STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST BUSINESS CREDIT, L.L.C.,

Plaintiff-Appellant,

v

TTOD LIQUIDATION, INC. and LAPEER PLATING & PLASTICS, INC.,

Defendants-Appellees.

and

DOTT ACQUISITION, L.L.C.

Defendant

UNPUBLISHED
November 27, 2012

No. 305569
Lapeer Circuit Court
LC No. 10-043082-PD

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Midwest Business Credit, L.L.C., a Nevada company with its principal place of business in Illinois ("Midwest"), appeals as of right from the trial court's final order on July 25, 2011, dismissing Midwest's remaining claims against the debtor, Dott Acquisition, L.L.C. ("the debtor"). Midwest primarily contests the trial court's prior grant of summary disposition pursuant to MCR 2.116(C)(10) to defendants TTOD Liquidation, Inc. and Lapeer Plating & Plastics, Inc. ("defendants"), both Michigan companies, in its order on December 6, 2010.[1] For all the following reasons, we affirm in part, reverse and remand in part.

[1] The court did not immediately enter a final order after granting summary disposition to defendants in part because the court initially stayed its order and refused to release defendants' $250,000 deposit pending Midwest's application for leave to appeal with this Court. Midwest sought the stay because it was concerned about the lack of a remedy in the event this Court reversed the trial court's dispositive decision, as the trial court permitted defendants to use and consume the collateral in the ordinary course of business. After this Court denied leave to appeal in *Midwest Business Credit LLC v TTOD Liquidation, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2011 (Docket No. 301540), the trial court returned the deposit,

I. FACTUAL BACKGROUND

This case primarily involves a dispute between two creditors, Midwest and TTOD Liquidation, Inc. ("TTOD"), over their respective rights in the debtor's collateral—inventory comprised of manufacturing materials for use in fabricating chrome-plated, plastic-molded automobile parts. The debtor, a bankrupt Michigan company who defaulted on its loan obligations to both Midwest and TTOD, is not a party to this appeal. The disputed collateral is comprised of the debtor's inventory, as well as all inventory records and insurance proceeds of the inventory, worth approximately $3,000,000.

The loan agreement between Midwest and the debtor ("Midwest loan") contained a choice of law provision, which specified that the terms of the agreement would be governed by Illinois law. The agreement provided the debtor with a $500,000 line of credit, while interest would be charged at: (1) five percent higher than the prime rate; and (2) upon default, the lesser of 23 percent a year, or the highest rate permitted under Illinois Law. To protect Midwest's investment and establish the creditors' respective priorities in the debtor's inventory, Midwest and TTOD independently entered into the Intercreditor and Lien Subordination Agreement ("Intercreditor Agreement"), which granted Midwest priority over TTOD in the debtor's inventory to the extent of the "Midwest Obligations," while acknowledging that TTOD claimed priority over the remaining inventory. "Midwest Obligations" was defined as "[t]he obligations of Debtor to Midwest, not exceeding in the aggregate $500,000 in principal plus interest thereon and all fees costs, and expenses incurred in connection therewith, that are now or hereafter secured by all or a portion of the Midwest Senior Collateral and the TTOD Senior Collateral." Additionally, the Intercreditor Agreement restricts both Midwest and TTOD from taking "any action" with respect to each others' senior collateral, and permits each party to "interpose as a defense or plea the making of this Agreement," and do so "in its name or in the name of the Debtor" if either party acts to enforce the lien over each other's senior collateral.

When the debtor defaulted on its loan obligations, TTOD evicted the debtor from its facility and leased the space to Lapeer Plating & Plastics, Inc. ("LPP"), and permitted LPP to use and consume the collateral in order to produce automobile parts. However, TTOD required LPP to sequester a portion of the collateral that allegedly equaled the value of the Midwest Obligations. When TTOD failed to guarantee that none of the collateral was being consumed and failed to immediately permit Midwest to inspect the collateral, Midwest filed the instant complaint to recover all the collateral in order to satisfy the outstanding balance on the Midwest loan, which was $684,986. Midwest also sued TTOD for breach of the Intercreditor Agreement and both statutory and common law conversion.

