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ORDERED in the Southern District of Florida on MAR 19 2012



Laurel M. Isicoff

Laurel Myerson Isicoff, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

Case No. 08-19174-BKC-LMI
Chapter 7

MOLNAT, INC.,

Debtor.

ALAN GOLDBERG Chapter 7 Trustee for
the Estate of Molnat, Inc.,

Adv. Case No. 10-03256-BKC-LMI

Plaintiff,

vs.

MERCANTIL COMMERCEBANK
FLORIDA BANCORP INC., f/d/b/a
COMMERCE BANK,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter came before me for hearing on October 6, 2011 upon the Motion for Partial Summary Judgment (DE #84) on Counts II and IV of Plaintiff's Second Amended Complaint

(the “Complaint”) (DE #40) filed by the Plaintiff, Alan Goldberg, as chapter 7 Trustee for the Estate of Molnat Inc. (the “Plaintiff” or “Trustee”), and the Motion for Summary Judgment (DE #85) on all Counts of Plaintiff’s Complaint filed by the Defendant Mercantil Commercebank N.A. (the “Defendant” or “Mercantil”).¹ Having considered all of the record, the applicable law, arguments of counsel, and the Complaint, the Defendant’s Motion for Summary Judgment is granted, while the Trustee’s Motion for Partial Summary Judgment is denied.

Background

Molnat, Inc. (the “Debtor” or “Molnat”)² was a truck services broker that specialized in hauling construction fill. Molnat maintained a corporate bank account with Mercantil beginning in 1991 (the “Molnat Account”). Molnat’s principal, Angel Carballido, and his wife, Teresita Carballido (together the “Carballidos”) also kept a personal bank account with Mercantil (the “Carballido Account”). In 1998 the Carballidos, Molnat, and Mercantil entered into an agreement authorizing Mercantil to transfer funds from the Molnat Account to the Carballido Account (the “Account Transfer Agreement” or “ATA”).³ Angel Carballido signed the ATA on his own behalf and on behalf of Molnat. Under the ATA, Mercantil was authorized to transfer funds if the balance in the Carballido Account fell below zero dollars.⁴ Pursuant to the ATA, between October 6, 2006 and April 4, 2008, Mercantil initiated 230 transfers totaling \$776,966.09 (the “Transfers”) from the Molnat Account to the Carballido Account.⁵ On July 2,

¹ The parties also filed the following pleadings: Plaintiff’s Response to Defendant’s Motion for Summary Judgment (ECF #113); Defendant’s Response to Plaintiff’s Motion for Partial Summary Judgment (ECF #119); Defendant’s Reply to Trustee’s Response to Defendant’s Motion for Summary Judgment (ECF #121); and Plaintiff’s Reply to Defendant’s Response to Plaintiff’s Motion for Partial Summary Judgment (ECF #125).

² Molnat was incorporated in the State of Florida. Florida law is applicable in this case.

³ A copy of the ATA is attached to this opinion as Exhibit A.

⁴ The ATA states that “I /We hereby authorize you [Mercantil] to transfer funds between my/our Primary Account and my/our Secondary Account (as designated below) when the balance in my/our Primary Account falls below \$0.”

⁵ Trustee’s Complaint p. 3.

2008, Molnat filed for protection under chapter 7 of the Bankruptcy Code and Alan Goldberg was appointed as the Trustee.

The Adversary Proceeding

The Trustee filed this adversary proceeding on June 24, 2010. The Complaint seeks to recover the Transfers based on Mercantil's alleged breach of contract, conversion, and alternative actual and constructive fraudulent conveyance theories.⁶ The Trustee's Complaint asserts that the Carballidos began to excessively overdraft the Carballido Account as part of the Debtor's scheme to defraud its creditors.⁷ The Trustee further alleges that Mercantil was an active participant in, and beneficiary of, the fraud because Mercantil, rather than dishonor the transactions which caused the Carballido Account to overdraft, instead transferred funds from the Molnat Account to cover the overdrafts.⁸

The Trustee filed the Motion for Partial Summary Judgment seeking summary judgment on Counts II and IV of the Complaint – each of which seeks recovery of the Transfers from Mercantil based on constructively fraudulent transfers. The Defendant filed its Motion for Summary Judgment seeking summary judgment on all counts of the Complaint.

