STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SPS TEMPORARIES, INC.,

Plaintiff,

MEMORANDUM DECISION

vs.

Index No. 2007-8712

WASHINGTON MUTUAL BANK
and BENEFICIAL NEW YORK, INC.,

Defendants.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **DAMON & MOREY LLP**
Attorneys for Plaintiff
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by JPMorgan Chase Bank, N.A., as
Assignee of certain assets and liabilities of
Washington Mutual Bank
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CURRAN, J.

This matter came before the Court upon motions to dismiss brought by both Defendants. Upon due consideration of the papers submitted, the Court grants the motions only insofar as Plaintiff asserts causes of action for conversion based upon checks deposited more than three (3) years prior to the commencement of the action, but denies the motions in all other respects.

BACKGROUND

The following facts are alleged in the Complaint. Plaintiff SPS Temporaries, Inc. provides temporary employees to industrial, professional and clerical customers for a fee. Beginning in 2003 and continuing until May of 2007, Plaintiff's long-time bookkeeper, Karen Ruhland (hereinafter Ruhland) is believed to have embezzled between $600,000 and $700,000 from SPS and used the money to pay her credit card and other debts (Complaint ¶¶2, 4, 15).

Ruhland had a credit account with Defendant Washington Mutual Bank (hereinafter WaMu) (Complaint ¶ 6). In addition, Ruhland had a credit account with Providian Financial Corporation for a number of years; WaMu acquired Providian in 2005. As a consequence, WaMu is a successor to Providian on that credit account (Complaint ¶¶ 7-9). Ruhland also had a credit account with Beneficial Finance Corporation (hereinafter BFC) (*id*. ¶ 12). HSBC Bank Group acquired BFC in 2003, and continued the portion of its business relevant to this action under its subsidiary, Defendant Beneficial New York, Inc. (hereinafter Beneficial) (Complaint ¶¶10-13). The Complaint alleges both that Beneficial is "a personal credit institution" and that it is a "depositary bank" (Complaint ¶¶10 & 63).

One of Ruhland's duties as bookkeeper was to open the mail addressed to Plaintiff at Plaintiff's office. On a number of occasions, Ruhland took checks payable to Plaintiff, and applied a rubber stamp containing Plaintiff's name and address to the back of the check (Complaint ¶¶17-19).[1] Plaintiff asserts that it was unaware that Ruhland had the stamp and did not approve of the use of it (*id*. ¶ 20). The checks at issue did not otherwise have any additional indorsement by Plaintiff (*id*. ¶ 21). Ruhland mailed the checks at issue to either WaMu or Beneficial, in an envelope addressed to that Defendant, along with a payment coupon for her account provided to her by that Defendant (*id*. ¶ 22). Despite the fact that the checks were payable to and indorsed by Plaintiff corporation, Defendants processed the checks sent to them by Ruhland in this fashion, and credited their accounts for Ruhland for a payment in the amount of the so-called diverted checks (*id*. ¶ 24-28).

In 2007, Ruhland pled guilty to grand larceny in the second degree and was imprisoned in 2008 (Complaint ¶¶34-35). She also confessed judgment in Plaintiff's favor in the amount of $431,278.67 (*id.* ¶36). Of that amount, Ruhland paid $75,000 in restitution (*id*. ¶ 38). Plaintiff filed the instant action on September 2, 2008, alleging a loss in excess of $500,000 (Complaint ¶ 42). The Complaint contains three causes of action against each Defendant: 1) money had and received; 2) common law conversion; and 3) conversion under Uniform Commercial Code § 3-419 (1).

Beneficial served a motion to dismiss for failure to state any causes of action. WaMu also served a motion to dismiss on the same basis and, in an affidavit of counsel,

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[1] The stamp stated: "SPS Temporaries, Inc./135 Delaware Ave./3rd Floor/ Buffalo, New York 14202."

adopted the arguments set forth in the memorandum of law submitted by Beneficial. The parties waived oral argument and, on the return date, the Court reserved decision. Thereafter, the Court received a request from counsel for WaMu for leave to submit a late reply brief. A member of the Court staff informed counsel for Defendant WaMu that the Court would accept such a brief if all parties consented and, if they did not, would permit WaMu a second chance to present oral argument. Not having heard back from WaMu's counsel, on January 22, 2009, a member of the court's staff contacted counsel and was informed that the other parties had not stipulated to submission of further papers, and that WaMu would not be requesting a second date for oral argument. The matter was then taken under submission.

DISCUSSION

Standard of Review

The Court of Appeals has held: "Under modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists . . .. Modern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633-634, 636 [1976] [internal citations omitted]). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (see *Foley v D'Agostino*, 21 AD2d 60, 64-65; Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:24, p. 31; 4 Weinstein-Korn-Miller, NY Civ Prac, ¶ 3211.36)" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "On a motion to dismiss pursuant to

CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]).

The Court will address the contentions of Beneficial in the order in which they were made.[2]

Defendants as Holders in Due Course

Initially, Beneficial contends that all of Plaintiff's causes of action are barred as a matter of law because it is a holder in due course. WaMu joins in that contention.[3]

Under the UCC:

> (1) A holder in due course is 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 § 3-302). Thus, in order to be a holder in due course, one must first be a holder. Also, if an entity establishes that it is a holder in due course, that entity:

> . . . .takes the instrument free from
> (1) all claims to it on the part of any person; and

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[2] In its reply brief, Beneficial appears to concede that, only for the purposes of this motion, Plaintiff has sufficiently alleged that Beneficial was not a holder (i.e. that the indorsement was forged) and that Plaintiff received the checks (i.e. that, contrary to Beneficial's moving brief, part II, A, Beneficial concedes for the purposes of this motion only that Plaintiff sufficiently alleged that it "owned" the checks).

[3] WaMu has effectively filed a "me too" motion, alleging that it is entitled to the same relief as Beneficial, for the same reasons (*see* Charlton Affid. ¶ 4).

> (2) all defenses of any party to the instrument with whom the holder has not dealt except
> (a) infancy, to the extent that it is a defense to a simple contract; and
> (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
> (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
> . . . .
> (e) any other discharge of which the holder has notice when he takes the instrument.

(UCC § 3-305).

An entity in possession of an instrument indorsed "in blank" generally is considered to be a "holder" (*see* UCC § 1-201 [20]). An indorsement in blank is one that does not state an indorsee; for example, if the indorsement consists only of the payee's "signature", it is an indorsement in blank (*see Hagedorn & Bailey, Brady on Bank Checks* ¶7.06). Under UCC 1-201, a signature includes "any symbol executed or adopted by a party with present intention to authenticate a writing" (UCC § 1-201 [39]), and includes a stamp mark (*see* UCC Official Comments to Section 1-201 [39]).[4] It is well settled that, where checks are indorsed in blank, they become bearer instruments and are negotiable by delivery alone (*see* UCC § 3-204 [2]; *Franzese v Fidelity New York FSB*, 214 AD2d 646 [2nd Dept 1995]).

However, under the circumstances as alleged by the Complaint, a forged indorsement could not make Beneficial or WaMu a "holder". That is because in order for an

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[4] The Comment to UCC 1-201 (39) provides in pertinent part: "The inclusion of authentication in the definition of 'signed' is to make clear that as the term is used in this Act a complete signature is not necessary. Authentication may be printed, stamped or written;. . .. **The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing".** (emphasis supplied)

indorsement to negotiate an instrument from a payee – here, Plaintiff – to another – here, Beneficial or WaMu – the indorsement "must be written by or on behalf of the holder", here Plaintiff (UCC § 3-202 [2]).[5] Plaintiff asserts that it did not know that Ruhland had a stamp with its name and address, and did not approve of her use of it, i.e. did not authorize her use of it to indorse checks (Complaint ¶¶19-21; *Rovello*, 40 NY2d at 634). "[A] forged indorsement, since it is an unauthorized signature (Uniform Commercial Code, § 1-201, subd [43]), in and by itself would be 'wholly inoperative' (Uniform Commercial Code, § 3-404, subd [1])" to negotiate a check (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Chemical Bank*, 57 NY2d 439, 444 [1982]).[6]

Thus, as contended by Plaintiff, taking all facts as alleged in the Complaint as true, as the Court must on a motion to dismiss, Plaintiff has sufficiently alleged that the indorsement on the checks of its customers by Ruhland was a forgery, i.e. it had not authorized her to indorse the checks or adopted the indorsements as its own. Plaintiff thereby sufficiently alleges that Beneficial/WaMu are not holders in due course, and Defendants have not established as a matter of law that they were. The motions insofar as based upon that alleged status must be denied.

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UCC § 3-202 states in pertinent part: "1) Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery. (2) **An indorsement must be written by or on behalf of the holder** and on the instrument or on a paper so firmly affixed thereto as to become a part thereof. . . .

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UCC § 1-201 (43) provides that an "'Unauthorized' signature or indorsement means one made without actual, implied or apparent authority and includes a forgery."

Plaintiff's Standing

Next, Beneficial contends that Plaintiff lacks standing to bring a cause of action for money had and received or for conversion against it.

The elements of a cause of action for money had and received are:

> **(1) defendant received money belonging to plaintiff**; (2) defendant benefitted from the receipt of the money; and (3) under principles of good conscience, defendant should not be allowed to retain the money

(*Fesseha v TD Waterhouse Investor Services, Inc.*, 193 Misc 2d 253, 260 [(Sup Court NY County 2002], *aff'd* 305 AD2d 268 [1st Dept 2003]). In addition, one of the key elements of conversion is that the plaintiff have a possessory right or interest in the property (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]).

The Court of Appeals has recognized that,

> in creating a statutory right to bring a conversion action for payment over a forged indorsement (see, UCC 3-419 [1] [c]) at the time of the Uniform Commercial Code's enactment, the Legislature did not intend to abrogate the payee's pre-Code common-law rights to sue in assumpsit, for money had and received or unjust enrichment

(*State v Barclays Bank of New York, N.A.*, 76 NY2d 533, 540 [1990], citing *Hechter v New York Life Ins. Co.*, 46 NY2d 34, 37-39 [1978]).

Initially, Beneficial asserts that where a payee does not receive a check, it has no possession of it and, therefore, no ownership interest in the check (*see State v Barclays Bank*, 76 NY2d 533, 536 [1990]). Although Beneficial asserts that *Barclays* is controlling, in fact, it can be easily distinguished from the record on this case. In *Barclays*, the dishonest accountant diverted checks drawn by his clients and made payable to the State of New York; the Court

ruled that, in order to sue the depositary bank, the State as the payee on the checks had to have had, at some point, actual or constructive possession of them (*see id*. at 537).

The Court determines that (as conceded in the reply brief) Plaintiff has sufficiently alleged that it has the standing or right to sue as a holder on the checks at issue. Under the UCC, the definition of a "holder" includes "a person who is in possession of . . . an instrument . . . drawn. . . to his order" (UCC § 1-201 [20]). Plaintiff has sufficiently alleged that it had at least constructive possession of the checks at issue, as they were received at its place of business and processed by its employee, Ruhland (*see* Complaint ¶¶17-18; *see also Lawyers' Fund for Client Protection of the State of New York v Gateway State Bank*, 239 AD2d 826, 827 [3rd Dept 1997], *appeal dismissed* 91 NY2d 848 [1997]). The motions, therefore, are denied to the extent that they are based on contentions that Plaitniff did not have possession of the checks.[7]

Plaintiff's Cause of Action under UCC § 3-419

Beneficial contends that Plaintiff's cause of action under UCC § 3-419 fails as a matter of law because liability under that provision applies only to banks. However, the case it cites in support of that proposition actually supports a conclusion that UCC Article 3 in general can apply to non-banks (*see Getty Petroleum Corp v American Express Travel Related Services Co.*, 90 NY2d 322, 328-329 [1997]; *see also* UCC § 1-201 [4] ["'Bank' means any person engaged in the business of banking"]). As stated by the Court of Appeals in *Getty*, the Uniform Commercial Code "does not distinguish between bank and nonbank holders" of checks

[7] Beneficial's contention that Plaintiff failed to allege that Defendants received any funds belonging to Plaintiff is without merit; the law that it cites in support of that contention applies only to drawers, not to payees like Plaintiff.

(*Getty Petroleum Corp.*, 90 NY2d at 328). *Getty* also notes that portions of UCC § 3-419 limit the conversion liability only of intermediary or payor banks – as opposed to other types of entities, under certain circumstances, and the Court points out that, in the case of the statute at issue there:

> [H]ad the Legislature intended to limit UCC 3-405 to banks, it might have done so in the plain language of the statute.. . . Alternatively, the Legislature might have expressed such a limitation in UCC 3-103 ("Limitations on Scope of Article").... Finally, had the Legislature wanted to limit the scope of article 3 to banks, it would not have included such a broad range of negotiable instruments within its reach, including "draft [s]" and "note[s]," representing a promise of payment by entities other than banks

(*Getty Petroleum Corp. v American Exp. Travel Related Services Co., Inc.*, 90 NY2d at 328 -329).

