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COURT OF APPEALS
STATE OF NEW YORK

CLEMENTE BROS. CONTRACTING CORP., et al.,
Appellants,
-against-
HAFNER-MILAZZO, et al.,
Respondents.

No. 64
20 Eagle Street
Albany, New York 12207
March 26, 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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So we're going to
2 start with number 64, Clemente Brothers. Counsel?

3 MR. DOLLINGER: May it please the court, my
4 name is Matthew Dollinger, the attorney for the
5 appellants herein.

6 CHIEF JUDGE LIPPMAN: Do you want any
7 rebuttal time, counsel?

8 MR. DOLLINGER: Two minutes, please, Your
9 Honor.

10 CHIEF JUDGE LIPPMAN: Two minutes, go
11 ahead; you're on.

12 MR. DOLLINGER: Thank you. The causes of
13 action in the complaint clearly address only one
14 thing and that is the line of credit. The causes of
15 action in the answer, the counterclaims address two
16 issues: the line of credit note, and the additional
17 200,000-dollar note. Notwithstanding this clear fact
18 that is supported by this record, both the Supreme
19 Court and the Appellate Division made a finding
20 relating to forged checks. Both of them are wrong.

21 CHIEF JUDGE LIPPMAN: What about - - - what
22 about notifying the - - - the bank as to improper
23 payments? What about the fourteen days? Is that - -
24 - is - - - do you - - - you argue that that's
25 unreasonable?

1 MR. DOLLINGER: I argue that that is
2 unreasonable, and more important than that,
3 inapplicable, because 4-406 is not applicable to the
4 line of credit.

5 CHIEF JUDGE LIPPMAN: Let's - - - let's not
6 go there yet. Let's talk about the fourteen days
7 first.

8 MR. DOLLINGER: Yes.

9 CHIEF JUDGE LIPPMAN: Can - - - can you - -
10 - you seem to be - - - your client, a sophisticated
11 party, you pass a resolution about the fourteen days.
12 Why - - - why isn't that okay?

13 MR. DOLLINGER: It isn't okay in this
14 instance; I won't go there right now, sir.

15 CHIEF JUDGE LIPPMAN: Yeah, yeah, let's - -
16 - keep the line of credit separate. We understand
17 that issue.

18 MR. DOLLINGER: It isn't there; it isn't
19 fair. It isn't justified. And this court had the
20 opportunity and did make a decision in 2005 in
21 Regatos v. North Fork, the predecessor-in-interest to
22 Capital One.

23 CHIEF JUDGE LIPPMAN: Right.

24 JUDGE GRAFFEO: There is some value,
25 though, to determining whether any fraud has been

1 committed in a reasonable time period, so that
2 appropriate steps can be taken, perhaps, maybe rather
3 than waiting the whole one-year period.

4 MR. DOLLINGER: I - - -

5 JUDGE GRAFFEO: If - - - if your client had
6 looked at any of these statements, would they have
7 detected the embezzlement?

8 MR. DOLLINGER: They should have been
9 capable of determining that the checks - - - various
10 checks - - - were forged. My client is not
11 necessarily a sophisticated businessperson. He is -
12 - -

13 CHIEF JUDGE LIPPMAN: But you're - - - but
14 you are a part of the modern world, the electronic
15 world, where you can check these things online. Why
16 is this not reasonable, particularly today, in terms
17 of modern technology, to be able to look at what's
18 being paid out and if there's a problem, raising it?
19 Why is - - - especially when you have a resolution
20 that says that you understand that that's the case,
21 and, you know - - - and agreed to it?

22 MR. DOLLINGER: Because our legislature has
23 appropriately passed UCC 4-406, and that clearly
24 requires notice. There are two affidavits that were
25 submitted in opposition - - - in support of the

1 motion for summary judgment. One was Mr. Lyons, and
2 one was Ms. Immerso.

3 Neither one of these people allege applying
4 only the issue of the forged checks that the copies
5 or the original of the items as defined in the UCC
6 were ever sent to the client.

7 JUDGE SMITH: Stick - - - stick with 4-406
8 for a moment. You - - - you - - - they have the one-
9 year period in there. And are you saying that the -
10 - - that the parties can't agree to change that?

11 MR. DOLLINGER: Well, they can agree to
12 change it, but fair dealing and good faith are
13 required.

14 JUDGE SMITH: But, well - - - well, before
15 you even get there, what about - - - what about the
16 statute that says that no agreement can disclaim a
17 bank's responsibility for its own failure to exercise
18 ordinary care. Would you - - - are - - - you say
19 that - - - you say that applies here?