Jurisdiction and Venue

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334. The adversary claim is a core proceeding under 28 U.S.C. §157(b)(2)(h), my jurisdiction of

⁶ Count I - recovery of the Transfers under 11 U.S.C. §548(a)(1)(A) and §550(a); Count II - recovery of the Transfers under 11 U.S.C. §548(a)(1)(A) and §550(a)(1)(B); Count III - recovery of the Transfers under 11 U.S.C. §544(b), 11 U.S.C. §550(a), and Fla. Stat. §726.105(1)(a); Count IV - recovery of the Transfers under 11 U.S.C. §544(b), 11 U.S.C. §550(a), and Fla. Stat. §726.105(1)(b); Count V - breach of contract under the terms of the ATA with the Debtor; and Count VI – conversion.

⁷ Complaint p. 3-4.

⁸ *Id.*

which neither party has challenged. Venue of this adversary proceeding is proper in this district pursuant to 28 U.S.C. §1409.

Standard of Review

Rule 56 of the Federal Rules of Civil Procedure is applicable to this adversary proceeding pursuant to Fed. R. Bankr. P. 7056. Summary judgment is appropriate where the “pleadings, dispositions, 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 the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). If there are no material facts in dispute, and only a purely legal question remains to be decided by the court, then granting summary judgment is appropriate. *See, e.g., Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995) (finding summary judgment appropriate when there were no material facts in dispute); *United States v. Reader’s Digest Ass’n*, 662 F.2d 955, 961 (3d Cir. 1981) (noting that interpreting the provisions of a consent order was a question of law and therefore, appropriate for summary judgment). “The moving party bears the burden of production. If the moving party meets this burden, ‘the nonmoving party must present evidence beyond the pleadings showing that a reasonable jury could find in its favor.’ ‘Speculation does not create a genuine issue of fact.’” *Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). There are no disputed issues of material fact in this case, only disagreements about the legal meaning and significance of facts.

Analysis

The Fraudulent Transfer Counts:⁹

Under each of the four fraudulent transfer counts, the Trustee seeks recovery from Mercantil as the “initial transferee”, the transferee for whose benefit the Transfers were made, or as a mediate transferee, of the Transfers pursuant to 11 U.S.C. §550(a).¹⁰

The Eleventh Circuit has, through a series of cases – *Nordberg v. Sanchez (In re Chase and Sanborn)*, 813 F.2d 1177 (11th Cir. 1987) (“*Chase and Sanborn*”); *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.)*, 848 F.2d 1196 (11th Cir. 1988) (“*Nordberg*”); *IBT Int’l, Inc. v. Northern (In re Int’l Admin. Servs., Inc.)*, 408 F.3d 689, 703 (11th Cir. 2005) (“*IBT*”), *Andreini & Co. v. Pony Express Delivery Services, Inc. (In re Pony Express Delivery Services, Inc.)*, 440 F.3d 1296 (11th Cir. 2006) (“*Pony Express*”) and *Martinez v. Hutton (In re Harwell)*, 628 F.3d 1312, 1322-1323 (11th Cir. 2010) (“*Harwell*”) - developed its approach to fraudulent conveyances and the elements that the court must consider in determining liability of a defendant under section 550(a). The Eleventh Circuit in *Harwell* examined and then summarized that precedence.