Following oral arguments, the trial court granted defendants' motion for summary disposition. The court initially found that TTOD held a valid security interest in the debtor's inventory, evidenced by the fact that TTOD presented its UCC-1 covering the collateral. However, defendants did not submit a signed security agreement from the debtor during this

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released all restrictions on the use of the collateral, and later entered the final order by dismissing the debtor.

motion.[2] The court also found that, in the 18 months since Midwest executed the Midwest loan, "interest has accrued in the amount of $487,845.22," which constituted an interest rate in excess of 25 percent a year and qualified as criminal usury in Michigan.[3] Although unstated, the trial court implicitly held that the Midwest loan was unenforceable as a matter of law in Michigan because the interest rate constituted criminal usury, notwithstanding the usury savings clause in the parties' agreement. The trial court held that defendants could invoke the usury defense because the Intercreditor Agreement granted TTOD the right to raise the debtor's defenses when Midwest attempted to foreclose on the TTOD Senior Collateral, and because the debtor assigned LPP all its property rights. Without commenting on whether Michigan or Illinois law applied, the court noted that Midwest was not exempt from usury under Illinois law because the statute it referenced, 815 ILCS 205/4(1)(c), did not expressly exempt loans made to limited liability companies from usury restrictions. Finally, the court held that Midwest failed to raise a genuine issue of material fact regarding its claims because it offered no proof that defendants had converted the collateral, and defendants proved that: (1) they sequestered the Midwest Senior Collateral; (2) they permitted Midwest to inspect the collateral; and (3) they only used it in the ordinary course of business after the court granted them permission to do so. Accordingly, the trial court granted summary disposition to defendants on all claims.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a dispositive motion. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010). When analyzing a motion for summary disposition under MCR 2.116(C)(10), the court evaluates whether a genuine issue of material fact exists. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes an issue where reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The trial court may not make factual findings or weigh witness credibility on disputed factual matters when deciding a dispositive motion. *Anzaldua v Neogen Corp*, 292 Mich App 626, 637; 808 NW2d 804 (2011).

Statutory interpretation invokes questions of law that are reviewed de novo by this Court. *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010). When interpreting a statute, the court's goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628-629; 765NW2d 31 (2009) (citation omitted). Further, the construction of contractual language is a question of law, which

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[2] Defendants, in a later proceeding, submitted the security agreement between TTOD and the debtor, which created a security interest over all of the debtor's interest to secure the debtor's loan obligations to TTOD.

[3] Although not calculated by the trial court, this amounts to an average yearly interest charge of $325,230.15, or a 65.05 percent interest rate, over the life of the loan.

is reviewed de novo by this Court. *Shay*, 487 Mich at 656. Finally, conflicts of law are reviewed de novo. *Frederick v Federal-Mogul Corp*, 273 Mich App 334, 336; 733 NW2d 57 (2006).

III. CHOICE OF LAW

Although Midwest initially argues that defendants lack standing to raise the usury defense, the outcome of this matter depends on whether Michigan or Illinois law controls in this dispute. Midwest argues that, in refusing to honor the parties' choice of law provision contained in their contract, the trial court erroneously concluded that Midwest lacked an enforceable security interest in the collateral because the Midwest loan agreement was unenforceable under Michigan law, on the grounds that the charged interest rate constituted criminal usury. We agree.

