

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of November, 2012.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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RELIABLE CHECK CASHING CORP.,
Plaintiff,

- against -

Index No. 11726/09

BANCO POPULAR, SUPREME INTERIOR
MANAGEMENT INC., AND LEIBY GOLDBERGER,
Defendants.

-----X

The following papers numbered 1 to 13 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-3 6-9</u>
Opposing Affidavits (Affirmations) _____	<u>4 10</u>
Reply Affidavits (Affirmations) _____	<u>5</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Banco Popular's attorney's letter dated June 21, 2012</u>	<u>11</u>
Memoranda of Law _____	<u>12-13</u>

In this action by plaintiff Reliable Check Cashing Corp. (Reliable) seeking recovery based upon the non-payment of cashier's checks, defendant Banco Popular moves for summary judgment in its favor dismissing Reliable's complaint as against it upon the grounds that there are no triable issues of fact and that it is entitled to judgment as a matter of law.

Claiming entitlement as a holder in due course of the checks at issue, Reliable cross-moves for summary judgment in its favor as against Banco Popular in the sum of \$83,000 with interest, as demanded in its complaint.

BACKGROUND

On or about December 10, 2008, defendant Leiby Goldberger (Goldberger), the principal of defendant Supreme Interior Management Inc. (Supreme Interior Management) and Supreme Drywall, Inc. (Supreme Drywall), opened a business checking account in the name of Supreme Interior Management at the Banco Popular branch located at 5216 Fifth Avenue, in Brooklyn, New York. According to Supreme Interior Management's bank statement, dated March 31, 2009, for the period February 27, 2009 through March 31, 2009, Supreme Interior Management began this period with a negative balance of \$12,091.54 due to two deposits to its account in January 2009 that had been returned.

On or about March 10, 2009, a \$200,000 deposit was made to the account in the form of check No. 1362 from another Banco Popular customer, NP Holding, LLC (NP Holding), payable to "Supreme Interiors." This check was stale since it was dated May 14, 2008, and was more than six months old (*see* UCC 4-404). According to the affidavit of Jenny Lobo (Lobo), the assistant branch manager of Banco Popular, sworn February 18, 2010, the check was delivered by Goldberger to Gilbert Ruiz (Ruiz), then the branch manager of Banco Popular, who called NP Holding and received permission to deposit its check into Supreme Interior Management's account. Since NP Holding was a customer of Banco Popular, upon

such consent, Ruiz instructed that the funds should be cleared for next day availability, i.e., March 11, 2009.

On March 11, 2009, Goldberger wrote check no. 1166 on Supreme Interior Management's account payable to Banco Popular in the amount of \$145,060. In return, Banco Popular issued, pursuant to Goldberger's orders, six cashier's checks, which totaled \$145,000 (\$60 was the transaction fee). Each of these checks was dated March 11, 2009, and made payable to Supreme Interior Management as follows: check no. 1599386 in the amount of \$30,000, check no. 1599387 in the amount of \$20,000, check no. 1599388 in the amount of \$35,000, check no. 1599389 in the amount of \$30,000, check no. 1599390 in the amount of \$18,000, and check no. 1599391 in the amount of \$12,000.

Later that same day, Goldberger returned to Banco Popular, and wrote another check for \$27,000, from which he purchased a cashier's check for \$7,000 made payable to 562 Grand Avenue LLC, and took out \$20,000 in cash for himself.

On or about March 12, 2009, Ruiz learned that NP Holding had rejected the negotiation of its \$200,000 check and it was going to be returned as "Stale Dated." As a result, Ruiz placed stop payment orders on the checks ending in nos. 388, 389, and 390, in the amounts of \$35,000, \$30,000, and \$18,000, respectively, for a total of \$83,000.

On or about March 11, 2009, Goldberger went to Reliable's premises to cash five of the cashier checks issued to Supreme Interior Management by Banco Popular. Goldberger endorsed the cashier's checks, and Reliable gave cash to Goldberger for these checks,

depositing the checks into its bank account. Two of the checks were honored, but the three checks, in the total sum of \$83,000, in which Ruiz had issued stop payment orders, were dishonored by Banco Popular on presentment for payment.