⁹ In order to recovery against Mercantil, the Trustee must prove first, that some or all of the Transfers were fraudulent conveyances that can be recovered, pursuant to any of 11 U.S.C. §§544, 548(a)(1)(A), 11 U.S.C. §548(a)(1)(B), Fla. Stat. §726.105(1)(a), or Fla. Stat. §726.105(1)(b). Assuming the Transfers are found to be avoidable under any of these subsections, the Trustee then must prove that Mercantil was either the initial transferee, the transferee or the entity for whose benefit the transfer was made, or an immediate or mediate transferee, each as required by section 550. For purposes of this opinion I will assume the Trustee would be able to prove the Transfers were fraudulent, and focus solely on Mercantil’s alleged liability for the value of those Transfers in accordance with section 550(a).

¹⁰ 11 U.S.C. §550(a):

Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from – (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.

First, this Court has observed that a literal or rigid interpretation of the statutory term “initial transferee” in §550(a) means that the first recipient of the debtor’s fraudulently-transferred funds is an “initial transferee.” . . .

Second, this Court carved out an equitable exception to the literal statutory language of “initial transferee,” known as the mere conduit or control test, for initial recipients who are “mere conduits” with no control over the fraudulently-transferred funds. . . . In doing so, the Court has adopted a flexible, pragmatic, equitable approach of looking beyond the particular transfer in question to the circumstances of the transaction in its entirety. . . . The mere conduit or control test is a judicial creation that is not based in statutory language, but is an exception based on the bankruptcy courts’ equitable power. . . . The conduit or control test is based on, and defined by, equity and requires good faith to escape “initial transferee” liability. In effect, we have tempered literal application of §550(a)(1), examining all the facts and circumstances surrounding a transaction to prevent recovery from a transferee innocent of wrongdoing and deserving of protection. . . .

Third, as part of the mere conduit or control test, this Court considers whether the intermediary “acts without bad faith, and is simply an innocent participant” to the fraudulent transfer. . . .

Accordingly, initial recipients of the debtor’s fraudulently transferred funds who seek to take advantage of equitable exceptions to §550(a)(1)’s statutory language must establish (1) that they did not have control over the assets received, i.e., that they merely served as a conduit for the assets that were under the actual control of the debtor-transferor *and* (2) that they acted in good faith and as an innocent participant in the fraudulent transfer.

628 F.3d at 1322-1323 (citations omitted).

Mercantil asserts that it was not the initial transferee of the Transfers under section 550, because the undisputed facts show it had no control over the Transfers and was a mere conduit, and moreover that it should not be held liable as the initial transferee under equitable principles.¹¹ Accordingly, Mercantil argues, it is entitled to summary judgment on all four fraudulent transfer counts. While separately argued by the Trustee and Mercantil, the issues of

¹¹ Mercantil argued that it never received a transfer. While this argument invites some enticing, although perhaps esoteric, mental gymnastics regarding what constitutes a “transfer” in the electronic age when a bank transfers funds from one account to the other only virtually, it is not a necessary issue for resolving this dispute. Whether a defendant is an initial transferee for purposes of section 550, assumes, as noted by the Eleventh Circuit in *Harwell*, that the defendant has, in fact, received a transfer.

control, conduit status, and equity are concepts that are conflated by the Eleventh Circuit in its analysis.

The Trustee insists that Mercantil should be held liable as the initial transferee of the Transfers because Mercantil exercised control over the Transfers. The Trustee argues that the ATA, if valid,¹² gives Mercantil the option, not the obligation, to transfer funds between accounts. According to the Trustee, this choice (*i.e.*, to transfer or not to transfer funds between accounts) equals control. In *Chase & Sanborn* the Eleventh Circuit held that, to determine whether funds became property of the bankruptcy estate, the appropriate determination is whether the debtor had control over those funds. 813 F. 2d at 1181. In *Nordberg*, the Eleventh Circuit held that the control test is appropriately applied in determining liability of a defendant in a fraudulent conveyance action.¹³ “The control test, then, as adopted by this circuit, simply requires courts to step back and evaluate a transaction in its entirety to make sure that their conclusions are logical and equitable.” 848 F.2d at 1200. In the context of a fraudulent conveyance action against a bank, the court continued:

[T]he outcome of the cases turn on whether the banks actually controlled the funds or merely served as conduits, holding money that was in fact controlled by either the transferor or the real transferee. . . . When banks receive money for the sole purpose of depositing it into a customer’s account . . . the bank never has actual control of the funds and is not a section 550 initial transferee. This is true even when, after a bank deposits the money

¹² See *infra* note 20.

