MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANTS

Conor S. Slocum
Bonahoom & Bobilya, LLC
Fort Wayne, Indiana

Dennis G. Golden
Golden Law, P.C.
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE

Jacqueline Sells Homann
Jones Obenchain, LLP
South Bend, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Nature's Comfort, LLC, and David Nyhof,

Appellants-Defendants,

v.

First State Bank of Middlebury,

Appellee-Plaintiff.

June 9, 2021

Court of Appeals Case No. 20A-PL-2138

Appeal from the LaGrange Circuit Court

The Hon. William R. Walz IV, Judge

Trial Court Cause No. 44C01-1911-PL-21

Bradford, Chief Judge.

Case Summary

[1] In December of 2018, Nature's Comfort, LLC, run by David Nyhof (collectively, "Appellants"), took out a $500,000.00 commercial loan from the First State Bank of Middlebury ("the Bank") and executed a security agreement ("the Security Agreement") in which it pledged all of its assets as security for the loan and any future obligations. In July of 2019, Nature's Comfort and the Bank executed a second promissory note for $500,000.00. A Bank officer visited Nature's Comfort in August of 2019 due to concerns about Nature's Comfort's viability. Nyhof assured the Bank officer that Nature's Comfort was doing well and showed him a balance sheet indicating over $900,000.00 in assets, more than enough to cover its then-current balance of approximately $350,000.00.

[2] Soon thereafter, Nyhof began selling Nature's Comfort's inventory and equipment, using the proceeds to pay unsecured creditors approximately $320,000.00. Within two months, almost every asset mentioned on the balance sheet was gone, and none of the proceeds had been transferred to the Bank. In November of 2019, the Bank sued Appellants for breach of contract and later amended its complaint to include a claim of conversion against Nyhof. In February of 2020, the trial court entered summary judgment in favor of the Bank on the breach-of-contract claim and, in March, held a bench trial on the conversion claim. In July of 2020, the trial court entered judgment against Appellants on the Bank's conversion claim, ruling that Nyhof and Nature's

Comfort had converted approximately $225,000.00 in collateral and ordering double damages, for a final money judgment of approximately $450,000.00. Appellants contend that the Bank could not pursue a conversion claim against Nyhof as a matter of law and that, even if it could, the evidence does not support a conclusion that Nyhof converted the Bank's property. Appellants also note that the trial court should not have entered judgment against Nature's Comfort for conversion because it was not named in that count. Because we disagree with Appellants' first two contentions but agree that the trial court erroneously entered judgment against Nature's Comfort for conversion, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] Nyhof was the sole member of Nature's Comfort, which manufactured wood- and coal-burning boilers for residential heating applications. On December 11, 2018, the Bank and Nyhof (in his capacity as sole member of Nature's Comfort) executed the Security Agreement to secure a $500,000.00 loan. The Security Agreement granted the Bank a security interest in all of Nature's Comfort's assets and obligated Nature's Comfort to leave its assets at its business location, not sell any assets other than inventory, only sell inventory in the normal course of business, maintain all assets in good repair, and possess all assets until it defaulted. The Security Agreement also provided that it would apply to all future advances to Nature's Comfort. On July 17, 2019, the Bank and Nature's Comfort executed a promissory note with a maturity date of September 9, 2019, pursuant to which the Bank loaned another $500,000.00 to Nature's Comfort.

[4] The Bank became concerned about Nature's Comfort's ongoing viability, and in August of 2019, Bank officer Duane Miller visited Nature's Comfort's facility. Nyhof assured Miller that Nature's Comfort was doing well and gave no indication that he was planning to sell company assets or that he was closing the business. Nyhof also gave Miller a balance sheet indicating that Nature's Comfort had over $900,000.00 in assets as of August 31, 2019. Soon after Miller's visit, Nyhof began selling Nature's Comfort's assets. The tangible assets Nyhof had reported on August 31, 2019, were almost completely depleted within two months. None of the money generated from the disposal of these assets was transferred to the Bank.

[5] On November 12, 2019, the Bank filed suit against Appellants for breach of contract and requested a preliminary injunction to prevent them from disposing of any additional assets. On November 13, after the trial court entered a preliminary injunction in the Bank's favor, the Bank visited Nature's Comfort to take inventory of remaining collateral. Only a small amount of inventory, a few tools, and some miscellaneous office furniture remained. Two months later, Nature's Comfort turned over a trailer to the Bank, but the rest of the over $900,000.00 in tangible assets listed on the August 31, 2019, balance sheet was gone.

[6] Discovery indicated that between August 31 and November 30, 2019, Nyhof had deposited $284,588.82 into a Flagstar Bank account and $94,431.68 into an account at Mound City Bank. Between September 1 and October 31, 2019, Nyhof had deposited $349,015.35 into Nature's Comfort's account at the Bank,

of which only $69,846.36 remained on October 31. When the Bank eventually set off the account against Nature's Comfort's debt, there was less than $30,000.00 remaining.

[7] According to checks drawn on Nature's Comfort's account with the Bank, it paid its unsecured creditors $317,319.42. The records from Nature's Comfort's other bank accounts also confirm that the money was used to pay other parties and not the Bank. Nyhof admitted that none of the money from the asset sales went to the Bank. Nyhof did not consult the Bank about selling company assets or request permission to sell them, and the Bank did not authorize Nyhof to sell them or use the proceeds obtained to pay unsecured creditors.

[8] Meanwhile, on November 15, 2019, the Bank filed an amended complaint against Nature's Comfort and Nyhof, adding a claim of conversion of the collateral against Nyhof and seeking treble damages. On November 19, 2019, Nyhof moved to dismiss the conversion complaint against him and sought attorney's fees. On December 16, 2019, the Bank moved for summary judgment on its claim that Nature's Comfort and Nyhof defaulted on the promissory note of September of 2019. On February 11, 2020, the trial court entered summary judgment in favor of the Bank on the contract claim, awarding damages of $337,738.91, accrued interest of $3711.48, and attorney's fees of $7976.16.

[9] On March 20, 2020, the trial court held a bench trial on the conversion claim. On July 30, 2020, the trial court entered its findings of fact and conclusions thereon, in which it found that Nyhof and Nature's Comfort had converted

$225,591.67 of the Bank's collateral and awarded the Bank double damages, for a total of $451,183.34. On October 20, 2020, the trial court denied Appellants' motion to correct error and granted the Bank's attorney an additional $16,915.00 in fees.

Discussion and Decision

[10] Where, as happened here, the trial court *sua sponte* enters specific findings of fact and conclusions, we review its findings and conclusions to determine whether the evidence supports the findings, and whether the findings support the judgment. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Id*. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake was made. *Id*. We neither reweigh the evidence nor assess the witnesses' credibility, and consider only the evidence most favorable to the judgment. *Id*. Further, "findings made *sua sponte* control only as to the issues they cover[,] and a general judgment will control as to the issues upon which there are no findings. A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence." *Id*.

[11] To reach its conclusion that Nyhof converted bank property, the trial court necessarily found that he knowingly or intentionally exerted unauthorized control over the collateral. Ind. Code § 35-43-4-3(a). Indiana Code section 34-24-3-1 provides, in part, that a person who suffers a pecuniary loss resulting from a violation of Indiana Code article 35-43 may recover, in a civil action, an

amount not to exceed three times its damages, costs, and attorney's fees. The Indiana Supreme Court has held that "specific intent can be inferred from a subject's actions." *Williams v. State*, 485 N.E.2d 113, 114 (Ind. 1985).

I. Whether the Bank Established that Nyhof Converted the Bank's Collateral

[12] Nyhof does not dispute that all of Nature's Comfort's assets effectively became the Bank's property upon its default in September of 2019 or that he disposed of them without passing the proceeds to the Bank. Nyhof first makes two related legal challenges, arguing that the Bank (1) has impermissibly repackaged its breach-of-contract claim as a conversion claim and (2) is seeking to hold Nyhof personally liable pursuant to a contract to which he is not a party. We find neither of these arguments to be persuasive.