In any event, as alleged by Plaintiff, Ruhland's account was originally with BFC. HSBC Bank Group acquired BFC in 2003, and continued the portion of its business relevant to this action under its subsidiary, Defendant Beneficial New York, Inc. (Complaint ¶¶10-13). The Complaint alleges that Beneficial is both "a personal credit institution" and a depositary bank (Complaint ¶¶10 & 63). Because this is a motion to dismiss, and because Beneficial submits no conclusive proof in admissible form that it is not a "bank"as defined under the UCC (*see e.g.* CPLR 3211 [a] [1]), the motion is denied to the extent that it contends that Beneficial has no liability under UCC § 3-419 because it is not a bank.[8]

Conversion Claims Time-Barred in Part

Beneficial contends that the second and third causes of action for conversion under the common law and the UCC, respectively, are in part time-barred. Under CPLR 214(3),

[8] There appears to be no assertion that Defendant WaMu is not a bank.

Plaintiff had three years from the date of deposit of the checks at issue to sue on a cause of action for conversion (*see Jones v Community Bank of Sullivan County*, 306 AD2d 679, 680 [3rd Dept 2003]). Beneficial also contends that, to the extent that the cause of action is time-barred with respect to all checks deposited more than three years prior to the commencement of the action, those claims cannot be effectively "re-cast" as claims for money had and received, which have a longer statute of limitations (*see* CPLR 213 [2]; *see also New Windsor Assocs. v Norstar Bank of Hudson Valley, N.A.*, 114 AD2d 1017, 1018 [2d Dept 1985]).

It is well settled that the statute of limitations on a cause of action for money had and received, being one "of quasi-contract or of contract implied-in-law" (*County of Niagara v Town of Royalton*, 48 AD3d 1072 [4th Dept 2008] [internal citation omitted]) is six years. Further, the Court of Appeals has in fact explicitly held that, even after the promulgation of the UCC, where a payee sues on a check that was paid on a forged indorsement, the payee may elect to sue in conversion or under a cause of action for money had and received, with a longer statute of limitations (*see Hechter v New York Life Ins. Co.*, 46 NY2d 34, 38-39 [1978]; *see also State v Barclays Bank of New York, N.A.,* 76 NY2d at 540). *New Windsor Associates*, a case cited by Beneficial, involved a plaintiff's assertion of both a cause of action in conversion and based upon an alleged bailment, against a defendant not in privity with the plaintiff; the Court dismissed the bailment cause of action, stating:

> The record before us is insufficient to establish the creation of a bailment contract [or] any other contractual relationship between the parties. Inasmuch as plaintiff partnership did not even have an account at defendant bank, it is difficult to conceive on what basis plaintiff seeks to convert a simple conversion action into a contract action (*cf. Baratta v Kozlowski*, 94 AD2d 454 [2nd Dept 1983]).

(*New Windsor Assoc. v Norstar Bank of the Hudson Valley, N.A.*, 114 AD2d 1017, 1018 [2nd Dept 1985], citing *Baratta*, 94 AD2d at 464 [finding it well settled that a plaintiff may elect to waive a conversion claim and sue instead in "assumpsit or quasi contract"]). The only way to reconcile *New Windsor* with *Hechter*, a controlling precedent, is to conclude that New Windsor Associates failed to assert any cause of action for money had and received, not that it did not have the right to do so.

Based upon the above, the motions are denied to the extent that they seek dismissal of the cause of action for money had and received with respect to any diverted checks deposited by Ruhland more than three years prior to the commencement of the action, but granted with respect to any causes of action for conversion of those same checks.

The motions are, therefore, granted only insofar as Plaintiff asserts causes of action for conversion based upon checks deposited more than three (3) years prior to the commencement of the action, but are denied in all other respects. Plaintiff shall prepare the order and settle it with Defendants.

DATED: April 7, 2009

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HON. JOHN M. CURRAN, J.S.C.