When deciding whether to enforce the parties' contractual choice of law, the parties' expectations "must be balanced with the interests of the states." *Hudson v Mathers*, 283 Mich App 91, 96; 770 NW2d 883 (2009). Our courts have historically honored a choice of law provision contained in a contract, unless: (1) the chosen state lacks a substantial relationship to the parties or the transaction; (2) there is no reasonable basis for adopting the law of the chosen state; or (3) it "would be contrary to a fundamental policy of [Michigan] which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties." *Chrysler Corp v Skyline Industrial Services, Inc*, 448 Mich 113, 126; 528 NW2d 698 (1995), quoting Restatement Conflict of Laws, 2d, § 187(2)(b).

Under the facts presented by the parties, it is clear that the chosen state of Illinois has a substantial relationship to the parties and the transaction. In its brief during the motion for summary disposition, Midwest presented uncontested evidence showing that: (1) the debtor contacted Midwest in Illinois, which is its principal place of business, in order to obtain the Midwest loan; (2) some of the direct negotiations occurred in Illinois; (3) the debtor sent all loan documents and payments to Midwest at its Illinois office; (4) the loan documents were executed in Illinois; (5) the loan was underwritten in Illinois; and (6) the funds were transferred to the debtor from an Illinois account. While Michigan undoubtedly possesses a substantial relationship to the parties and transaction, this fact does not invalidate Illinois's clear relationship to the parties and the transaction, as the debtor travelled to Illinois in order to procure the loan.

If there is an exception under Illinois law for charging what has otherwise been defined as a "usurious" interest rate on business loans to LLCs, then there exists a reasonable basis for the parties to adopt Illinois law, as doing so would permit Midwest to charge a higher interest rate than permitted under Michigan law. Defendants claim that Illinois law is unclear as to the status of usury restrictions regarding LLCs. However, 805 ILCS 180/1-30(7) unambiguously permits LLCs to incur liabilities and borrow money at any interest rate, regardless of any usury restrictions under Illinois law. Because the Illinois Legislature unambiguously expressed, as a matter of policy, its intent to permit LLCs to borrow at "any rate of interest," the parties' dispute over the type of entities subject to the "business loan" exception from usury under 815 ILCS 205/4(1)(c) is irrelevant. Moreover, the Appellate Court of Illinois has clearly stated that, under Illinois law, defendants cannot assert a usury defense. "[T]he defense of usury is a personal one and not available to a [corporation]." *Jones & Brown, Inc v W E Erickson Constr Co*, 73 Ill App

3d 481, 483; 391 NE2d 1097 (1979). For the purposes of 815 ILCS 205/4(1)(a), an LLC is considered a corporation, and thus loans made to an LLC are exempt from the usury restrictions in the Illinois Interest Act. *Asset Exchange II, LLC v First Choice Bank*, 2011 IL App (1st) 103718; 953 NE2d 446, 451-452; 352 Ill Dec 207 (2011) ("There is no dispute here that [the] plaintiff is a corporation within the meaning of the Illinois Interest Act, and thus the Act does not apply to [the] plaintiff's loan agreement with the Bank."). Therefore, because Illinois law exempts usury restrictions on loans made to LLCs such as the debtor, there is a reasonable basis for adopting Illinois law.

Finally, we hold that Michigan does not have a materially greater interest than Illinois in seeing its own laws enforced because our policy concerns regarding usury are not implicated in this case. "A fundamental policy may be embodied in a statute which (1) makes one or more kinds of contracts illegal or (2) which is designed to protect a person against the oppressive use of superior bargaining power." *Martino v Cottman Transmission Sys, Inc*, 218 Mich App 54, 60-61; 554 NW2d 17 (1996). The debtor, a sophisticated commercial entity, sought out Midwest in Illinois to obtain financing for its business operations. In this scenario, the debtor was fully aware of what it was getting into when it negotiated and agreed to the terms of the Midwest loan. Illinois arguably has a strong interest in seeing its contracts enforced according to its own laws, particularly when out-of-state debtors seek funding from its in-state creditors. As Midwest notes, Michigan has a policy interest in seeing its contracts honored and in interpreting usury restrictions narrowly, especially in the context of commercial transactions between business entities. *Minthorn v Haines*, 169 Mich 169, 171; 134 NW 1113 (1912); see *Allan v M&S Mortgage Company*, 138 Mich App 28, 37-39; 359 NW2d 238 (1984). Any countervailing policy concerns are further mitigated by the fact that the debtor is no longer a party to this dispute and will therefore be unaffected by the outcome. Moreover, contrary to defendants' assertions, the Midwest loan is not an "illegal contract" because the contractual language in the agreement clearly prohibits Midwest from charging the debtor interest in excess of 23 percent a year.[4] Therefore, the trial court should have honored the parties' choice of law provision and held that the Midwest loan did not violate Illinois' usury laws. Accordingly, we hold that the