[13] As for Nyhof's first argument, it is indeed well-settled that "the failure to pay a debt […] does not constitute criminal conversion as a matter of law." *Tobin v. Ruman*, 819 N.E.2d 78, 89 (Ind. Ct. App. 2004), *trans. denied*. The Bank, however, argues that Nyhof's conversion of the collateral constitutes a tort independent of the breach-of-contract claim. In Indiana, a party in a contractual relationship with another can maintain a tort suit if the other party's conduct goes beyond simply failing to live up to contractual obligations. *See Greg Allen Const. Co. v. Estelle*, 798 N.E.2d 171, 175 (Ind. 2003) ("The reason is that this negligence goes beyond failure to perform up to contractual standards, and constitutes a tort even if there were no contractual relationship between the Estelles and either Allen or his corporation."); *Koehlinger v. State Lottery Comm'n*

of Ind., 933 N.E.2d 534, 542 (Ind. Ct. App. 2010) ("As in *Greg Allen Construction*, the question is not whether Appellants have, as we assume, adequately pled their tort claims, but, rather, whether the Lottery is alleged to have done anything that 'constituted an independent tort if there were no contract.'") (quoting *Greg Allen Const. Co.*, 798 N.E.2d at 173).

[14] Nyhof's conduct went beyond a mere failure to satisfy contractual obligations. For one thing, Nyhof *had* no contractual obligations pursuant to the loan, to which he as an individual was not a party. Moreover, while it is true that the Security Agreement placed certain restrictions on the use, treatment, and disposition of collateral, neither Nyhof nor Nature's Comfort was alleged to have done anything with the collateral that violated the Security Agreement. Rather, Nyhof was alleged to have disposed of the collateral after Nature's Comfort's default, when the collateral had essentially become the Bank's property. We conclude that the Bank sufficiently alleged a tort against Nyhof independent of its contractual relationship with Nature's Comfort. As for Nyhof's claim that the Bank is seeking to make him personally liable for the breach of a contract to which he was not a party, we find it similarly unconvincing. The Bank never sought to make Nyhof personally liable for Nature's Comfort's contractual obligation—it sought to make him liable for the conversion of property that did not belong to him.

[15] Nyhof also contends that the record does not support a finding that he had the necessary mens rea to commit criminal conversion of the collateral, specifically, that he did not knowingly or intentionally exert control over it. Nyhof relies

primarily on his testimony that he had not really read the Security Agreement before signing it and therefore did not understand that all of Nature's Comfort's assets were collateral for the loan. First, the trial court was under no obligation to credit Nyhof's self-serving testimony and apparently did not. Moreover, contrary to Nyhof's implication, there was no need for him to actually confess to conversion because it is well-settled that intent can be inferred from his actions. *See, e.g.*, *Williams*, 485 N.E.2d at 114 ("This Court has held that specific intent can be inferred from a subject's actions."). Here, those actions included, upon learning that the Bank had concerns about Nature's Comfort's business, selling off the vast majority of Nature's Comfort's assets and transferring several hundred thousand dollars to unsecured creditors instead of the Bank.

[16] Finally, Nyhof contends that the Bank "implicitly consented" to his disposition of its collateral because it did not track Nature's Comfort's bank account with the Bank, set off the account before the payments to unsecured creditors were made, or take immediate action to protect its collateral upon breach. Appellants' Br. p. 25. Under the circumstances, we find none of this to be particularly compelling, and certainly insufficient to overturn the trial court's judgment. A Bank representative, after all, had been assured by Nyhof that Nature's Comfort's business was doing well and was shown evidence of over $900,000.00 in assets, more than enough to satisfy the debt to the Bank. The trial court was entitled to conclude that the Bank simply chose to believe Nyhof about Nature's Comfort's circumstances, however misplaced that faith turned

out to be. We agree with the Bank that it strains credulity to suggest that the Bank would simply have allowed Nyhof to dispose of almost all of Nature's Comfort's assets and distribute the proceeds to unsecured creditors had it known any of that was occurring.

II. Whether the Trial Court Erroneously Entered Judgment Against Nature's Comfort for Conversion

[17] Appellants argue that Nature's Comfort was never named as a defendant by the Bank in its conversion count and so should not have had judgment entered against it. Our review of the record indicates that indeed the Bank did not, in fact, sue Nature's Comfort for conversion, only Nyhof. Consequently, the trial court erred in entering judgment on that count against Nature's Comfort.

Conclusion

[18] We affirm the trial court's entry of judgment against Nyhof for conversion, but we reverse the trial court's entry of judgment against Nature's Comfort for conversion. We remand with instructions to alter the judgment in a manner consistent with the above.

[19] We affirm in part, reverse in part, and remand with instructions.

Vaidik, J., and Brown, J., concur.