¹³ In the Trustee’s Response to Defendant’s Motion for Summary Judgment (DE #121), the Trustee makes the distinction between the two tests used by courts to determine whether a party is a conduit: the “dominion test,” used in the Seventh Circuit, and the “control test,” used in the Eleventh Circuit. In *Bonded Financial Servs. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988), Judge Easterbrook wrote that the “minimum requirement of status as a ‘transferee’ is dominion over the money or asset, the right to put the money to one’s own purposes.” The *Bonded* court further reasoned that a transferee “must mean something different from ‘possessor’ or ‘holder’ or ‘agent’... [t]o treat ‘transferee’ as ‘anyone who touches the money’ and then to escape the absurd results that follow is to introduce useless steps.” *Id.* at 894. To the extent there is a distinction with a difference between these two approaches, the Eleventh Circuit control test governs resolution of this dispute.

into a customer's account, the customer gives the money to the bank to pay off a debt that it owes to the bank.

Id. (citations omitted).¹⁴

In *Nordberg*, the debtor, Colombian Coffee, issued a check to Banco Popular Bogota ("Banco Popular") that triggered a negative balance in its bank account at Societe Generale (the "Overdraft Check"). Colombian Coffee also simultaneously transferred funds from a second bank in order to cover the negative balance. *Id.* at 1197-99. Before honoring the Overdraft Check, Societe Generale verified that the second bank had wired the funds to cover the negative balance. *Id.* After confirming the money had been wired but before actually receiving it, Societe Generale honored the Overdraft Check. One day passed between the creation of the negative balance and Societe Generale's receipt of the funds from the second bank. *Id.* The trustee in *Nordberg* brought a fraudulent transfer action against Societe Generale pursuant to sections 548 and 550 alleging Societe Generale was the initial transferee of the funds from the second bank. *Id.*

The *Nordberg* court began its analysis by viewing Societe Generale's role in the overall transaction. "Bankruptcy courts considering the question of whether a defendant is an initial transferee have traditionally evaluated that defendant's status in light of the entire transaction." *Id.* The court reasoned that no overdraft occurred because the transfer from the second bank and Societe Generale's honoring of the Overdraft Check were "effectively simultaneous." *Nordberg*,

¹⁴ The Tenth Circuit, in the *Rupp v. Markgraf*, 95 F.3d 936 (10th Cir. 1996) decision, illustrates best the absurdity of extending initial transferee liability to its logical extreme. The *Rupp* court explained that all couriers exercise the control to either deliver or not deliver something entrusted to them. If this was all that was required to establish control, that

[W]ould transform the United States Postal Service into the initial transferee under § 550 in innumerable instances merely by virtue of having been given the right to deliver financial instruments. The Postal Service would be shocked, no doubt, to learn of the potentially staggering financial liability it was assuming for the price of a thirty-two cent stamp.

Rupp, 95 F.3d at 941.

848 F.2d. at 1201. The court placed special significance in Societe Generale's confirmation that the funds from the second bank had been wired. *Id.* Societe Generale extended no faith or credit to Colombian Coffee when it honored the Overdraft Check. *Id.* Since the transaction "was effectively simultaneous," no debt between Societe Generale and Colombian Coffee ever existed, and no overdraft took place.¹⁵ Accordingly the *Nordberg* court held that since "there was no real debtor-creditor relationship, then the bank merely deposited the funds into Colombian Coffee's account, and Colombian Coffee used that money to pay the check to Banco Popular. When viewed in that manner, Societe Generale functioned as a conduit, receiving funds and depositing them into the Colombian Coffee account." *Id.* at 1201. Accordingly, the trustee was unable to recover the transfer from Societe Generale.