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[4] Even if this agreement could be construed as a criminally usurious contract under Michigan law, we note that defendants are conflating a criminally usurious contract with an "illegal contract" that is unenforceable in its entirety. An "illegal contract" is one that is unenforceable on the grounds that the illegal provision is an essential part of the contract. See *Miller v Radikopf*, 394 Mich 83, 88-89; 228 NW2d 386 (1975). Under these facts, the interest rate was clearly a nonessential part of the agreement because the subject matter of the contract involved a business loan regarding the acquisition of operating capital. Also, when there is a specific statutory remedy for usury, and this remedy does not include rendering the contract unenforceable in its entirety, construing the contract as "illegal" would improperly create a greater remedy than provided by the Legislature. MCL 438.32; *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 590-591; 683 NW2d 233 (2004). "[A] usurious rate of interest does not make an instrument void." See *Shaw Inv Co v Rollert*, 159 Mich App 575, 580; 407 NW2d 40 (1987).

trial court committed error requiring reversal by finding that Midwest lacked an enforceable security interest in the collateral.[5]

IV. RIGHT TO INVOKE THE USURY DEFENSE

Midwest next challenges defendants' "standing"[6] under both Michigan and Illinois law to invoke the usury defense because they were not parties to the Midwest loan. However, as we have decided that Illinois law is controlling, defendants cannot assert the usury defense. As noted above, under Illinois law, the defense of usury is not available to a corporation, including an LLC . *Jones & Brown, Inc*, 73 Ill App 3d at 483; *Asset Exchange II, LLC*, 953 NE2d at 451-452. Thus, as both defendants and the debtor are considered "corporations," and corporations may not assert the usury defense under Illinois law, they lack the right to raise this defense.

V. TTOD'S SECURITY INTEREST

Midwest next challenges the trial court's finding that TTOD had a valid security interest in the collateral because TTOD offered no proof during the dispositional hearing of its alleged security interest in the collateral. We agree. During the dispositional hearing, TTOD only produced the following as evidence of its purported security interest in the collateral: (1) its judgment and injunction against the debtor from its independent case in *TTOD Liquidation, Inc v Dott Acquisition, Inc*, Oakland Circuit Court No. 09-102138; and (2) its UCC-1 financing statement covering the collateral. However, the court documents made no reference to any collateral that TTOD had in the debtor's property, so this evidence does not establish that defendants had a valid security interest in the collateral.

Further, a financing statement does not attach a security interest to collateral; it merely perfects an existing security interest. MCL 440.9310. To attach a security interest to collateral, the secured party must: (1) have the debtor authenticate a security agreement specifically describing the collateral; (2) value must be given; and (3) the debtor must have rights in the collateral. MCL 440.9203(2); *Michigan Tractor & Machinery Co v Elsey*, 216 Mich App 94, 97-98; 549 NW2d 27 (1996). While defendants claim that Midwest is bound by its admission that TTOD had a valid security interest in the collateral, this matter involves a question of law,

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[5] As we hold that the trial court should have applied Illinois law, we need not address plaintiff's arguments concerning whether the court correctly applied Michigan law in determining that the Midwest loan was unenforceable.

