July 25, 2007, Banner assigned an EFA between it and Sada Hikmet Yaldo, D.D.S., to Lyon. Along with the Yaldo EFA, Lyon received a purported Bausch & Lomb invoice in the amount of $99,161 for equipment. Lyon mailed a check, dated July 25, 2007, to Bausch & Lomb for $99,161. Once again Lyon designed the check so that it appeared to be from Banner. Bausch & Lomb applied the $99,161 to Luna's $100,000 outstanding bill for May 2007 treatment-card fees; it wrote off the $839 remaining unpaid balance after hearing from a Banner employee that Banner did not have sufficient funds to pay the full amount.

On August 7, 2007, Banner assigned an EFA between it and Dr. J. Thwainey M.D. P.C. to Lyon. Along with the Thwainey EFA, Lyon received a purported Bausch & Lomb invoice in the amount of $15,000 for equipment. Lyon mailed a check, dated August 7, 2007, to Bausch & Lomb for $15,000. Again Lyon designed the check so that it appeared to be from Banner. Bausch & Lomb applied the $15,000 to Luna's $15,000 outstanding bill for June 2007 treatment-card fees.

As a result of the payments, which Bausch & Lomb believed it had received from Banner, Bausch & Lomb removed the credit hold and payment restrictions from Luna's account. Bausch & Lomb also continued to deliver additional treatment cards to Luna, resulting in Luna's incurring an additional $102,103.91 of indebtedness to Bausch &

Lomb. Luna filed for bankruptcy in May 2008, and Bausch & Lomb wrote off the $102,103.91 as bad debt.

Although the checks prominently bore Banner's name and address, all of the checks bore Lyon's bank-account number, all checks were signed by a Lyon senior vice president, and all checks were sent in a Lyon envelope from Lyon's office. Additionally, the checks stated in very small print that their "drawer" was "US Bank." But nothing on the checks or their attached stubs reflected that they were from Lyon or were intended as payment for medical equipment. The check stubs referenced invoice numbers, but the invoice numbers did not correspond to any actual invoices.

Bausch & Lomb did not learn that Lyon, rather than Banner, had made the four payments until May 2008, when Lyon contacted Bausch & Lomb. Lyon informed Bausch & Lomb that it had made the four payments for equipment covered by the EFAs, not as payments on Luna's debt. Bausch & Lomb investigated the purported invoices, determined that they were not authentic and that the numbers on them did not match any of its invoices, and informed Lyon that Bausch & Lomb had not provided the purportedly invoiced equipment to the EFA customers. Lyon demanded Bausch & Lomb refund the four payments; Bausch & Lomb refused.

Lyon commenced suit against Bausch & Lomb on theories of money paid by mistake, unjust enrichment, conversion, recovery of monies remitted, and money had and received, seeking damages of $364,489 for the total of the four checks. Lyon also sought

an accounting and inspection of Bausch & Lomb's corporate records.[2] Both parties moved for summary judgment. Treating Lyon's claims of unjust enrichment and money had and received as a single claim, the district court granted summary judgment to Lyon in the amount of $262,385.09 on that claim and on Lyon's conversion claim. The court reserved for trial Lyon's remaining claim for $102,103.91, because of Bausch & Lomb's claim that it was entitled to an offset. The court dismissed all remaining claims and expressly found that there was no just reason to delay the entry of partial final judgment. This appeal follows.

D E C I S I O N

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

Bausch & Lomb argues that Lyon is equitably estopped from asserting its claims in this case because Bausch & Lomb relied to its detriment on Lyon's representation that the checks were from Banner. We agree.

[2] In a separate action, Lyon has sued Banner in the United States District Court for the Southern District of New York. Based on information in an affidavit provided to the district court by Lyon, that case was pending as of August 31, 2009. No further details about the case are in the record.

"Equitable estoppel prevents the assertion of otherwise valid rights where one has acted in such a way as to induce another party to detrimentally rely on those actions." *Pollard v. Southdale Gardens of Edina Condo. Ass'n*, 698 N.W.2d 449, 454 (Minn. App. 2005) (quotation omitted). The doctrine "is based on the principle that wherever one of two innocent persons must suffer by the acts of a third, he who by his conduct, act, or omission has enabled such third person to occasion the loss must sustain it." *Pesina v. Juarez*, 288 Minn. 379, 385, 181 N.W.2d 109, 113 (1970) (quotation omitted). A party seeking to invoke the doctrine of equitable estoppel must show the following elements:

> 1. There must be conduct[—]acts, language or silence[—]amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse[;] in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

Brekke v. THM Biomedical, Inc., 683 N.W.2d 771, 777 (Minn. 2004) (quoting *Lunning v. Land O'Lakes*, 303 N.W.2d 452, 457 (Minn. 1980)) (modification omitted). "The

application of equitable estoppel ordinarily presents a question of fact, unless only one inference may be drawn from the facts." *Pollard*, 698 N.W.2d at 454.

In this case, the undisputed evidence establishes that Lyon is equitably estopped from asserting its claims. By designing the checks it sent to Bausch & Lomb to appear as if they were from Banner, Lyon misrepresented or concealed material facts that it knew and that Bausch & Lomb did not know. Lyon disputes that the checks appeared to be from Banner, arguing that the checks "explicitly state Lyon was 'the drawer' of the funds and the Checks were drawn from a Lyon bank account." But Lyon misstates the facts. The checks did not state that Lyon was the drawer. Although in very small print they stated, "Drawer: US Bank," the record contains no evidence to suggest that Bausch & Lomb should have known that "US Bank" meant Lyon and not Banner.[3]

We also reject Lyon's argument that "the Checks made explicit references to the Invoices they were intended to pay." Based on the record, this is simply not true—none of the invoice numbers on the check stubs matched any invoices that Lyon purportedly intended them to pay. And the fact that the invoice numbers on the check stubs did not match Bausch & Lomb's invoice numbers, and that the account number on the checks was Lyon's, is irrelevant. Under the U.C.C., when numbers and text on a negotiable instrument conflict, "words prevail over numbers." Minn. Stat. § 336.3-114 (2008).

Under the circumstances in this case, it was natural and probable that Bausch & Lomb would act upon an assumption that the checks were sent by Banner, as promised.

[3] In fact, Banner told Bausch & Lomb in an e-mail that Banner was "affiliated with a large financial institution."

And based on Banner's promises of payment and Bausch & Lomb's receipt of checks that it reasonably believed were sent by Banner, Bausch & Lomb applied the payments to Luna's outstanding debt. In further reliance on the payments, Bausch & Lomb lifted Luna's account restrictions and extended Luna additional credit, resulting in $102,103.91 in unpaid indebtedness to Bausch & Lomb at the time that Luna declared bankruptcy. Lyon offers no support for its argument that it is "implausible" that Bausch & Lomb extended the additional credit to Luna as a result of the four checks it received.

The undisputed facts establish each element of equitable estoppel in favor of Bausch & Lomb. Although both Bausch & Lomb and Lyon may be victims of Banner's fraud, Lyon's agreement with Banner that Lyon would advance the purchase price for lease equipment to suppliers or manufacturers on behalf of Banner "but in a draft showing [Banner] as the maker thereof" enabled Banner to effectuate its scheme. Equity therefore requires that Lyon sustain the loss. *See Pesina*, 288 Minn. at 385, 181 N.W.2d at 113.

Reversed.