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COURT OF APPEALS
STATE OF NEW YORK

GOLDEN,
Respondent,

-against-

No. 71

CITIBANK, N.A.,
Appellant.

20 Eagle Street
Albany, New York 12207
March 25, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 71?

2 (Pause)

3 CHIEF JUDGE LIPPMAN: Go ahead. Do you - -
4 - you have any - - - you want rebuttal time?

5 MR. GLICKMAN: Two minutes, please, Judge.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
7 ahead.

8 MR. GLICKMAN: May it please the court, I'm
9 Barry Glickman. I'm a partner at Zeichner, Ellman &
10 Krause, attorneys for defendant/appellant Citibank,
11 N.A.

12 CHIEF JUDGE LIPPMAN: Counsel, let me ask
13 you a question?

14 MR. GLICKMAN: Yes.

15 CHIEF JUDGE LIPPMAN: Isn't this the most
16 basic principle that when a - - - you go into a - - -
17 a layperson goes into the bank, and gets a bank
18 check, that they can count on that check. Isn't that
19 a - - -

20 MR. GLICKMAN: No.

21 CHIEF JUDGE LIPPMAN: No, that's not a
22 basic prin - - -

23 MR. GLICKMAN: No.

24 CHIEF JUDGE LIPPMAN: So the average person
25 is wrong if they think when they go into the bank,

1 this is almost the equivalent of cash. This is - - -
2 this is why often when you're making a major
3 transaction, you know, you're told by whoever it is
4 that you're dealing with, I'll only deal with a
5 cashier's check from the bank. They all don't
6 understand what - - - what those checks are?

7 MR. GLICKMAN: Sadly, you know, the law is
8 arcane.

9 CHIEF JUDGE LIPPMAN: Sadly for who?

10 MR. GLICKMAN: Sadly the law is arcane.
11 But the law is the law, and you form - - -

12 JUDGE PIGOTT: Do you charge for this
13 check?

14 MR. GLICKMAN: I'm sorry?

15 JUDGE PIGOTT: In other words, if I come
16 into your bank, and say I want a cashier's check for
17 300,000 dollars, do I have to pay for the check?

18 MR. GLICKMAN: Perhaps.

19 JUDGE ABDUS-SALAAM: There's a fee, yeah.

20 MR. GLICKMAN: Perhaps.

21 JUDGE PIGOTT: Do you know? I mean, if - -
22 - is there consideration for you issuing a check that
23 says this is Citibank behind it?

24 MR. GLICKMAN: Oh, between - - - as between
25 the - - - the purchaser and the bank?

1 JUDGE PIGOTT: It's a money order, right?

2 MR. GLICKMAN: There could be, under the
3 appropriate circumstances. There may not be.

4 JUDGE PIGOTT: Well, you're saying it like,
5 what difference does - - - like what difference does
6 it make? My - - - my thought is that - - - that when
7 you get a cashier's check, or when you get a money
8 order, generally speaking it's pretty good.

9 MR. GLICKMAN: But the consideration is,
10 that we're talking about here, is as between the
11 plaintiff, who is not a holder in due course, and the
12 bank. We're not talking about consideration passing
13 from the purchaser, the bank's depositor - - -

14 JUDGE PIGOTT: Well, I am. That's why I'm
15 asking the question.

16 MR. GLICKMAN: - - - of the cashier's
17 check.

18 JUDGE PIGOTT: It just seems to me that if
19 there's something special about this. If I - - - if
20 I go to Citibank and I'm not a depositor, and I say I
21 want a cashier's check, you're going to tell me I got
22 to get - - - come up with 300,000 dollars cash.
23 You're not going to rely on my bank account, right?