20 MR. DOLLINGER: Absolutely. And this court
21 said it applied in Regatos, where clearly in Regatos,
22 referred to this court questions by the Second
23 Circuit Court of Appeals. This court found that the
24 fifteen days was irrelevant and unenforceable. This
25 court found that, in fact, under Regatos, clearly,

1 there were imposed certain claims that were required
2 to be satisfied. One, because it was a letter of
3 credit under 4 - - - excuse me. It was a wire
4 transfer under 4(a) in Regatos. Clearly a different
5 statute.

6 JUDGE ABDUS-SALAAM: But doesn't that,
7 yeah. The different statute, doesn't that suggest
8 that we don't have to import 4-406(a) into 4-406?
9 It's a different statute.

10 MR. DOLLINGER: I believe not, because I
11 believe that this court in 2005, in deciding Regatos,
12 clearly said that in fact there were a - - - an
13 obligation imposed that, notwithstanding that Regatos
14 deals with a - - - with a wholly different counsel -
15 - -

16 CHIEF JUDGE LIPPMAN: Counsel, using your
17 logic, wouldn't really any of the period - - -
18 periods that the industry uses, whether it be
19 fourteen days or thirty days or nine months, wouldn't
20 it really make all of those impermissible?

21 MR. DOLLINGER: No, Your Honor, I don't
22 believe so. In this instance, the change in the
23 corporate resolution - - - the fourteen-day provision
24 - - - says that it's fourteen days from the date that
25 an item is received. And that's what it means. It

1 also says, delivery or mailing, one or the other.

2 But that delivery or mailing, the fourteen
3 days, means that that fourteen days from mailing is
4 different than fourteen from the delivery. So, it
5 even doesn't have a specificity, as this court should
6 require. That is the reason why the fourteen days
7 are inapp - - - is - - - is unenforceable, we
8 suggest. However, again, we never get to that.

9 JUDGE GRAFFEO: Was - - - was there a
10 difference between the delivery and the receipt? Did
11 - - - these statements come in paper form, didn't
12 they?

13 MR. DOLLINGER: They were no statements,
14 Your Honor. There were no statements received
15 relating to the letter of credit.

16 JUDGE GRAFFEO: Well, I'm not talking about
17 the letter of credit, the checks.

18 MR. DOLLINGER: Excuse me, the line of - -
19 - line - - - line of credit. They were never
20 received. In order for them to constitute an item
21 under the UCC, they have to somehow establish - - -

22 JUDGE ABDUS-SALAAM: So are you saying,
23 counsel, that there was no indication to your client
24 that there were drawdowns from the line of credit,
25 and then deposits into the operating account - - -

1 that there was nothing indicating to your client that
2 that had happened?

3 MR. DOLLINGER: If my client were diligent,
4 if my client spent the necessary time comparing the
5 statements, he could discern it. But once that is
6 applied - - -

7 JUDGE GRAFFEO: There were can - - -
8 weren't there canceled checks? Am I misunderstanding
9 the record?

10 MR. DOLLINGER: You are misunderstanding
11 the record, and I say to you, the causes of action
12 are on the line the credit; they are not - - -

13 JUDGE SMITH: But you're not - - - you're
14 not saying there were no canceled checks?

15 MR. DOLLINGER: There were no canceled
16 checks that were delivered ever. There - - - Mr.
17 Lyons doesn't address it. Ms. Immerso says in the
18 ordinary course, there are statements - - - checks -
19 - -

20 CHIEF JUDGE LIPPMAN: You could see the
21 drawdowns, though, right?

22 MR. DOLLINGER: Excuse me?

23 CHIEF JUDGE LIPPMAN: You could see the
24 drawdowns?

25 MR. DOLLINGER: Well, you actually might be

1 able to see it, if you kept track of the amount. But
2 once you get there, under 4-406, they have to be
3 delivered. They were never - - -

4 JUDGE ABDUS-SALAAM: So your - - - your
5 position, counsel, is that the transfer from the line
6 of credit to the operating account caused you some
7 kind of injury, not the - - - not - - - not taking
8 the money from the operating account that the
9 bookkeeper did by writing checks or from the - - -
10 from the account?

11 MR. DOLLINGER: The convict - - -

12 JUDGE ABDUS-SALAAM: Is that your position?

13 MR. DOLLINGER: The convicted felon wrote
14 checks and she's serving her time. This has nothing
15 to do with checks. This has to do only - - - only
16 with the line.

17 JUDGE ABDUS-SALAAM: But if she had - - -
18 if she had just taken the money from the line of
19 credit and put it in the operating account and left
20 it there, and not written any checks, then there
21 wouldn't be any problem, would there?

22 MR. DOLLINGER: No, there wouldn't be any
23 problem, but had she done what she did and didn't put
24 those monies in the account, there wouldn't have been
25 monies to cover her forgeries. Those monies would

1 not have been there. There was inadequate sums.