Consequently, on May 13, 2009, Reliable filed this action against Banco Popular, Supreme Interior Management, and Goldberger. Reliable's complaint, dated April 22, 2009, seeks to recover the \$83,000, alleging that it cashed these checks without notice of any defense to payment when it gave value for these checks. Banco Popular interposed an answer dated August 14, 2009, in which it asserts various affirmative defenses, including that Reliable was not a holder in due course because it acted with notice that Supreme Interior Management and Goldberger had fraudulently induced the issuance of the cashier's checks and did not act in good faith in cashing these checks. Supreme Interior Management and Goldberger have never appeared in this action, and are in default. Discovery has been completed, and, on April 18, 2012, Reliable filed its note of issue. On May 4, 2012, Banco Popular filed its instant motion for summary judgment, and, on May 14, 2012, Reliable filed its cross motion for summary judgment.

DISCUSSION

It is undisputed that Banco Popular was defrauded by Goldberger and Supreme Interior Management; the question presented is whether the bank or Reliable should bear the loss for such fraud. The resolution of this question turns upon whether Reliable was a holder in due course so as to take the cashier's checks free of Banco Popular's defenses. Banco

Popular, in seeking summary judgment in its favor, argues that Reliable was not a holder in due course, contending that Reliable had notice of its defenses, whereas Reliable, in seeking summary judgment in its favor, argues that it was a holder in due course, as it had no knowledge of any defenses when it cashed the checks.

UCC 3-302 (1) defines “[a] holder in due course” as “a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.” UCC 3-306 provides that “[u]nless [it] has the rights of a holder in due course any person takes the instrument subject to (a) all valid claims to it on the part of any person; and (b) all defenses of any party which would be available in an action on a simple contract; and (c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose . . .; and (d) the defense that [it] or a person through whom [it] holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement . . .”

Banco Popular asserts that Supreme Interior Management and Goldberger are liable to it for the amounts stated in the cashier’s checks under theories of fraud in the inducement and factum, misrepresentation, failure of consideration, and/or a breach of its customer agreement. It maintains that pursuant to UCC 3-306, Reliable is subject to these defenses, and, therefore, cannot succeed against Banco Popular.

While it is undisputed that plaintiff is a holder of the checks and gave value for them, Banco Popular contends that Reliable is not a holder in due course, as defined by UCC 3-302 (1), because it is unable to meet the good faith and notice requirements of this section, and, consequently, cannot avoid its defenses. UCC 1-201 (19) defines “good faith” as meaning “honesty in fact in the conduct or transaction concerned.” This language sets a subjective, rather than objective, standard, whereby a holder’s good faith is sufficiently shown where such holder “did not have actual knowledge of some fact which would prevent a commercially honest individual from taking up the instruments” (*Chemical Bank v Haskell*, 51 NY2d 85, 92 [1980], *rearg denied* 51 NY2d 1009 [1980]; *see also First Intl. Bank of Israel, Ltd. v L. Blankstein & Son, Inc.*, 59 NY2d 436, 441-442 [1983]).

As to the issue of whether Reliable can be found to have had notice of a defense against the subject cashier’s checks within the meaning of UCC 3-302 (1), UCC 3-304 is controlling. UCC 3-304 (7) provides that “to constitute notice of a claim or defense, the purchaser must have knowledge of the claim or defense or knowledge of such facts that [its] action in taking the instrument amounts to bad faith.”

It is well-settled that this standard, unique to New York and Virginia and distinct from the uniform objective test which permits constructive knowledge to be inferred from circumstantial evidence, “demands nothing less than actual knowledge” (*Hartford Accident & Indem. Co. v American Express Co.*, 74 NY2d 153, 162 [1989]; *see also, Chemical Bank v Haskell*, 51 NY2d at 92-93; *First Int’l Bank v Blankstein*, 59 NY2d at 445). “Holders in

due course are to be determined by the simple test of what they actually knew, not by speculation as to what they had reason to know, or what would have aroused the suspicion of a reasonable person in their circumstances” (*Hartford*, 74 NY2d at 163). Moreover, “constructive knowledge is insufficient to demonstrate a lack of good faith” (*In re AppOnline.com Inc. v Matrix Capital Bank and HSA Residential Mortgages Services, Inc.*, 321 BR 614, 624 [EDNY 2004]).