[6] Although the parties claim to raise the issue of "standing," in context it is clear that they are equivocating on the meaning of this word. The parties are contesting defendants' right to assert a defense, not this Court's propriety in determining whether defendants have an interest in a claim that is "distinct from the general public." See *Lansing Schools Education Association v Lansing Bd of Ed*, 487 Mich 349, 378; 792 NW2d 686 (2010).

and "an admission regarding a point of law is not binding on a court." *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 440; 581 NW2d 794 (1998). Although defendants later submitted its security agreement into the record as an exhibit to its motion on January 24, 2011, to modify a prior order, this does not cure the error because the trial court may only consider the documentary evidence "then filed in the action or submitted by the parties." MCR 2.116(G)(5). By relying on TTOD's UCC-1 in the absence of a signed security agreement, the trial court erred by finding as a matter of law that TTOD had an enforceable security interest in the collateral and basing its summary disposition decision on this finding.[7]

TTOD claims that Midwest is collaterally estopped from contesting TTOD's security interest in the debtor's collateral because these issues were conclusively decided in its independent case against the debtor. Although defendants present no legal analysis on this issue, "[c]ollateral estoppel precludes relitigation of issues between the same parties." *VanVorous v Burmeister*, 262 Mich App 467, 479; 687 NW2d 132 (2004). The elements of collateral estoppel are: "(1) a question of fact essential [i.e. necessary] to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). Mutuality of estoppel exists where there is substantial identity of the parties in the two proceedings. *Dearborn Heights Schools District No. 7 v Wayne County MEA/NEA*, 233 Mich App 120, 126-127; 592 NW2d 408 (1998) (noting that "a nonparty to an earlier proceeding will be bound by the result if that party controlled the earlier proceeding or if the party's interests were adequately represented in the original matter"). However, our Supreme Court has held mutuality of estoppel is not required when a party is asserting defensive collateral estoppel to defend against "a party who has already had a full and fair opportunity to litigate the issue." *Monat v State Farm Ins Co*, 469 Mich 679, 695; 677 NW2d 843 (2004). As Midwest was not a party to the prior proceeding, it did not have a full and fair opportunity to litigate this issue. Additionally, neither Midwest nor the debtor are in privity with each other, as they were adverse parties to this litigation. Therefore, it is clear that collateral estoppel does not prevent Midwest from challenging the validity of TTOD's security interest in the collateral.

VI. SUMMARY DISPOSITION

Midwest finally argues that the trial court improperly granted summary disposition to defendants when it was clear that Midwest was entitled to judgment as a matter of law pursuant to MCR 2.116(I)(2) on its breach of contract and conversion claims.[8] We agree in part and disagree in part.

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[7] Midwest alternatively avers that there is an outstanding factual dispute as to whether the debtor fully repaid its loans to TTOD, which—if true—would void TTOD's security interest in the collateral. As this Court already held that TTOD failed to establish its security interest in the collateral, this issue is moot.

[8] Midwest also argues that summary disposition was premature because the actual interest rate Midwest charged the debtor is in dispute. Midwest also argued that the lower court should have interpreted the scope of the "Midwest Obligations" as including all fees, interest, costs, and

Midwest argues that it was entitled to judgment as a matter of law on its breach of contract and conversion claims. Defendants respond by asserting that Midwest itself breached the Intercreditor Agreement by taking legal action to acquire the entire inventory, worth $3,000,000, to satisfy its $500,000 senior interest. Based on all the preceding analysis, Midwest had a perfected security interest in the debtor's inventory, with priority to the extent of $500,000. Although the Intercreditor Agreement specified that TTOD had priority over the remaining collateral, TTOD's ability to enforce the Agreement is contingent upon its capacity as a secured party to the collateral. As TTOD failed to establish a valid security interest in the collateral during the motion for summary disposition, the court should have treated TTOD as an unsecured party to the collateral, only holding an outstanding money judgment against the debtor. Accordingly, defendants had no rights to the collateral and were required to relinquish it to Midwest, who had priority as to the entire inventory. TTOD was not permitted to take "any action" against Midwest's collateral. Because TTOD failed to deliver the collateral to Midwest and permitted LPP to consume the collateral in its business operations, Midwest offered sufficient proof to establish that TTOD breached the Intercreditor Agreement by interfering with Midwest's interest in the collateral. The fact that TTOD permitted Midwest to inspect the collateral did not cure TTOD's refusal to cease consumption and relinquish the collateral to Midwest. Similarly, because TTOD had no enforceable security interest in the collateral, Midwest did not breach the Intercreditor Agreement by rightly demanding its collateral. Accordingly, the trial court erred in granting summary disposition to TTOD on the breach of contract claim.

