No. 2—10—0540
Order filed March 30, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KENNETH BAEHR,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08—L—580
	)	
LIBERTYVILLE COMMUNITY BANK	)	
AND TRUST,	)	Honorable
	)	Christopher C. Starck,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment.

ORDER

Held: (1) The trial court's judgment for plaintiff on his conversion claim was not against the manifest weight of the evidence, as the funds at issue were sufficiently identifiable and plaintiff did demand their return; (2) the trial court erred in granting punitive damages, as plaintiff's complaint did not seek such relief.

Following a bench trial, plaintiff, Kenneth Baehr, was awarded $25,000 in compensatory damages and $15,000 in punitive damages on his conversion claim against defendant, Libertyville Community Bank and Trust. Defendant appeals, arguing that (1) plaintiff failed to prove his claim of conversion, (2) the trial court erred in awarding plaintiff punitive damages, and (3) the trial court

erred in finding that defendant breached a fiduciary duty to plaintiff. For the reasons that follow, we affirm in part and reverse in part.

BACKGROUND

In his complaint, plaintiff alleged that defendant committed the tort of conversion when it, without authorization, removed $100,000 from his account and applied it to a loan on which plaintiff was not liable. He did not specify that he was seeking punitive damages.

The evidence presented at trial was as follows. In late 2007, plaintiff became interested in purchasing Ecologic, Inc. At the time, Ecologic owed a significant amount of money to defendant. Mike Murphy, an employee of defendant, told plaintiff that if he would put up some "good faith money" defendant would restructure and reorganize Ecologic's debt to make the purchase of Ecologic feasible. Under such restructuring, defendant would be willing to release its lien on Ecologic in exchange for payment of $300,000 on Ecologic's line of credit. Plaintiff deposited $100,000 in a passbook savings account with defendant. Shortly thereafter, defendant removed the $100,000 from plaintiff's account and applied it toward Ecologic's line of credit. Plaintiff testified that he authorized the use of only $75,000 to pay down the line of credit. Murphy, in contrast, testified that plaintiff authorized the use of all $100,000. Plaintiff's attempt to purchase Ecologic was ultimately unsuccessful. Thereafter, in a letter dated March 3, 2008, plaintiff, through counsel, requested the return of the funds he had placed in the passbook savings account. Defendant did not return the funds.

The trial court found that, although plaintiff had authorized defendant to take $75,000 as payment on the Ecologic line of credit, defendant acted without authorization, and thus committed conversion, when it took the additional $25,000. Accordingly, the trial court awarded plaintiff

$25,000 in compensatory damages. Without explanation, the trial court also awarded plaintiff $15,000 in punitive damages.

ANALYSIS

The first issue in this case is whether plaintiff proved that defendant converted the funds. After reviewing the parties' arguments and the record, we conclude that he did. To prove conversion, plaintiff was required to demonstrate the following by a preponderance of the evidence: (1) defendant's unauthorized and wrongful assumption of control, dominion, or ownership over plaintiff's personal property; (2) plaintiff's right in the property; (3) plaintiff's right to immediate possession of the property, absolutely and unconditionally; and (4) plaintiff's demand for possession of the property. *Bill Marek's The Competitive Edge, Inc. v. Mickelson Group, Inc.*, 346 Ill. App. 3d 996, 1003 (2004).

Defendant first contends that plaintiff could not, as a matter of law, recover under a theory of conversion because the funds held by it represented a general debt between defendant and plaintiff. While it is generally true that "conversion will not lie for money represented by a general debt or obligation" (*In re Thebus*, 108 Ill. 2d 255, 261 (1985)), a conversion claim may lie where the funds are capable of being described, identified, or segregated in a specific manner (*Bill Marek's*, 346 Ill. App. 3d at 1003). "A right to an indeterminate sum is insufficient to maintain a cause of action in conversion." *Roderick Development Investment Co. v. Community Bank of Edgewater*, 282 Ill. App. 3d 1052, 1058-59 (1996).

Although the parties contend that the applicable standard of review is *de novo* because the facts are undisputed, we disagree. In a bench trial, the obligation to weigh evidence and determine disputed issues of fact belongs to the trial court, and we must defer to those findings of fact unless

they are against the manifest weight of the evidence. *Klaskin v. Klepak*, 126 Ill. 2d 376, 389 (1989). Despite the parties' contention that the facts in this case are undisputed, the question of whether the funds were sufficiently identifiable is a disputed question of fact, thereby making the manifest-weight-of-the-evidence standard applicable.

Defendant does not explain why the funds at issue were not sufficiently capable of identification. Even a cursory review of the record reveals that they were. Plaintiff deposited an exact amount—$100,000—into a brand new passbook savings account. The funds were placed there for the specific purpose of facilitating the purchase of Ecologic. The funds were held in a specific account and were not intermingled with any other funds, and, when plaintiff authorized defendant to remove $75,000 from the account, a sufficiently identifiable amount *i.e.*, $25,000, remained. Based on these facts, a finding that the funds were sufficiently identifiable so as to allow for a claim of conversion was not against the manifest weight of the evidence. See *Bill Marek's*, 346 Ill. App. 3d at 1004 (amount owed under a sales agreement was sufficiently identifiable to support a claim of conversion where the amount could be readily determined from the sales agreement, an accounting, and other documents); *Roderick*, 282 Ill. App. 3d at 1059, 1062 (amount owed, though calculated as a percentage, was sufficiently identifiable because it "did not accrue," "was a determinate amount, 5% of the Purchaser's last payment," and was "not estimated," but was "exactly 5% of the final payment under the purchase agreement").

In its reply brief, defendant contends that the present case is distinguishable from *Roderick*, because the defendant in *Roderick* received the funds from a third party, whereas here plaintiff voluntarily gave the funds to defendant. According to defendant, the voluntary transfer of the funds precludes a finding that defendant assumed the funds wrongfully or without authority. This

contention is forfeited, as it is raised for the first time in defendant's reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) (points not argued in the appellant's brief are forfeited); Ill. S. Ct. R. 341(j) (eff. Sept. 1, 2006) (reply brief "confined strictly" to responding to the arguments presented in the appellee's brief); *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 507 (1997) (issues raised for the first time in the reply brief are forfeited). By raising it for the first time in its reply brief, defendant effectively denied plaintiff the opportunity to respond to an argument regarding an element of conversion that was not initially contested. This is the exact problem that the forfeiture rule was designed to avoid.

Nevertheless, even if we were to find defendant's argument not forfeited and merely responsive to arguments raised in plaintiff's brief, the argument fails. In *Roderick*, the court's discussion of a "voluntary" transfer of funds pertained to a transfer arising in the context of a debtor-creditor relationship. *Roderick*, 282 Ill. App. 3d at 1059-60. Here, as in *Roderick*, the relationship between plaintiff and defendant was not one of debtor and creditor and the fund at issue was not a debt. Rather, plaintiff opened an account with defendant and the voluntary deposit was not to pay a debt of *plaintiff's* but, rather, was to be used, as authorized by plaintiff, to pay down *Ecologic's* debt to defendant. As such, we disagree with defendant that the deposit, solely on the basis that it was voluntary, was not subject to conversion.

Defendant also argues that plaintiff failed to prove his claim of conversion because plaintiff failed to demonstrate that he made a demand for the return of the funds. While it is true, as defendant contends in its opening brief, that plaintiff did not demand the return of the funds immediately upon their removal from the passbook savings account, defendant completely fails to acknowledge that on March 3, 2008, plaintiff, through counsel, sent a letter to defendant demanding

the return of the funds. Defendant also does not cite anything indicating that a demand must be made within a specific time period or explain why the letter was otherwise insufficient to constitute a demand.

In its reply brief, defendant contends that plaintiff's acquiescence in the removal of the entire $100,000 precluded him from proving that he had an immediate right to the possession of the funds, as required for his claim of conversion. Again, this contention is forfeited, because it is raised for the first time in defendant's reply brief. *Sylvester*, 179 Ill. 2d at 507. As before, this contention relates to a completely separate element, and defendant's failure to raise this contention in its opening brief denied plaintiff an opportunity to respond.

Defendant next argues that the trial court erred in awarding plaintiff punitive damages, because plaintiff did not include a request for punitive damages in his complaint. We agree. "A defendant is entitled to be apprised of the precise charge brought against him, the nature and extent of the relief sought, and the property which may be affected. He must also be given an opportunity to defend the charge." *Young v. Hummel*, 216 Ill. App. 3d 303, 307 (1991). Where plaintiffs have failed to include specific requests for punitive damages in their complaints and where the issue was not raised until shortly before trial (or even later), awards of punitive damages have been found to be inappropriate. See *Young*, 216 Ill. App. 3d at 307-08 (where no request for punitive damages was included in the complaint and the issue of punitive damages was not raised until the jury instruction conference after trial, the court was required to reverse the award of punitive damages because the court could not "unequivocally determine whether the defendant had actual knowledge that [the] plaintiffs were seeking punitive damages"); *Yates v. Brock*, 191 Ill. App. 3d 358, 362-63 (1989) (where the complaint did not include a specific request for punitive damages and the issue was not

raised until *voir dire*, the trial court properly denied the plaintiffs' request for punitive damages) *abrogated on other grounds by Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 444 (1992); *People ex rel. Scott v. Police Hall of Fame, Inc.*, 60 Ill. App. 3d 331, 348 (1978) (where the complaint did not include a request for punitive damages, the defendant was unfairly surprised by the trial court's *sua sponte* award).

Plaintiff did not include in his complaint a request for punitive damages. Rather, he requested only the return of the $100,000. In addition, plaintiff did not indicate that he intended to seek punitive damages until the first trial witness was on the stand testifying. Accordingly, the trial court erred in awarding punitive damages.

Plaintiff argues that he included language in the complaint that would give rise to an inference of willful and wanton misconduct supporting punitive damages. While it is true that plaintiff made allegations that defendant acted "with callous lack of concern" and that defendant's conduct was "unauthorized and unlawful" and "contrary to the obligation of the bank," there was no use of the words willful or wanton in the complaint. Moreover, the failure to specifically request punitive damages in a complaint has been found to be fatal to an award of punitive damages, even where the complaint alleged willful and wanton conduct (*Young*, 216 Ill. App. 3d at 307) or egregious conduct (*Scott*, 60 Ill. App. 3d at 348).

Plaintiff also contends that defendant had actual knowledge of plaintiff's intention to seek punitive damages once the issue was raised during the questioning of the first trial witness and that it is difficult to determine how defendant would have prepared differently with more notice. In *Yates*, the appellate court held that the trial court properly denied punitive damages where the issue of punitive damages was raised for the first time during *voir dire*. *Yates*, 191 Ill. App. 3d at 362.

Here, in contrast, the issue of punitive damages was raised for the first time even later—plaintiff raised it for the first time once trial had commenced, during the questioning of the first witness. As the *Yates* court noted:

> "[T]he issue of punitive damages involves presentation of evidence which is distinct from and often unrelated to the issues of liability and actual damages and which might prejudice a defendant with regard to the jury's consideration of the questions of liability and special damages, including, for example, defendant's ability to pay punitive damages." *Yates*, 191 Ill. App. 3d at 363.

Thus, we reverse the award of punitive damages.

Defendant's final contention is that the trial court erred in finding that defendant breached a fiduciary duty to plaintiff. Because we have affirmed the award of compensatory damages on the basis of conversion, we need not determine whether those damages are also proper on the basis of breach of fiduciary duty.

Similarly, we need not address plaintiff's alternative bases for affirming the award of compensatory damages, as we have already affirmed that award.

CONCLUSION

For the reasons stated, we affirm the award of $25,000 in compensatory damages but reverse the award of $15,000 in punitive damages.

Affirmed in part and reversed in part.