Banco Popular’s claim that plaintiff is not a holder in due course is premised upon its speculation that Reliable was somehow complicit in Goldberger’s fraud, was “willfully ignorant” or acted in bad faith by failing to enforce its own regulations contained in a manual promulgated pursuant to the federal Bank Secrecy Act to prevent money laundering. The only evidence proffered in support of this claim is the deposition testimony of Samuel Rottenstein (Rottenstein)¹, Reliable’s president, regarding the procedures followed in

¹ In its cross-motion filed May 14, 2012, plaintiff’s counsel argued that the unsigned deposition of Samuel Rottenstein, which was annexed to Banco Popular’s moving papers, was of “no evidentiary value” because it had been submitted, unsigned, prior to the expiration of the 60-day period allotted in CPLR § 3116 for signing and that the bank’s motion was fatally defective as unsupported by competent, admissible evidence. In his affirmation dated May 15, 2012, plaintiff’s counsel, Marc Illish, Esq., stated that the signed Rottenstein deposition, together with an errata sheet, had been served on the bank’s attorney on April 30, 2012, within 60 days of its service upon him on March 1, 2012, attaching the affidavit of such service by overnight express mail.

At oral argument on June 6, 2012, whether the deposition, and/or the errata sheet, should be considered upon the parties’ reciprocal motions was vigorously contested and the court directed both parties to submit a short letter-brief on the issue.

Attached to his “Affirmation in Reply” dated June 13, 2012, Banco Popular’s attorney, Jeffrey Cohen, Esq., provided an errata sheet purportedly signed and notarized on April 23, 2012, but bearing only /s/ as an indication of such signing by both “Sam Rottenstein” and the notary, objecting that this was insufficient compliance with CPLR § 3116(a), that he had never seen a properly-executed deposition and that the errata sheet should be rejected. Attached to Mr. Illish’s

compliance with the New York State Banking Law and the federal Bank Secrecy Act (31 USC § 5313), which requires that transactions of more than \$10,000 be reported to the Internal Revenue Service by filing a Currency Transaction Report (CTR), and the documentary evidence of the transactions involved.² Evidence has been adduced that, while

affirmation in response dated June 14, 2012, is a copy of the signed and notarized final page of Rottenstein's deposition together with a signed and notarized "Correction/Errata Sheet", both dated April 23, 2012, indicating that the reason for change, as to all responses, was that it was "not complete and or clearly stated" and "upon examination of all information documents, the corrections more accurately reflect the facts." In arguing that the errata sheet should be disregarded, defendant Banco Popular relies on CPLR 3116(a) which requires that the deposition transcript be signed "before any officer authorized to administer an oath" within sixty days and prohibits changes after sixty days from the date of submission to the witness. Upon failure to sign within the allotted sixty days, the unsigned transcript may be used. While acknowledging the court's inherent power to permit changes even where the proper procedure has not been observed (see *Zamir v Hilton Hotels Corp*, 304 AD2d 493 [1st Dept 2003]; *Keenan v Munday*, 79 AD3d 1415, 1417 [3d Dept 2010]), defendant resists consideration of the errata sheet upon the reason given, arguing that the changes substantially alter the original testimony upon which Banco Popular's motion is predicated, and are designed to defeat its motion by raising triable issues of fact, citing, *inter alia*, *Marzan v Persand* (29 AD3d 652 [2d Dept 2006], and *Perez v Mekulovic* (13 AD3d 158 [1st Dept 2004]).

However, consistent with the course recommended by the Appellate Court in *Columbia v Lee* (239 AD 849 [2d Dept 1933]), this Court has reviewed the proposed changes, comparing the changes to the original transcript, and finds that the corrections are of little consequence and do not effect the very dramatic substantive alterations considered in *Marzan* or *Perez*. The explanation given for the changes is adequate. Moreover, there was no significant delay in providing the corrections, which appear to have been made simultaneously with execution of the transcript. Although counsel for defendant bank infers duplicity in the purported execution of the transcript and the errata sheet within sixty days, since it was delivered to him only after his motion was made, the Court finds that Banco Popular was not entitled to reply upon the unsigned transcript without affording plaintiff the full sixty days, thereby precluding any amendment. Although defendant is correct that a deposition and errata sheet must bear the actual sworn signature of the deponent (plaintiff's authorities to the contrary are inapposite), in light of the disposition herein, it is unnecessary to establish exactly when the two documents were actually executed. Accordingly, the Court has considered both the original transcript and the errata sheet, both of which have now been properly signed and notarized, in reaching its decision.

² Rottenstein, when asked at his deposition about cashing a corporate check for over \$10,000, responded that a teller at Reliable was required to obtain a copy of the filing receipt

the payee named on the subject cashier's checks was "Supreme Interior Management" (without a corporate designation), the duly-prepared CTR's, to which a copy of the subject check was appended, report that the transaction was "conducted on behalf of" Supreme Drywall, Inc. by Leiby Goldberger.³ It is undisputed that plaintiff did not maintain a record of Supreme Interior Management's corporate status or a copy of a corporate resolution authorizing Goldberger to cash checks.

from the New York State Division of Corporations indicating that the company existed, and its SS4 form from the Internal Revenue Service (IRS), meaning its taxpayer I.D. (Rottenstein's Dep. Transcript at 20-22). Rottenstein explained that Reliable's employees were given training in areas of money laundering and suspicious activities (*Id.* at 24) and stated that in 2009, he had a compliance officer as required under the U.S. Patriot Act of 2001 as part of the government's anti-money laundering programs (*Id.* at 25). He identified a manual called "Reliable Check Cashing Corp. Internal Controls, Policies, and Procedures, Anti Money Laundering Program" (the manual) adopted on June 1, 2007 (*Id.* at 25-27; Exhibit F to Banco Popular's motion). He testified that Reliable's employees were trained in the information contained in the manual (*Id.* at 28, 32), acknowledging that the manual required that CTRs "must be complete and accurate," that "[a]ll required customer information should be obtained from the customer before the transaction is completed," and that "[i]f information is not available, the transaction should not be completed (*Id.* at 28-29). He also testified that the compliance officer was "responsible to recognize and identify customer patterns and usage to detect suspicious activity" (*Id.* at 33). Rottenstein further testified that it had never been Reliable's practice to require a corporate resolution authorizing the individual presenting a check to cash it (*Id.* at 41-42). When asked how then did he know that such a person had the requisite authority to cash a check, Rottenstein responded that if the individual had the requisite corporate "paperwork," such as the filing receipt from the New York State Division of Corporations and an SS4 form, he accepted that such person had such authority (*id.*).

³ Banco Popular annexed (as Exhibit I to its motion) another 45 CTRs with attached checks, that were produced in discovery by Reliable, all naming Supreme Drywall as the entity on whose behalf these checks were cashed, despite the fact that these checks, which were cashed by Reliable, had actually been made payable to Supreme Interior Management, Supreme Interiors, Supreme Interiors, Inc., Supreme Interior, or Supreme. These CTRs, all of which were filed with the IRS, total approximately \$1,424,000 and cover about a 27-month time period.

Mr. Rottenstein's deposition, together with the plaintiff's log of all transactions, establishes, however, that Leiby Goldberger had been a regular customer of plaintiff since at least early 2006, frequently cashing checks of Supreme Interior Management and Supreme Drywall, payable to himself, Supreme Interior Management and Supreme Drywall and various other payees. The New York State corporate filings for Supreme Drywall, Inc., its employer identification number issued by the IRS, and copies of the driver's license and social security card for Leiby Goldberger were maintained in plaintiff's file. Mr. Rottenstein speculated, and apparently believed, that "Supreme Interior Management" was a d/b/a for Supreme Drywall. Plaintiff represents that, now that Supreme Interior Management's separate corporate status has been recognized, the CTR's incorrectly reporting its transactions as made on behalf of Supreme Drywall, have been, or will be, amended, as permitted by law. When asked whether he knew either NP Holding, Banco Popular's customer that had stopped payment on the stale \$200,000 check, or its principal, Nissan Perla, or Banco Popular's employee Gilbert Ruiz,⁴ Rottenstein indicated he did not, nor did he know that Goldberger had been convicted of a crime (Transcript at p. 119-120). No evidence has been proffered to impeach such testimony.

In *Chemical Bank v Haskill* (51 NY2d at 90), the Court held that indorsement by one lacking actual authority to do so does not impeach the status of a holder in due course "if the signer is clothed with apparent authority." It follows that an individual whose identity has

⁴ No affidavit of Gilbert Ruiz has been submitted. Although he no longer is employed by Banco Popular, he is reported to be locally employed at another bank.

been established through years of transactions on behalf of a known corporate entity, in which a second entity has frequently been a named payee, has been sufficiently clothed with “apparent authority” to negotiate the checks of that second entity, notwithstanding the failure to investigate the identity of the second entity, reasonably presumed to be a d/b/a alternative of the known corporation. The long experience of plaintiff with respect to Goldberger and his role as principal of both Supreme Drywall and Supreme Interior Management does not suggest bad faith in cashing the checks at issue or permit an inference of knowledge of defenses that were not otherwise perceptible (see *First Transcapital Corp v King Umberto, Inc.*, 214 AD2d 699, 701 [2d Dept 1995]). It is noted that the subject checks were cashier’s checks issued by Banco Popular to its own depositor. The consequences of negligence, in failing to confirm the legitimacy of Goldberger’s actions in purchasing several cashier’s checks payable to the depositor itself within the same day, particularly, as here, against funds solely derived from the crediting of a stale check, which might well have raised suspicion, should fall upon Banco Popular, the facilitator of the fraud, and not upon an apparently innocent holder in due course (see *Hartford v American Express*, 74 NY2d at 163-165, *In re AppOnline.com*, 321 BR at 627; cf. *Chemical Bank v Haskill*, 51 NY2d at 93).

In *First International Bank of Israel v L. Blankstein* (59 NY2d 436), the Court of Appeals explained the burdens of proof imposed under UCC § 3-307. Initially, a holder in due course must produce a properly signed instrument. Here, the cashier’s checks were issued by defendant Banco Popular to the order of “Supreme Interior Management”, without

indication of the payee's corporate status, notwithstanding that the payee maintained an account at Banco Popular as Supreme Interior Management, Inc. Consistent with plaintiff's understanding, Leiby Goldberger was clearly the authorized signatory for "Supreme Interior Management" as he signed the check payable to Banco Popular, which was drawn and accepted in payment for the cashier's checks. Banco Popular has not disputed the endorsement on the checks it issued, which were cashed by plaintiff upon that endorsement. There is no indication that plaintiff actually knew, or even had reason to know, that the cashier's checks issued by a reputable bank were fraudulently induced as alleged in the Answer. Even according defendant Banco Popular the benefit of its alleged defense of fraudulent inducement, which has not been established by competent evidence since the only affidavit of anyone with knowledge of the transaction is both stale, having been executed in 2010, and hearsay, as it is not the sworn statement of Mr. Ruiz who actually authorized and conducted the transaction (Banco Popular's attorney's affirmation as to the facts is incompetent to support summary judgment (see *Zuckerman v New York*, 49 NY2d 557 [1980]; *Matter of Idhailia P.*, 95 AD3d 1333, 1335 [2d Dept 2012])), there is absolutely no evidence that plaintiff would have known of such defense. As the *First International Court* observed, "rarely, if ever, will the holder have documentary evidence showing its lack of knowledge . . . evidence, if any, that the holder had knowledge of defenses will ordinarily be in the hands of the defendant. It is appropriate, therefore, to require the defendant . . . to proffer such evidence to rebut the holder's statement of no knowledge" (59 NY2d at 444).

Although Rottenstein conceded that the CTR for the cashier's checks at issue, as well as the CTRs for other Supreme Interior Management transactions (which totaled over \$1.4 million), falsely named Supreme Drywall, a different corporate entity from payee Supreme Interior Management, as the entity on whose behalf the transactions were made, and the CTRs filed for these checks therefore provided inaccurate information, not in compliance with the reporting requirements of federal law, Rottenstein's understanding that Superior Interior Management was merely a d/b/a for Drywall, and that the two entities were one and the same corporation, was reasonable based upon the information known to plaintiff and the long pattern of prior check-cashing by Goldberger on behalf of both entities. There is no indication that plaintiff knowingly reported inaccurate information or was involved in any fraud perpetrated upon Banco Popular. Banco Popular suffered no damage whatever from such inaccurate reporting. Defendant Banco Popular has thus failed to sustain its burden to allege and prove, by competent factual evidence, that, when it accepted the checks, plaintiff had the required actual notice or knowledge of fraud in the inducement rendering the checks voidable, or acted in bad faith in any way.

Because Banco Popular has provided no factual evidence to impeach plaintiff as a holder in due course, there are no triable issues of fact to defeat plaintiff's entitlement to recover (*First International*, 59 NY2d at 446). The issue of whether Reliable was a holder in due course is therefore purely a question of law which can be determined based upon the unrefuted evidence submitted. Upon such evidence, the motion by Banco Popular for

summary judgment is defeated and plaintiff's cross-motion for summary judgment must be granted (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

CONCLUSION

Accordingly, Banco Popular's motion for summary judgment dismissing Reliable's complaint as against it is denied, and Reliable's cross motion for summary judgment in its favor as against Banco Popular is granted. Plaintiff may enter judgment for \$83,000, plus interest from April 7, 2009.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.