In this case, when presentment of a check to the Carballido Account triggered a negative balance, Mercantil, if funds were available, mechanically transferred funds from the Molnat Account to cover the negative balance in the Carballido Account.¹⁶ According to Mercantil, which the Trustee does not dispute, a negative balance in the Carballido Account was resolved within the day, and no overdraft occurred.¹⁷ Mercantil never charged an overdraft fee in these situations. As the *Nordberg* court considered that a transaction that took a day to resolve was "effectively simultaneous," the Transfers in this case, which were resolved within the same day, are also "effectively simultaneous." Consequently, Mercantil acted as a mere conduit, and did not exercise control over the Molnat Account or the Transfers.

¹⁵ "Overdrafts have traditionally been considered debts." *Id.* at 1200.

¹⁶ Trustee's Motion for Partial Summary Judgment (DE #84) p. 6-7. Mercantil, like Societe Generale in *Nordberg*, could verify if funds were available in the Molnat Account before honoring a debit in the Carballido Account.

¹⁷ The Plaintiff argued that there was technically an overdraft during the day in the Carballido Account and it was only because Mercantil did not do a "true up" until day's end that no overdraft appeared. The unrebutted deposition testimony of Carolyn McGoey, a Mercantil employee, is that the Transfers instantaneously covered a negative balance in the Carballido Account: "the bank [Mercantil] has to take a check that causes the account to fall below zero, simultaneously or a second later a transfer is made from the funding account to the funded account." Defendant's Response to Plaintiff's Motion for Partial Summary Judgment (DE #119) p.11.

The Trustee argues that Mercantil should be held liable as the initial transferee, whether or not Mercantil exercised control over the Transfers, because Mercantil acted in bad faith, and therefore, according to *Harwell*, is not entitled to assert the equitable protections of a conduit defense. The Trustee suggests that Mercantil should have been aware of Molnat's insolvency because from October 2006 to April 2008 416 checks were rejected by Mercantil due to insufficient funds in the Molnat Account, and because from January 1, 2006 to April 4, 2008 Molnat wrote checks made payable to cash in the amount of \$492,844.24.¹⁸ The Trustee also argues that Mercantil should have inquired further into the Transfers because the Carballidos filled out a "Know Your Customer Form" in which they anticipated monthly check transactions of approximately \$5,000 in the Carballido Account and the actual monthly account activity far exceeded that amount.¹⁹ Finally, the Trustee asserts that the ATA may not be valid because the two accounts involved did not have a common owner.²⁰

The conduit defense "presumes that the facilitator of funds acts without bad faith, and is simply an innocent participant to the underlying fraud." *IBT*, 408 F.3d at 705. In *IBT*, the debtor, International Administrative Services, Inc. ("IAS"), a "leviathan in the world of get rich-quick schemes," funneled over \$50 million dollars through a series of multi-step international transactions involving multiple corporate entities. The IAS bankruptcy trustee brought an adversary proceeding against several entities that were part of the convoluted chain of transfers. The *IBT* court, in determining the defendants' bad faith, relied on the defendants' depth of

¹⁸ Trustee's Motion for Partial Summary Judgment p. 4-7.

¹⁹ The "Know Your Customer Form" is a method for Mercantil to obtain information on clients' anticipated transactions in order to compare that with the actual activity in accounts. Motion for Partial Summary Judgment (DE # 84) p. 5.