Similarly, Midwest has presented evidence that TTOD committed common law conversion. Common law conversion is defined as a "distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Dep't of Agriculture v Appletree Marketing, LLC*, 485 Mich 1, 13-14; 779 NW2d 237 (2010) (citation and quotation marks omitted). Additionally, "[c]onversion may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party." *Id.* at 14. The undisputed facts establish that TTOD delivered possession of the collateral to LPP and permitted LPP to consume the collateral in its business operations. By doing so, TTOD could be found to have committed common law conversion because it "delivered the collateral without authorization to a third party" and "used [the collateral] in an improper way." *Id.*.[9] Accordingly, the trial court erred in granting summary disposition to TTOD on this claim.

In contrast, statutory conversion, a cumulative claim to common law conversion that permits recovery of treble damages, occurs if a defendant commits either of the following actions:

> (a) Another person's stealing or embezzling property or converting property to the other person's own use.

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expenses above the initial $500,000 principal balance. However, due to our resolution of the above issues, these questions are now moot.

[9] Although the debtor later assigned all its assets to LPP, this occurred long after TTOD leased the facility to LPP and permitted LPP to use the collateral.

> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted. [MCL 600.2919a(1).]

In light of the record, Midwest presented no evidence supporting its claim of statutory conversion against TTOD, so the trial court did not err in granting summary disposition to TTOD on this claim. The record establishes that TTOD did not convert the property for its own use, but rather permitted LPP to use it for its own purposes. Additionally, Midwest presented no evidence that TTOD knowingly converted the collateral. In fact, but for TTOD's failure to timely submit its security agreement, it would have shown that it had an enforceable security interest in the collateral. Thus, in only permitting LPP to consume collateral that allegedly exceeded the value of the amount owed to Midwest, TTOD cannot be said to have knowingly converted the collateral.

Finally, Midwest argues that the trial court erred by prematurely granting summary disposition before discovery was complete. "A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Anzaldua*, 292 Mich App at 636 (citation and quotation marks omitted). Midwest submitted a discovery request, asking TTOD in part to furnish all records pertaining to: (1) the debtor's outstanding debt to TTOD; (2) TTOD's security interest in the collateral; and (3) the methodology behind how TTOD calculated and sequestered the Midwest Senior Collateral. As these documents were pertinent to establishing TTOD's security interest—and priority—in the collateral, the trial court erred in prematurely granting summary disposition because there was a fair likelihood that this information could have established whether TTOD breached the Intercreditor Agreement by converting the Midwest Senior Collateral. However, because discovery was incomplete, the trial court also did not err in failing to grant summary disposition to Midwest on its breach of contract and common law conversion claims.

VII. CONCLUSION

Because the Midwest loan was not usurious under Illinois law and was not an unenforceable "illegal" contract, Midwest has shown that it had an enforceable security interest in the debtor's collateral. While TTOD failed to properly establish below its security interest in the collateral, the trial court improperly granted summary disposition to defendants before discovery was complete. Accordingly, we hold that the trial court erroneously granted summary disposition to defendants on all claims, as TTOD was only entitled to summary disposition on the statutory conversion claim. Accordingly, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan