

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 9-30-10
SUBMITTED: 11-18-10
MOTION NO.: 001-MG; RPC

_____ x
**CLEMENTE BROS. CONTRACTING CORP.
and JEFFREY A. CLEMENTE,**

Plaintiffs,

**DOLLINGER, GONSKI & GROSSMAN
Attorneys for Plaintiffs
One Old Country Road, P.O. Box 9010
Carle Place, New York 11514**

-against-

**APRILE HAFNER-MILAZZO a/k/a
APRILEANNA MILAZZO and CAPITAL ONE,
N.A.,**

**HERRICK, FEINSTEIN LLP
Attorneys for Defendant Capital One, N.A.
2 Park Avenue
New York, New York 10016**

Defendants.

_____ x

Upon the following papers numbered 1-43 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-15 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 16-36 ; Replying Affidavits and supporting papers 37-43 ; it is,

ORDERED that this motion by the defendant Capital One, N.A., for summary judgment in its favor on the counterclaims and for dismissal of the complaint insofar as asserted against it is granted; and it is further

ORDERED that the defendant Capital One, N.A., is awarded damages in the principal amount of \$1,141,015.82, plus unpaid interest thereon through July 6, 2010, in the amount of \$5,247.08, plus additional interest from July 7, 2010, until the date of this order at the contractual default rate and interest at the statutory rate thereafter; and it is further

ORDERED that the plaintiff's claim for attorney's fees and expenses is reserved until the time of trial or other disposition of the remainder of the action; and it is further

ORDERED that the plaintiffs and the defendant Aprile Hafner-Milazzo are

directed to appear for a preliminary conference, which shall be held on March 14, 2011 at 10:00 a.m., Supreme Court, 1 Court Street, DCM Courtroom A362, 3rd Floor, Riverhead, New York 11901.

On April 19, 2007, the plaintiff Clemente Bros. Contracting Corp. ("Clemente Bros.") opened three accounts at North Fork Bank ("North Fork"), which subsequently merged with the defendant Capital One, N.A. ("Capital One"). Capital One is the holder of two promissory notes executed by Clemente Bros. on October 26, 2009. Pursuant to the terms of the first note, Capital One extended to Clemente Bros. a line of credit in the amount of \$1 million. The first note required Clemente Bros to make interest payments on the unpaid principal balance of the line of credit on the first day of each month until July 1, 2010, when all unpaid principal and interest became due in full. The second note evinced a term loan to Clemente Bros. in the amount of \$200,000. The second note required Clemente Bros. to make monthly payments of principal and interest on the first day of each month until November 1, 2014, when all unpaid principal and interest would become due in full. The notes were secured by a personal guarantee by the plaintiff Jeffrey Clemente and a security agreement. Both notes provided that Capital One could declare the entire unpaid balance due and payable upon the occurrence of an event of default, which was defined as:

(a) Failure to pay any amount required by [the] Note when due, or any other obligation owed to the Bank by [the Borrower] or any Guarantor...;

(b) Failure to perform or keep or abide by any terms, covenant or condition contained in [the] Note, any Guaranty or any other document given to the Bank in connection with [the] loan;

* * *

(d) The happening of an event which, in the judgment of the Bank, adversely affects the [Borrower's] or any Guarantor's ability to repay or the value of any collateral.

By a letter dated March 29, 2010, Capital One declared Clemente Bros. in default under the notes. Capital One advised the plaintiffs that, in its judgment, events had taken place that adversely affected its ability to repay its indebtedness to the bank. The events were the arrest of Clemente Bros.' former bookkeeper, the defendant Aprile Hafner-Milazzo, on charges of embezzlement and losses sustained as a result thereof. Clemente Bros. subsequently failed to repay the line of credit on July 1, 2010, in accordance with the original terms of the note. By a letter dated July 6, 2010, Capital One advised the plaintiffs that the first note was past due and demanded immediate payment of all outstanding amounts due under both the line of credit and the term loan.

The plaintiffs commenced this action against Hafner-Milazzo and Capital One. The plaintiffs allege that they were the victims of fraud, forgery and defalcation of corporate funds by Hafner Milazzo. Specifically, the plaintiffs allege that Hafner-Milazzo was not an authorized signatory on Clemente Bros' corporate accounts, nor was she authorized to draw down funds on the line of credit. The plaintiffs allege that, after Capital One rejected her initial request to draw down funds under the line of credit in her own name, Haffner-Milazzo forged Jeffrey Clemente's signature on subsequent draw-down requests. The plaintiffs further allege that she deposited the funds into Clemente Bros' corporate operating account, from which she wrote checks, again forging Jeffrey Clemente's signature thereon. The plaintiffs seek a judgment declaring that Capital One is barred from enforcing any of its claims against them. They also seek to recover attorney's fees and damages due to Capital One's purported negligence and failure to exercise ordinary care in approving forged draw-down requests and paying on forged and altered corporate checks. Capital One counterclaims to recover the amounts due under the line of credit, the term loan, the guaranty, and the security agreement. Capital One moves for summary judgment on its counterclaims and for dismissal of the complaint insofar as asserted against it.

Capital One has established, prima facie, its entitlement to judgment as a matter of law. Capital One has demonstrated that it is the holder of two promissory notes executed by the plaintiff Clemente Bros. and a personal guarantee executed by the plaintiff Jeffrey Clemente. Capital One has also demonstrated that the plaintiffs have failed to make payments in accordance with the terms of the notes and guarantee (*see*, **North Fork Bank Corp. v Graphic Forms Assocs.**, 36 AD3d 676; **Judarl LLC v Cycletech, Inc.**, 246 AD2d 736, 737). In opposition, the plaintiffs contend that Capital One failed to act in accordance with reasonable commercial standards and failed to exercise ordinary care to prevent the defalcations by Hafner-Milazzo.

The Uniform Commercial Code imposes strict liability on a bank that charges against its customer's account any "item" that is not "properly payable (**Montreal v Fleet Bank**, 95 NY2d 204, 207). A check bearing a forgery of the customer's signature is an item not properly payable and, therefore, may not be charged against the customer's account (**Id.**).

The Uniform Commercial Code imposes reciprocal duties on the customer limiting the bank's strict liability (**Id.**). Pursuant to UCC 4-406 (1), a customer must exercise reasonable care and promptness to examine statements of account and included items to discover his or her unauthorized signature or any alteration on an item and notify the bank promptly after discovery thereof (**Id.**). A customer who fails to comply with these duties is precluded from asserting a claim against the bank (UCC 4-406 [2]). This preclusion, however, is not absolute. Even a customer failing in its duties may bring a claim against the bank if the customer can establish that the bank lacked ordinary care in paying the item (UCC 4-406 [3]). UCC 4-406 (4) places an absolute time limit on the right of a customer to make a claim for payment of an altered or forged item without regard to care or lack of care of either the customer or the bank. In the case of an alteration or unauthorized signature of the customer, the absolute time limit is one year from the time the statement and item are made available to the customer (UCC 4-406 [4],

Official Comment 5).

The record reveals that, contrary to the plaintiffs' contentions, Capital One mailed statements of account for all three Clemente Bros.' corporate accounts, including the operating account, to the business address provided by Clemente Bros. The monthly statements of account for the corporate operating account included copies of cancelled checks drawn on that account. With respect to the line of credit, Capital One mailed a statement to Clemente Bros. each month showing the principal balance on the line of credit and the monthly interest payment, which was automatically debited from Clemente Bros.' operating account. Although the draw-downs from the line of credit were not reflected on such statement, they did appear as credits on the monthly statements for the operating account, the account into which they were deposited.¹ The court finds that, under these circumstances, statements were made available to the plaintiffs within the meaning of the UCC (*see*, **Robinson Motor Xpress, Inc. v HSBC Bank, USA**, 37 AD3d 117, 119). Capital One is, therefore, entitled to the protection afforded by UCC 4-406 (4) even if the statements were thereafter intercepted by Hafner-Milazzo (**Id.** at 119-120).

The record reveals that the alleged forgeries by Hafner-Milazzo occurred between 2007, when she was hired by Clemente Bros., and the end of 2009. They were discovered by Jeffrey Clemente in February 2010, and he notified the bank on or before March 2, 2010. The court finds that, under these circumstances, any claims regarding forged items made available to the plaintiff before the end of 2008 are barred pursuant to UCC 4-406 (4).

The record further reveals that the one-year time period found in UCC 4-406 (4) was shortened pursuant to the rules and regulations of North Fork Bank, Capital One's predecessor in interest, which required written notification of forgeries within 14 days of the delivery or mailing of any statement of account and cancelled check, draft, or other instrument for the payment of money. Contrary to the plaintiff's contentions, the North Fork rules and regulations remained in effect after North Fork merged with Capital One. As a condition precedent to opening its accounts at North Fork, Clemente Bros. passed a corporate resolution on April 19, 2007, which provides that Jeffrey Clemente is the only authorized signatory on such accounts. The resolution also provides, in pertinent part, as follows:

That unless [Clemente Bros.] shall notify the Bank in writing within fourteen calendar days of the delivery or mailing of any statement of account and cancelled check, draft or other instrument for the payment of money (hereinafter referred to as 'Instrument') of any claimed errors in such statement, or that [Clemente Bros.'] signature upon any such returned Instrument was forged, or that

¹The court notes that the forged draw-down requests did not result in any defalcations since all draw-downs by Hafner-Milazzo were deposited into Clemente Bros.' operating account. Thus, any losses sustained by the plaintiffs are directly attributable to the forged checks, not the forged draw-down requests.

any such Instrument was made or drawn without the authority of [Clemente Bros.]...or that it was raised or otherwise altered, said statement of account shall be considered correct for all purposes and said Bank shall not be liable for any payments made and charged to the account of [Clemente Bros.] or for any other errors in the statement of account as rendered to it.

The resolution further provides that it “shall remain in full force and effect until revoked or modified by written notice actually received by the Bank at its offices where the account of [Clemente Bros.] is then maintained...” There is no evidence in the record that Clemente Bros. revoked or modified the corporate resolution. In fact, the plaintiffs rely on the resolution in opposition to Capital One’s motion for summary judgment insofar as they assert that Jeffrey Clemente was the only authorized signatory on the accounts maintained by Clemente Bros. at Capital One.

In view of the foregoing, the court finds that the statutory one-year period in which to bring an action against Capital One based on negligence in detecting Jeremy Clemente’s forged signature was abbreviated to 14 days (*see, Gluck v JP Morgan Chase Bank*, 12 AD3d 305, 306; *Catalano v Marine Midland Bank*, 303 AD2d 617, 618; *Josephs v Bank of N.Y.*, 302 AD2d 318). The last forged draw-down request written by Hafner-Milazzo in the record is dated November 23, 2009, and the last forged check, December 31, 2009. The forgeries were discovered by Jeffrey Clemente in February 2010, and he notified the bank on or before March 2, 2010. Thus, the remaining claims regarding forged items made available to the plaintiff after the end of 2008, are also barred. Accordingly, the motion is granted.

Dated: February 8, 2011

J.S.C.