

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502017AP000092XXXXMB
L.T. NO.: 502016SC004056XXXXMB

WHY GO TO THE DEALER
AUTOMOTIVE, INC.,
Appellant(s),

v.

WESTGATE & WABASSO, CORP.,
Appellee(s).

Opinion filed: **MAR 1 2 2018**

Appeal from the Palm Beach County Court, Judge Frank Castor

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PER CURIAM.

Appellant, Why Go to the Dealer Automotive, Inc., appeals the trial court's dismissal of its complaint and award of attorney's fees in favor of Appellee, Westgate & Wabasso Corp. Appellant filed claims for conversion and civil theft against Appellee, alleging that Appellee failed to return its entire security deposit. The trial court dismissed the claims after determining that they were based upon an underlying contractual dispute. Upon review of the allegations of the

complaint and the attached “contract,” we agree with Appellant that there was no underlying contract between the parties, and reverse for further proceedings.

“A trial court’s ruling on a motion to dismiss based on a question of law is subject to *de novo* review.” *Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 584 (Fla. 2000). “When presented with a motion to dismiss, a trial court is required to ‘treat the factual allegations of the complaint as true and to consider those allegations in the light most favorable to the plaintiffs.’” *Locker v. United Pharmaceutical Group, Inc.*, 46 So. 3d 1126, 1128 (Fla. 1st DCA 2010) (quoting *Hollywood Lakes Section Civic Ass’n, Inc. v. City of Hollywood*, 676 So. 2d 500, 501 (Fla. 4th DCA 1996)). “It is error for the trial court to rely ‘upon matters raised in the motion, but not contained within the four corners of the complaint.’” *Id.* (citing to *Chatham Mfg. Corp. v. Cates*, 969 So. 2d 515, 516 (Fla. 1st DCA 2007)). All documents or a copy thereof on which an action may be brought must be incorporated in or attached to the pleading. *See* Fla. R. Civ. P. 1.130(a) (2017). “Any exhibit attached to a pleading must be considered a part thereof for all purposes.” Fla. R. Civ. P. 1.130(b).

Appellant alleged in its complaint that the parties orally agreed to the terms of a document entitled “Non-binding Letter of Intent,” which was attached to the complaint. The document related to a proposed lease of commercial property in which Appellant agreed to pay a “security deposit” of \$5,200.00. The Non-binding Letter of Intent contained the following language:

This letter of intent is a non-binding agreement between the parties. Only a fully executed lease agreement shall constitute a binding agreement. ... Upon payment of the security deposit, Landlord to discontinue marketing the premises, providing only that the lease will be executed by both parties within fourteen (14) days.

Appellant alleged that the parties did not exchange any other written or oral communication suggesting that the deposit money paid by Appellant would be or could be non-refundable under any circumstances. The parties did not ultimately enter into a lease agreement, and Appellant

alleged that Appellee failed to return the entire security deposit. This failure to return the security deposit was the basis for Appellant's claims for conversion and civil theft.

"Conversion is an 'act of dominion wrongfully asserted over another's property inconsistent with his ownership therein.'" *Warshall v. Price*, 629 So. 2d 903, 904 (Fla. 4th DCA 1993). However, a conversion action is inappropriate where the basis of the suit is a contract, either express or implied. *Belford Trucking Co. v. Zagar*, 243 So. 2d 646, 648 (Fla. 4th DCA 1970). The Court finds that the allegations in the complaint and the incorporated Non-binding Letter of Intent are insufficient to establish the existence of a contract, and that Appellant's allegations are otherwise sufficient to state a claim for conversion.

To create a valid, enforceable contract, the parties must provide consideration. *Kaufman v. Harder*, 354 So. 2d 109 (Fla. 3d DCA 1978). Nothing in the Non-binding Letter of Intent states that the security deposit is non-refundable—partially or fully—in the event the parties do not enter into a lease agreement. Restricted to the four corners of the complaint and the incorporated Non-binding Letter of Intent, the Court finds that the parties did not enter into a contract, because a security deposit that must be fully refunded if the parties do not enter into a subsequent lease cannot constitute consideration. Rather, the parties entered into an unenforceable agreement to agree. *See Brown v. Dobry*, 311 So. 2d 159 (Fla. 2d DCA 1975) (finding no cause of action for specific performance of a contract where the language demonstrated "that it was a mere incident to negotiations of a prospective, option agreement at some future, undisclosed time, and that the terms thereof are so vague, indefinite, uncertain, and incomplete, that it is impossible to ascertain the intent of the parties thereto.")). We therefore find that the dismissal of Appellant's claim for conversion was in error.

As to the claim for civil theft, Appellant alleged in the complaint that this claim was premised upon its claim for conversion. “To establish a claim for civil theft, a party must prove that a conversion has taken place and that the accused party acted with criminal intent.” *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1056 (Fla. 3d DCA 2008); *see, e.g., Fla. Desk, Inc. v. Mitchell Int’l, Inc.*, 817 So. 2d 1059, 1060 (Fla. 5th DCA 2002); *W.C.P. of Fla., Inc. v. Standard Brands of Am.*, 707 So. 2d 416 (Fla. 4th DCA 1998); *Rosen v. Marlin*, 486 So. 2d 623, 626 (Fla. 3d DCA 1986). “A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently deprive the other person of a right to the property or a benefit from the property” or “appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.” § 812.014, Fla. Stat. (2015) (emphasis added).

In its claim for civil theft, Appellant alleged that Appellee knowingly used Appellant’s property with intent to either temporarily or permanently deprive Appellant of the right to the property or the benefit of the property by failing to return the entire amount of the security deposit in violation of section 812.014, Florida Statutes. Appellant alternatively argued that Appellee appropriated Appellant’s property to its own use without being legally entitled to use Appellant’s property in violation of section 812.014, Florida Statutes. Because the trial court was required to treat the factual allegations in the complaint as true and to consider those allegations in the light most favorable to Appellant, we find that the trial court erred by granting Appellee’s motion to dismiss Appellee’s claim for civil theft.

The Court finds that Appellant’s claims for conversion and civil theft were not based upon an underlying contractual dispute, and the trial court erred by granting Appellee’s motion to

dismiss the claims. Accordingly, we REVERSE the trial court's final judgment and award of attorney's fees, and REMAND for further proceedings.

We also conditionally GRANT Appellant's Motion for Appellate Attorney's Fees based upon section 722.11, Florida Statutes, and REMAND the case to the trial court to determine a reasonable amount thereof; however, an award of appellate fees is conditioned upon Appellant ultimately proving its civil theft claim by clear and convincing evidence. *See* § 722.11, Fla. Stat. ("Any person who proves by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation of ss. 812.012-812.037 or s. 825.103(1) . . . is entitled to . . . reasonable attorney's fees and court costs in the . . . appellate courts.")

BLANC, FRENCH, and GOODMAN, JJ., concur.

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Appeal from Palm Beach County Court
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Appellee(s).

Date of Appeal: June 28, 2017

_____/_____
DATE OF PANEL: FEBRUARY 20, 2018

PANEL JUDGES: BLANC, FRENCH, GOODMAN

AFFIRMED/REVERSED/OTHER: REVERSED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:)	DISSENTING:)	CONCURRING SPECIALLY:)
)	With/Without Opinion)	With/Without Opinion)
<i>DR</i> <u>3/8/18</u>)))
DATE: J.)))
<i>PWB</i> <u>3/8/18</u>)))
DATE: J.)))
<i>PR</i> <u>3/9/18</u>)))
DATE: J.)))