24 MR. GLICKMAN: Well, I - - - I'm also going
25 to tell if you are - - - if you are in a mission

1 critical situation, and this is one of the items we
2 address in our brief, you don't want to do a personal
3 check; you don't even want to do a cashier's check.
4 You do a wire transfer. And the fact is, as this
5 court recognized in Greenberg Trager several years
6 ago, that there are situations - - -

7 JUDGE PIGOTT: Some of us.

8 MR. GLICKMAN: Some of us, yes.

9 But - - - but there are situations in which
10 there's going to be a stuckee, and by the way, I
11 think what we're talking about here - - -

12 CHIEF JUDGE LIPPMAN: It's not the bank who
13 - - - it's not the bank who's the stuckee, huh?

14 MR. GLICKMAN: No, because here, we - - -

15 JUDGE GRAFFEO: What - - - what did this
16 attorney do wrong? Did this attorney do anything
17 wrong? Mr. Goldman?

18 MR. GLICKMAN: Did the attorney do anything
19 wrong?

20 JUDGE GRAFFEO: Yes.

21 MR. GLICKMAN: Well, as we point out, there
22 are - - - there are bar - - -

23 JUDGE GRAFFEO: He went in and asked - - -
24 he went in and asked for the check.

25 MR. GLICKMAN: No, no. The attorney didn't

1 ask for the check. That's the whole point. The
2 check was payable to the order of the attorney as
3 attorney. He was an escrow agent.

4 JUDGE GRAFFEO: Right, right.

5 MR. GLICKMAN: If these are funds - - -

6 JUDGE RIVERA: And he deposited - - -

7 MR. GLICKMAN: - - - then he should have no
8 interest, other than being paid - - -

9 JUDGE RIVERA: And he deposited it - - -

10 JUDGE GRAFFEO: He was - - - he was putting
11 it in his - - - he was putting it in his escrow
12 account, correct?

13 MR. GLICKMAN: He was placing it in his
14 escrow account, that's right.

15 JUDGE RIVERA: He deposited it into his
16 account, and then how many days before you figured
17 out that your - - - your account holder had missigned
18 a check?

19 MR. GLICKMAN: No, no. It was all but
20 immediate.

21 JUDGE RIVERA: Where is he in the wrong?

22 MR. GLICKMAN: It was all but immediate.

23 JUDGE RIVERA: Really? How many days? How
24 many days?

25 MR. GLICKMAN: I believe the check was

1 issued by the bank on the 29th.

2 JUDGE RIVERA: Right.

3 MR. GLICKMAN: That sa - - - later that
4 same day it recognized that the consideration failed.
5 There's no claim here that there was a late return.

6 JUDGE RIVERA: You're saying, not even
7 twenty-four hours had passed?

8 MR. GLICKMAN: There's - - - there's no
9 claim of a late return. That's the - - - there's no
10 - - - there's nothing in the record that suggests a
11 late return. Rather, the whole point here is that
12 the claim is simply that you can never stop - - - you
13 can never dishonor a cashier's check. And that's why
14 we say that the Gates decision - - -

15 CHIEF JUDGE LIPPMAN: But we know you can
16 in certain circumstances. How does this fit into the
17 circumstances - - -

18 MR. GLICKMAN: This is - - -

19 CHIEF JUDGE LIPPMAN: - - - when which you
20 can dishonor?

21 MR. GLICKMAN: Because this is precisely
22 Gates. You don't have a holder in due course. And
23 there was a failure of consideration. This is not a
24 late return case.

25 JUDGE ABDUS-SALAAM: Well, we don't know

1 that it's precisely Gates.

2 JUDGE GRAFFEO: What was this - - - what
3 was this attorney supposed to do? You want him to
4 wait longer before dispersing the monies?

5 MR. GLICKMAN: 4-213 of the Code says that
6 you have to wait until final payment. There was no
7 payment. There was nothingness.

8 JUDGE ABDUS-SALAAM: But there was
9 acceptance.

10 JUDGE GRAFFEO: So I'll ask again. What
11 was these - - - this attorney supposed to do? Call
12 you - - -

13 MR. GLICKMAN: Coordinate - - -

14 JUDGE GRAFFEO: - - - you to find out?

15 MR. GLICKMAN: No, coordinate with his own
16 bank to ascertain that there had been final payment.
17 This check was never paid, which is why it's so
18 different than any - - - than any other case except
19 for Gates. Gates is - - -

20 JUDGE GRAFFEO: So we all have to - - - we
21 all have to call our banks all the time, every time -
22 - -

23 MR. GLICKMAN: That's certainly - - -
24 that's certainly what the Code says.

25 JUDGE GRAFFEO: Is that really what - - -

1 is that really how - - - what people do in actual
2 practice?