²⁰ While the ATA does require a common owner, Carolyn McGoey testified in deposition that Angel Carballido's signature for both himself and Molnat, of which he was the sole owner, satisfied the common ownership requirement in the ATA. Defendant's Response to Plaintiff's Motion for Partial Summary Judgment (DE #119) p.12. *See infra* note 23.

knowledge of the underlying fraud. *Id.* at 706. A conduit’s “intimate and thorough knowledge” of the underlying fraud, does not “conjure images of well-intentioned, but gullible, parties who mistakenly fell victim to a massive conspiracy.” *Id.*²¹ The court in *Perlman v. Wells Fargo Bank, N.A.*, No. 10–81612–CV, 2011 WL 5873054, at *16 (S.D. Fla. Nov. 22, 2011),²² “[b]earing in mind the flexible nature of the *Harwell* analysis and the special concerns associated with treating a bank as an initial transferee,” further concluded “that the essential inquiry again becomes the degree of knowledge the Bank had... in an equitable analysis, the Bank’s relative culpability or involvement hinges directly on its actual knowledge that the transfers were part of a fraudulent scheme.” When a bank raises the conduit defense, whether the bank acted in good faith hinges on the bank’s actual knowledge of the underlying fraud.

The Trustee has not submitted anything in support of his motion for summary judgment or in opposition to Mercantil’s motion to suggest that Mercantil knew about Angel Carballido’s alleged exsanguination of Molnat or that Mercantil had “intimate and thorough knowledge” of the underlying fraud. According to the Trustee’s own Motion for Partial Summary Judgment, Mercantil “has no policy to review customer accounts on an ongoing basis unless something

²¹ The Trustee points to *In re Harbour*, 845 F.2d 1254 (4th Cir.1988) decision to argue that, in regards to the conduit defense, “willful [sic] ignorance in the face of facts which cried out for investigation may not support a finding of [a defendant’s] good faith...” In *Harbour*, the defendant, Vivian Brandon, served as an intermediary between the debtor and her son in a series of fraudulent transfers. The defendant had intimate knowledge of both parties. The *Harbour* court found that the defendant “[i]n the instant case, the initial recipient of the transfer, Vivian Brandon, was the ultimate recipient’s mother and, based on her own admissions, practically a surrogate mother to the debtor.” *Harbour*, 845 F.2d at 1257. Further, the *Harbour* court made the distinction between individuals raising the conduit defense and commercial entities:

We note, however, that all of the defendants in these decisions, with one possible exception, were clearly commercial entities. And in the cases where the trustee’s recovery was denied there was no hint that the defendants’ handling of the debtor’s funds in any way departed from their normal handling of commercial transactions.

Id. There is nothing in the record to indicate that Mercantil did anything other than provide banking services to the Carballidos or Molnat. The Trustee has provided no support of Mercantil’s alleged sinister purpose or willful blindness beyond mere conjecture.

raises a red flag...” and Mercantil “has no system in place to raise any warning flags with regard to any irregularities for excessive transfers made pursuant to Account Transfer Agreements.” The Trustee has provided nothing to suggest there is any dispute that Mercantil’s internal fraud detection mechanisms, which comply with state and federal law, triggered an audit or an investigation of either the Molnat Account or the Carballido Account as a result of the Transfers. Further the Trustee has provided no basis to suggest that Mercantil’s lack of a specific fraud detection policy in regards to account transfer agreements is culpable behavior. Thus there appears to be no dispute that Mercantil did not have actual knowledge of, or inappropriately participated in, the underlying fraud. Finally, the facts are undisputed that the ATA was an operative document over several years, and Mercantil honored that agreement consistently over that entire time period.²³ The Trustee has cited nothing to support his suggestion that the alleged invalidity of the ATA in and of itself is an indicator of bad faith such that the equitable protections of a mere conduit status would be lost.