3 MR. GLICKMAN: Then it's up to the
4 legislature to change the law.

5 JUDGE RIVERA: So why - - - why is a
6 cashier's check any different from a personal check?

7 MR. GLICKMAN: I'm sorry?

8 JUDGE RIVERA: Why is - - - why is a
9 cashier's check any different from a personal check?

10 MR. GLICKMAN: There are a variety of
11 reasons. First of all, the customer can't come into
12 the bank and stop it for any or no good reason.
13 That's the most important thing. So under the great
14 majority of the situations, the cashier's check is
15 giving you a great deal of security - - -

16 JUDGE SMITH: But - - - but if the - - -

17 MR. GLICKMAN: - - - that a personal check
18 wouldn't.

19 JUDGE SMITH: But if the customer's - - -
20 if it turns out that the customer is not as good a
21 risk as the bank thought he was, if the customer has
22 taken the bank for a ride, then the bank - - - that's
23 what happened here essentially. The bank can stop
24 the check.

25 MR. GLICKMAN: But that's the notion of

1 failure of consideration. That's - - - that's - - -

2 JUDGE SMITH: But isn't - - - but isn't the
3 whole point of, say, the car dealer, who says you're
4 not driving this car out of this lot until I see a
5 cashier's check, isn't - - - doesn't he reasonably
6 think that he's not taking the risk of your solvency
7 or your integrity?

8 MR. GLICKMAN: Not under the Code, no.

9 JUDGE GRAFFEO: Well, under - - -

10 MR. GLICKMAN: No, that's precisely why,
11 without there being final payment, you can't have a
12 claim - - -

13 JUDGE ABDUS-SALAAM: Well, counsel, is it -
14 - - is it - - -

15 MR. GLICKMAN: - - - against the bank. And
16 this is - - - and this is - - - and this is exactly
17 why we keep on pointing to two sections of the Code.
18 There's 3-306 and 3-408, upon which - - - upon which
19 Gates is decided. Gates is identical. It's - - -

20 JUDGE ABDUS-SALAAM: The case is not - - -

21 CHIEF JUDGE LIPPMAN: Why isn't Gates just
22 - - - why isn't Gates just wrong?

23 JUDGE READ: Thank you.

24 CHIEF JUDGE LIPPMAN: Why isn't it dead
25 wrong?

1 MR. GLICKMAN: Well, okay, what about every
2 - - - and I'll ask you - - -

3 CHIEF JUDGE LIPPMAN: It's not binding on
4 us, is it?

5 MR. GLICKMAN: Your Honor, if I may ask you
6 a question then. Are you suggesting that every case
7 where there's fraud is similarly wrong? There's a
8 long line of cases - - -

9 CHIEF JUDGE LIPPMAN: No, no.

10 JUDGE ABDUS-SALAAM: This isn't exactly
11 Gates, though, because in Gates, the Third Department
12 denied summary judgment to both sides and said, in
13 part, because Gates' status, there was some question
14 about Gates' status.

15 And you mentioned the defenses. But - - -
16 and you say final payment, but doesn't the UCC also
17 say acceptance? And if - - - and I tried to figure
18 out what was the problem with Gates' status, because
19 it does seem exactly like Mr. Golden's here, but the
20 UCC also says that a person who is not a holder in
21 due course, if they've changed their position in good
22 faith, and reliance upon acceptance of the check, and
23 I'm not sure; this is one of my questions.

24 Are you saying final payment is acceptance
25 or is acceptance different than final payment?

1 MR. GLICKMAN: Final payment is different.
2 Final payment is payment. Here there was no payment
3 at all. You may have - - -

4 JUDGE ABDUS-SALAAM: So if - - - if the UCC
5 says acceptance, and a change in a position in good
6 faith on reliance of acceptance, then why shouldn't
7 we say - - - why couldn't we say here that Mr. Golden
8 changed his position in reliance on your issuing or
9 Citibank issuing this check?

10 MR. GLICKMAN: In doing that, you're
11 undoing every one of the cases that suggests that
12 there is a defense under fraud for example. The
13 whole point is, this is judicially created law based
14 on Code provisions. And the Code provisions here are
15 that there is a defense of consideration. And - - -
16 and - - -

17 JUDGE PIGOTT: But if there's - - -

18 MR. GLICKMAN: And - - - excuse me - - -

19 JUDGE PIGOTT: Okay.

20 MR. GLICKMAN: - - - but you bring up the
21 issue in Gates. Here, the court - - - the Supreme
22 Court denied summary judgment because there wasn't
23 enough evidence. The Appellate Division reversed it
24 and didn't even address the issue of plaintiff's
25 status as not a holder in due course.

1 I'm sorry, Judge.

2 JUDGE SMITH: But why isn't the plaintiff a
3 holder in due course?

4 JUDGE ABDUS-SALAAM: He's not.

5 MR. GLICKMAN: He gave no value. He's an
6 escrow agent. The Crossland case that we identify in
7 our brief - - -

8 JUDGE SMITH: I see, so you - - - I mean,
9 you - - - so assume the - - - assume you didn't have
10 the attorney/client factor here. Suppose this - - -
11 this had been given directly to whoever the, I guess,
12 the seller is in this real estate deal, then that - -
13 - that person would be a holder in due course?

14 MR. GLICKMAN: If there was consideration -
15 - -

16 JUDGE SMITH: Well, yeah - - -

17 MR. GLICKMAN: - - - you know, if there was
18 value given.

19 JUDGE SMITH: And if, well - - -

20 JUDGE GRAFFEO: They sign - - - they give a
21 - - - they sign the deed. They transfer the deed.

22 MR. GLICKMAN: If that was the party
23 bringing the law suit and those were the facts, but
24 that's pure speculation, - - -

25 JUDGE RIVERA: Coun - - - coun - - -

1 MR. GLICKMAN: - - - because here we know
2 that he was an escrow agent.

3 JUDGE RIVERA: Counsel, if - - - if the
4 court disagrees with you, if we hold against you, and
5 don't - - - don't adopt sort of this analysis that
6 you have, how, if at all, will Citibank change its
7 practices?

8 MR. GLICKMAN: I can't tell you how
9 Citibank is going to change its practice, but what's
10 going to ultimately happen is, you're now digging
11 into the claims that the parties might have as
12 against each other, and they're simply looking at a
13 bank as a deep pocket.

14 The bank simply issued its own funds.
15 That's why when counsel and other cases refer to
16 sections of the Code that refer to stop payments.
17 Stop payments are the funds of the bank customer.
18 This is the bank's money. The bank is the one that's
19 going to take a hit.

20 JUDGE RIVERA: But - - -

21 MR. GLICKMAN: And in this particular case
22 - - -

23 JUDGE RIVERA: So how would you - - - so
24 would you not then choose to only issue a cashier's
25 check when you got the funds?

1 MR. GLICKMAN: But we'll never know.

2 JUDGE RIVERA: And what's wrong with that?

3 MR. GLICKMAN: But we'll never know if we
4 have the funds at the time, because there - - -

5 JUDGE GRAFFEO: Well, why don't - - - why
6 don't you wait and say, I can't issue the cashier's
7 check until I check. Because you're just saying the
8 attorney shouldn't issue the check out of the escrow
9 account until he checks.

10 MR. GLICKMAN: Well - - -

11 JUDGE GRAFFEO: Maybe the bank shouldn't
12 issue a cashier's check until they know they have the
13 funds.

14 MR. GLICKMAN: The answer to Judge Rivera's
15 question may be that this is the slippery slope where
16 banks won't issue cashier's checks anymore - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. GLICKMAN: - - - and require that
19 people use wire transfers.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 You'll have your rebuttal.

22 MR. GLICKMAN: Thank you, Judge.

23 CHIEF JUDGE LIPPMAN: Let's hear from your
24 adversary.

25 MR. GOLDEN: May it please the court. It's

1 quite interesting that counsel refers to the ability
2 to stop payment on a cashier's check and that the
3 bank shouldn't - - - that the payee shouldn't rely
4 upon it, when in their papers, they clearly indicate
5 that Citibank deposited - - - or had a deposit from
6 the BNB Bank payable to XOX Solutions. That was a
7 cashier's check.

8 That check apparently was deposited into
9 the account of XOX Solution. Unfortunately, it was
10 endorsed by the individual, rather than as an officer
11 of the corporation. It appears that Citibank relied
12 upon that check. Just as I relied upon the check
13 that they gave me.

14 JUDGE ABDUS-SALAAM: So, Mr. - - - Mr.
15 Golden, what's your position on the interplay between
16 UCC 3-306 with the defense of lack of consideration,
17 and 3-418, which says, even you - - - if you're not a
18 holder in due course, and I think you agree you're
19 not, that a person who changes a position in good
20 faith, and reliance on acceptance, should be able to
21 do that and - - - and prevail, I guess.

22 MR. GOLDEN: Your Honor - - -

23 JUDGE ABDUS-SALAAM: So what's your - - -
24 your position on that?

25 MR. GOLDEN: There are a number of issues

1 here. Number one, Article 3 of the UCC deals
2 primarily with negotiable instruments where the
3 negotiable instrument is transferred to a third
4 party, as in Gates. In the case at bar, there was no
5 transfer of - - - of the - - - the cashier's check.
6 It was payable to Golden. It wasn't transferred from
7 Golden.

8 The - - - the case of Dziurak states very
9 clearly from the Court of Appeals back in 1978, that
10 a bank must honor its cashier's check. It's payable
11 directly to the payee, and they are responsible to
12 pay. How - - -

13 JUDGE PIGOTT: Well, the irony here, as I
14 understand it - - -

15 MR. GOLDEN: Yes.

16 JUDGE PIGOTT: - - - is that this got
17 corrected, right? I mean, once they found out that
18 the - - - that the signature was wrong, they went
19 back and they - - - and they corrected the signature
20 on the - - - on the cashier's check.

21 MR. GOLDEN: Correct.

22 JUDGE PIGOTT: And the only one to suffer
23 in this whole thing is you. You're out of trust, and
24 all of a sudden, you're blown into the grievance
25 committee.

1 MR. GOLDEN: That's right, Your Honor.
2 Now, curiously, even though the bank received the
3 proper endorsement and the funds were deposited into
4 XOX Solutions, they originally indicated that the
5 reason they weren't going to pay the cashier's check
6 is now the customer, the remitter, is saying that
7 there was a change of plans, there was a new
8 arrangement.

9 Now, they're saying that, in essence, that
10 the customer stopped payment on the cashier's check.
11 However, in their reply brief, they're saying, no,
12 we're not saying that. So, I'm not sure what their
13 position is with regard to that.

14 JUDGE SMITH: Is there a difference between
15 the customer stopping payment and the cust - - - and
16 the customer essentially stiffing the bank? The
17 customer didn't stop payment. It just made - - - it
18 made clear that it wasn't making funds available to
19 cover it.

20 MR. GOLDEN: Well, in this case, Your
21 Honor, there was - - - there was no attempt - - -
22 there was no fraud. The - - - the customer relied
23 upon a check from BNB Bank. That - - - that - - -
24 those funds were deposited into the account of XOX
25 Solutions. And ultimately the - - - the check was

1 paid from BNB Bank. So there was no attempt by the -
2 - -

3 JUDGE SMITH: And then - - - then when they
4 got another check that said, you know what, we
5 changed our mind. We're not sending it to Golden
6 after all. We're sending it to my sister-in-law or
7 somebody.

8 MR. GOLDEN: They can't do that.

9 JUDGE SMITH: Yeah, I - - - yeah. Suppose
10 - - - suppose there had been good old fashioned
11 fraud. Suppose that the - - - was it - - - Mrs.
12 Zheng - - - had actually defrauded the bank into
13 issuing the cashier's check. Would that change the
14 result?

15 MR. GOLDEN: By all means, Your Honor.
16 Banco Di Roma v. Merchants Bank of New York, which
17 was decided in the Second Department in 1983, clearly
18 indicates that there's an exception to the rule. And
19 the courts have consistently recognized that
20 exception since 1983, that a bank does have the right
21 to stop a payment in the event of a fraud.

22 JUDGE SMITH: So if I - - - if I defraud -
23 - - I'm still hung up on my buying this car. If I
24 defraud my bank into giving me a cashier's check to
25 my car dealer, and I take this cashier's check,

1 looking perfectly good on its face to the dealer and
2 hand it to him, and take the car, the dealer's out of
3 luck?

4 MR. GOLDEN: Is the dealer - - - is the
5 dealer out of luck?

6 JUDGE SMITH: Yeah.

7 MR. GOLDEN: In the event of a fraud? Yes.

8 JUDGE SMITH: Yeah, even - - - even though
9 the dealer didn't do anything wrong. I'm the crook.

10 MR. GOLDEN: Yeah, yeah, you are. And - -
11 - and the - - - the bank would have a right not to
12 pay.

13 JUDGE SMITH: Aren't there cases, at least
14 in some jurisdictions, that go farther? That say
15 even - - - even in that case, it's the bank's
16 problem? After all, you can see the logic; it was
17 the bank that dealt - - - that trusted the crook.

18 MR. GOLDEN: Well, there are numerous cases
19 where there was lack of consideration, but the courts
20 have held that that was not the basis to determine
21 whether or not the bank was liable or not. They've
22 held consistently that the bank is liable - - - is
23 liable - - - even if there's no consideration.

24 And it's interesting, Your Honors, that the
25 - - - the case of Turbine v. - - - Turbine Federal

1 Credit Union v. Amsterdam Federal Savings and Loan
2 Association was decided in 1996. That was also in
3 the Third Department. And there the bank did not
4 receive consideration. If they had followed Gates,
5 they could have easily said, no - - - lack of
6 consideration, the check is - - - is not an
7 obligation of the bank, because the bank didn't
8 receive payment.

9 But instead, the court looked into the
10 question of whether or not there was fraud. In the
11 case of Taboada which was a Suffolk County case, but
12 cited in Abilities and Mendelsohn, and even in the
13 Appellate Division in Golden v. Citibank, Toboada is
14 a situation very similar to the situation you're
15 suggesting, Your Honor.

16 There it was a - - - an auto mechanic who
17 made repairs, received a personal check, went to the
18 bank and exchanged that check for a cashier's check.
19 There the bank didn't receive payment for the
20 cashier's check, yet they issued the cashier's check
21 and the court held that they were obligated to pay
22 that cashier's check because there was no evidence of
23 fraud.

24 JUDGE GRAFFEO: So - - - so between the
25 banks and the transactions here, what's the rule

1 you're asking us to adopt?

2 MR. GOLDEN: Between the bank and the
3 payee?

4 JUDGE GRAFFEO: Yeah, what's - - -

5 MR. GOLDEN: The bank is obligated - - -

6 JUDGE GRAFFEO: What are you asking us to
7 do? What's the remedy and what's the rule we're
8 going to articulate so that banks and depositors have
9 some idea of what to do in the future to avoid this?

10 MR. GOLDEN: I'm asking this court to
11 recognize the decision in Dziurak, where the court
12 clearly said there's a primary obligation to pay a
13 cashier's check. The only exception would be in the
14 Matter of Banco Di Roma, where there's fraud, and
15 then there was a - - - an expansion of that in the
16 Matter of Hart v. North Fork Bank, where the court
17 said, if there was a forgery, if the check was stolen
18 or lost, the bank can also stop payment.

19 JUDGE GRAFFEO: So your adversary says if
20 we were take that position that banks then won't be
21 issuing cashier's checks.

22 MR. GOLDEN: Your Honor, we've been - - -

23 JUDGE GRAFFEO: Is that a good or a bad
24 thing or - - -

25 MR. GOLDEN: It's a terrible - - -

1 JUDGE GRAFFEO: - - - you have to wait for
2 your cashier check?

3 MR. GOLDEN: It's a terrible thing. We've
4 been relying on cashier's checks for a great long
5 period of time. The cashier's checks avoid the
6 necessity of bringing cash to a real estate closing
7 or any kind of commercial transaction.

8 JUDGE SMITH: But why isn't the wire
9 transfer a perfectly good substitute?

10 MR. GOLDEN: It is - - - it is a
11 substitute, Your Honor, but there are cases where a
12 cashier's check, the physical check, has its
13 significance and it's important to have a copy of the
14 check showing that the funds were - - - were actually
15 delivered.

16 JUDGE GRAFFEO: But a real estate closing,
17 you might not know if the property's going to close.
18 There could be other problems and the transfer of
19 title doesn't occur. So you might not want to wire
20 the money before the closing. Correct?

21 MR. GOLDEN: That's correct.

22 JUDGE GRAFFEO: I mean, sometimes the
23 closings fall apart and they're adjourned.

24 MR. GOLDEN: That's right. And then - - -
25 and then the question is - - -

1 JUDGE GRAFFEO: That's why you have the
2 cashier's check made out to you as purchaser - - -

3 MR. GOLDEN: Right.

4 JUDGE GRAFFEO: - - - instead of to the
5 seller, right?

6 MR. GOLDEN: Correct. There would be a
7 problem as to when the wire transfer would go
8 through. The - - - the commercial community relies
9 on cashier's checks. It's a - - - it's a very
10 valuable instrument. The banks have created this
11 instrument to assure payment, and - - - and to
12 protect the payee. The courts have taken an
13 exception to this rule, and they've - - - they've
14 recognized broad - - -

15 JUDGE ABDUS-SALAAM: Why wouldn't a
16 certified check be a - - -

17 MR. GOLDEN: Pardon me, Your Honor?

18 JUDGE ABDUS-SALAAM: Why wouldn't a
19 certified check be a good substitute?

20 MR. GOLDEN: Well, a certified check is
21 still the obligation of the drawer. In a cashier's
22 check, the obligation now becomes the obligation of
23 the bank, not the drawer.

24 JUDGE ABDUS-SALAAM: But in a certified
25 check, the bank is certifying that there are funds in

1 the depositor's account; otherwise the check wouldn't
2 be certified, right?

3 MR. GOLDEN: That's - - - that's correct,
4 Your Honor. But a cashier's check provides that
5 additional protection, because now it's not the - - -
6 it's not the drawer that - - - well, now the drawer
7 is the bank. The bank makes a personal obligation to
8 the payee to pay. The bank becomes both the drawer
9 and the drawee under 3-410(1). And that gives the
10 payee even greater assurances of payment.

11 JUDGE PIGOTT: Well, when you - - - when
12 you do your real estate closings - - - I mean, when
13 you - - - when you say that the payment's due at the
14 closing, you - - - you ask for cash or certified
15 funds?

16 MR. GOLDEN: Cashier's check.

17 JUDGE PIGOTT: Is that part of your - - -
18 is that - - -

19 MR. GOLDEN: Yes.

20 CHIEF JUDGE LIPPMAN: Okay. Thanks,
21 counsel.

22 MR. GOLDEN: Thank you, Your Honor.

23 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

24 MR. GLICKMAN: Yes, thank you, Judge. I
25 just wanted to touch on several points. First of

1 all, to your point about how plaintiff was the only
2 one who was damaged, I think you said, because he was
3 out of trust, and because he - - - he was reported -
4 - - or the grievance committee got into his hair.
5 Two things: it is - - - they - - - or the record,
6 but the transactions between the parties themselves
7 have been consummated. This - - -

8 JUDGE PIGOTT: Yeah, but that's a huge deal
9 to be blown into the grievance committee whether
10 you're innocent or not.

11 MR. GLICKMAN: But - - - but - - - but wait
12 a second, Judge. What coun - - - what plaintiff
13 seeks in this action is the 300,000 dollars. It's
14 not his money, and it's now - - -

15 JUDGE RIVERA: You're saying he's no longer
16 entitled to it, but - - - but if it's paid over to
17 him, isn't that then about you and XOX's president or
18 vice-president - - - whatever she was - - - resolving
19 that, or her resolving that with his client? Right
20 now it's about a check that you put your name and
21 your funds behind, he says.

22 MR. GLICKMAN: But what he is seeking in
23 this action is the return of the 300,000.

24 JUDGE RIVERA: Well, all right.

25 MR. GLICKMAN: That's what this first cause

1 of action is.