The Eleventh Circuit has stated in each instance in which it has considered the parameters of a fraudulent conveyance action that the circumstances surrounding the questioned transfer must be taken as a whole, considered in the context of the entire transaction being examined. Looking at the two motions for summary judgment and all that has been filed in support of, or

²³ As the Eleventh Circuit noted in *Harwell* “[o]ften these fiduciaries or agents are not considered initial transferees because their legal control over the assets received is circumscribed by their legal duties to their clients.” 628 F.3d at 1321 (citing *Pony Express*, 440 F.3d at 1301). Even if there is some doubt regarding the common ownership provisions of the ATA, the ATA was certainly ratified by the behavior of the parties throughout the years. The undisputed facts illustrate that all the parties acted under the belief that the ATA was a valid agreement. *See supra* note 20. The Trustee puts forward no support to the contrary. *Nationwide Mut. Fire Ins. Co. v. Royall*, 588 F.Supp.2d 1306, 1317-18 (M.D. Fla. 2008) (“The omission to disaffirm a contract within a reasonable time, has been held sufficient evidence of a ratification ‘Acquiescence merely for an unreasonable time is an act that denotes an intent not to rescind the contract.’” quoting *Summerall v. Thoms*, 3 Fla. 298, (Fla. 1850)). The record indicates that Mercantil transferred funds between the accounts, pursuant to the ATA, from 1998 to 2008, without any objections from either Molnat or the Carballidos.

referenced in, those motions, I find that there is no material disputed fact to contradict Mercantil's argument that it did not have control over the funds involved in the Transfers and that it acted in good faith as a financial intermediary between Molnat and the Carballidos. Moreover, because the Carballido's were not indebted to Mercantil at the time the Transfers occurred, Mercantil is not a party for whose benefit the Transfers took place. Finally, there is nothing in the cross-motions for summary judgment to support the Trustee's conclusory argument that Mercantil was an immediate or mediate transferee.²⁴ Accordingly the Defendant is entitled to summary judgment on Counts I, II, III, and IV of the Complaint.

Breach of Contract

In Count V, the Trustee claims that Mercantil breached the ATA by transferring funds before it was authorized to do so. The ATA provides that the Carballidos "hereby authorize you [Mercantil] to transfer funds between my/our Primary Account and my/our Secondary Account (as designated below) when the balance in my/our Primary Account falls below \$0." The Trustee argues that if the court were to agree with the Defendant that no overdraft ever took place during the Transfers, then that means the Carballido Account never technically fell below zero dollars, and as a result, the Trustee is still entitled to recovery because Mercantil breached the ATA by transferring funds before having authority to do so.²⁵

²⁴ Trustee's Complaint p. 4-9.

²⁵ Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment (DE #125) pp. 1-2.

The Trustee's argument is that a negative balance in an account automatically triggers an overdraft.²⁶ According to the undisputed facts in this case, as a result of a negative balance in the Carballido Account and pursuant to the ATA, there was an "effectively simultaneous" transfer of funds from the Molnat Account to the Carballido Account. As I have already addressed above, as in *Nordberg*, here no overdraft actually took place because no debt was created.²⁷ However, this does not mean that the account balance did not fall below zero. There is no factual dispute that Mercantil only transferred funds when a pending transaction caused a negative balance in the Carballido Account, and, therefore, in compliance with the ATA. Mercantil therefore did not breach the ATA. Accordingly the Defendant is entitled to summary judgment as to Count V of the Complaint.

Conversion

In Count VI, the Trustee alleges that, because the ATA is invalid, the Transfers initiated by Mercantil constitute a conversion of Molnat's property. Conversion in Florida is the "wrongful deprivation of a person of property to the possession of which he is entitled." *Star Fruit Co. v. Eagle Lake Growers, Inc.*, 33 So.2d 858, 860 (Fla. 1948). Conversion is an intentional tort which requires proof of intent. *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216, 1223 (Fla. 2010). *Murrell v. Trio Towing Service, Inc.*, 294 So.2d 331, 332 (Fla. App. 3d. 1974) ("The essence of an action for conversion is not the acquisition of property by the wrongdoer, but rather the refusal to surrender the possession of the subject personalty after demand for possession by one entitled thereto.").

²⁶ "An overdraft is when an account has a negative balance." Trustee's Motion for Partial Summary Judgment (DE #84) p. 7. In the Trustee's undisputed facts, the Trustee states that "[a]ll of the Transfers are considered overdraft transfers from a demand account... and were made to repay the bank to clear a negative balance in the Carballido's Account..." Trustee's Motion for Partial Summary Judgment (DE #84) p. 4.

²⁷ See *supra Nordberg* discussion in pp. 6-8.

As I have already discussed above, the Trustee argues that because no signatory party is a common owner of both accounts, the ATA is invalid and therefore the Transfers constitute a conversion of Molnat's property. Even if the ATA were invalid, the Trustee provides no support for his assertion that Mercantil intentionally converted Molnat's property. There is nothing filed in response to the Defendant's motion for summary judgment or alleged in the complaint that Molnat at any point requested Mercantil to return the money transferred to the Carballido Account or that Molnat informed Mercantil that Mercantil lacked authority to transfer funds between accounts. The Transfers were all carried out in accordance with the ATA.²⁸ Accordingly the Defendant is entitled to summary judgment on Count VI of the Complaint.

Conclusion

This Court hereby denies the Plaintiff's Partial Motion for Summary Judgment (DE #84) and grants Defendant's Motion for Summary Judgment (DE #85). The Defendant is entitled to Summary Judgment on all Counts of the Complaint.

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Copies furnished to:
Jay M. Gamberg, Esq.
Victor K Rones, Esq.

Attorney Rones is directed to serve a copy of this order upon all interested parties and file a certificate of service with the clerk of court.

²⁸ See *supra* notes 20, 23.

EXHIBIT
“A”



SWEEP

TARGET BAL. _____

OVERDRAFT PR. _____

ACCOUNT TRANSFER AGREEMENT

DATE: 8/13/98

TITLE OF ACCT.: MOLNAT Inc.

TO: COMMERCEBANK, N.A. 2750 W. 68th ST. #136 Hialeah, FL 33016
(Address)

As used in this Agreement, the word "I"/"We" means each and all of the authorized signer(s) below. "You" and "Your" means the COMMERCEBANK N.A. named in this Agreement.

I/We hereby authorize you to transfer funds between my/our Primary Account and my/our Secondary Account (as designated below) when the balance in my/our Primary Account falls below \$ 0.

I/We understand and acknowledge that according to Federal regulations, these transfers are limited to six per statement cycle or month in the case of a Money Market Secondary Account and II) six per quarter in the case of a Savings Secondary Account.

I/We understand that, after notifying me/us, you may charge a fee for this service and that you may change the amount of the fee from time to time.

I/We agree to indemnify you and hold you harmless from any claim, expense or action arising out of, or related to, this Agreement (including, but not limited to, reasonable attorneys' fees). I/We agree that your liability under this Agreement shall be limited to the exercise of ordinary care. This Agreement shall be governed by the laws of the State of Florida.

I/We agree that any authorized signer(s) who have signed this Agreement may terminate it by giving you five (5) days written notice, by mail. You may terminate this Agreement by giving me/us ten (10) days written notice, by mail, at the addresses in your files for both accounts.

I/We will not hold you responsible for any problems caused by your action under this Agreement or its termination thereof.

Special Instructions: _____

Account No. **FUNDED**
 # ██████████6506
ANGEL CABBALINO

Account No. **FUNDING**
 # ██████████0106
MOLNAT Inc.

New Existing
 Authorized Signers:
 + Angel O. Cabbalino
 + Loreta Cabbalino

New Existing
 Authorized Signers:
 + Angel O. Cabbalino

Note: a) All authorized signers on both accounts must sign this Agreement before it can take effect. At least one signer of this Agreement must be a common owner of both accounts.
 b) Federal regulations require all banks to reserve the right to require thirty days' notice of withdrawals from savings accounts. In the unlikely event any bank exercises that right, it must impose the notice requirement on all of its savings accounts, not just a few.

For bank use only:
 Signature verified by: [Signature]
 COM - 8-42 P/75

BRANCH: 040
 Accepted by: [Signature]
 [Bank Officer]