2 JUDGE SMITH: But he's clearly - - - he's -
3 - -

4 MR. GLICKMAN: The first cause of action
5 towards summary - - -

6 JUDGE SMITH: But he's clearly acting as a
7 fiduciary. He's not going to take the 300,000 and
8 spend it on a new house for himself. He's got to
9 account to his clients.

10 MR. GLICKMAN: Again, he's not a holder in
11 due course. There's nobody to give it to. There's
12 been discovery since then, and it's on the record.

13 JUDGE SMITH: But why can't - - - why can't
14 - - - why can't someone acting in a fiduciary
15 capacity be a holder in due course?

16 MR. GLICKMAN: Because as the Crossland - -
17 - Crossland section - - - Crossland case says, he
18 gives no value for it. He gives no value for it.

19 If I could, since my time is limited, I
20 just - - - I just wanted to touch on several things.
21 The Turbine case specifically recognizes Gates and
22 says, that one who is not a holder in due course
23 sakes - - - takes subject to all defenses.

24 To your point about what might happen at a
25 closing, you're not giving somebody the keys.

1 There's title insurance, and if there is a failure of
2 consideration, because of fraud or lack of - - -

3 JUDGE PIGOTT: Oh, no, you're giving them
4 the keys. You're giving them the keys.

5 MR. GLICKMAN: But the title - - -

6 JUDGE PIGOTT: At the closing, you're
7 giving them the keys, and say, feel that weight on
8 your shoulders. That's your mortgage; good-bye.

9 MR. GLICKMAN: And the title company will
10 satisfy if there is going to be an issue with a
11 failure of consideration or fraud, which ultimately
12 stopped the check. And - - -

13 JUDGE ABDUS-SALAAM: Counsel, I - - - I
14 would like to go back to something, you know, again,
15 about the UCC, because you seem to be relying on the
16 UCC - - -

17 MR. GLICKMAN: Yes.

18 JUDGE ABDUS-SALAAM: - - - for your
19 position. So the UCC does say lack of consideration
20 is a defense to a non-holder in due course, but the
21 UCC, as I mentioned before, also says if someone who
22 is not - - - a person, who gets one of these
23 cashier's checks or cert - - - checks, and then
24 relies - - - changes his or her position in reliance
25 on that check in good faith, why can't they prevail

1 without having to pay consideration?

2 MR. GLICKMAN: If that is the plaintiff's
3 position, then he can establish that during
4 discovery. That certainly isn't the case here.

5 JUDGE PIGOTT: Why? Why wouldn't he have
6 relied on it for the point that he paid money out of
7 his trust account, thinking that that money was
8 there, and then he's out of trust 100 and some
9 thousand dollars?

10 MR. GLICKMAN: But that goes to the return
11 of the 300,000. He's not - - -

12 JUDGE PIGOTT: No, it's reliance. I'm just
13 talking - - - I'm picking up on what Judge Abdus-
14 Salaam is suggesting.

15 MR. GLICKMAN: But - - -

16 JUDGE PIGOTT: There is reliance.

17 MR. GLICKMAN: But that refers to the
18 payment on the check. We're not talking about
19 plaintiff's right to sue for damages. We're talking
20 about a lawsuit brought - - -

21 JUDGE PIGOTT: But we are, because you - -
22 - okay.

23 MR. GLICKMAN: I'm sorry.

24 JUDGE PIGOTT: You said he can't bring an
25 action under the UCC because he's not a holder in due

1 course, and Judge Abdus-Salaam says you can if
2 there's reliance - - -

3 MR. GLICKMAN: For - - -

4 JUDGE PIGOTT: - - - and I'm suggesting
5 there's reliance, which would mean he can bring the
6 action.

7 MR. GLICKMAN: He can't sue for return of
8 the check or for - - - for payment of the proceeds of
9 the check.

10 CHIEF JUDGE LIPPMAN: Okay, counsel,
11 thanks.

12 MR. GLICKMAN: Thank you.

13 CHIEF JUDGE LIPPMAN: Thank you both.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Golden v. Citibank, N.A., No. 71, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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