2 So the client had the right, in November of
3 2008, he asked the question: what do I do with this
4 line? How does it work? And the record 143, Mr.
5 Kirpalani indicates the - - - "you will send an
6 original by fax, the original - - - a copy by fax,
7 original to follow in the mail." The exact same
8 thing that happened in Regatos.

9 CHIEF JUDGE LIPPMAN: Oh - - - okay,
10 counsel, finish - - - finish your thought - - -

11 MR. DOLLINGER: Thank you.

12 CHIEF JUDGE LIPPMAN: - - - and then - - -

13 MR. DOLLINGER: The same thing that
14 happened in Regatos. There were two conditions:
15 one, verify the - - - the signature, and two, call.
16 The jury in Regatos found there was no call.

17 CHIEF JUDGE LIPPMAN: Okay, thanks,
18 counsel.

19 MR. DOLLINGER: Thank you, Your Honor.

20 CHIEF JUDGE LIPPMAN: You'll have your
21 rebuttal. Let's hear from your adversary.

22 Counsel?

23 MS. LEVIN: Good afternoon, may it please
24 the court, Mara Levin, of Herrick Feinstein, on
25 behalf of respondents, Capital One. The case at bar

1 is emblematic of the situation that banks strive to
2 prevent, by limiting the notification period within
3 which a depositor - - -

4 JUDGE SMITH: Why - - - why - - - what's
5 wrong with the one year the UCC gave you? I mean,
6 the drawers of the UCC - - - the authors of the UCC
7 thought - - - thought that if you were negligent, the
8 client should have a year. Why - - - why is that a
9 problem?

10 MS. LEVIN: Well, nothing's wrong with the
11 - - - with the one-year period, except that there is
12 precise language contained within the UCC, 4-103,
13 that allows the provisions of Article 4 to be varied
14 by agreement, and - - -

15 JUDGE SMITH: Unless it disclaims the
16 responsibility.

17 MS. LEVIN: Unless it disclaims the bank's
18 - - -

19 JUDGE SMITH: You're saying this is not a
20 disclaimer, it's just a shortening of the time.

21 MS. LEVIN: That's exactly right, Your
22 Honor.

23 JUDGE SMITH: But - - - but isn't - - - but
24 weren't they wasting their - - - weren't they wasting
25 ink writing the year in there? I mean, every bank is

1 obviously going to shorten it.

2 MS. LEVIN: Well, I wouldn't say it was a
3 waste of ink, but sophisticated parties in a business
4 relationship, which is what we have here, can agree -
5 - - they can vary the terms - - -

6 JUDGE SMITH: Well, is that - - - is that
7 really a description of what happens when a company
8 signs a bank resolution that these are sophisticated
9 parties agreeing on a - - - on terms?

10 MS. LEVIN: Well, when a - - - when a
11 company signs a - - - agreements in connection with
12 the opening of an account, they're bound by their
13 agreement, so you can't forgive a depositor for
14 failing to read the agreement.

15 CHIEF JUDGE LIPPMAN: What is the
16 prevailing view about these kinds of shorter time
17 limits?

18 MS. LEVIN: The - - - the prevailing re - -
19 - the prevailing view is that eleven states have
20 considered this issue, and uniformly, the courts that
21 have addressed this issue on the merits, have agreed
22 that the statute of repose for - - - in 4 - - - in
23 Article 4, can in fact be shortened. And in fact, it
24 can be shortened - - -

25 JUDGE SMITH: Some commentators disagree,

1 don't they?

2 MS. LEVIN: Well, there really aren't - - -
3 I mean - - - no, fo - - - no, I wouldn't say there
4 are commentators that disagree. I would say that
5 there is - - - there was a footnote in one decision
6 in New Jersey, in which a court disagreed, but I do
7 not believe that that - - - that they - - -

8 CHIEF JUDGE LIPPMAN: What about this
9 Regatos case that your - - - your adversary points
10 to?

11 MS. LEVIN: Regatos was decided by this
12 court in 2005, and - - -

13 CHIEF JUDGE LIPPMAN: Is it applicable to
14 this situation?

15 MS. LEVIN: It is not applicable, because -
16 - -

17 CHIEF JUDGE LIPPMAN: Why not?

18 MS. LEVIN: Because it deals with Article
19 4(a). Article 4(a) was enacted in 1990 precisely
20 because the traditional principles of contract law
21 and negotiable instruments contained in Article 4 was
22 ineffective and inadequate at dealing with wire
23 transfers. And in Article 4(a) there was - - -
24 there's specific language in Article 4(a) that
25 prevents the bank from - - - from varying the

1 agreement, which would allow the customer to recover.
2 That language is not present in Article 4.

3 JUDGE SMITH: But let me - - - but let me -
4 - - but let me take you back - - -

5 JUDGE GRAFFEO: But you - - -

6 JUDGE SMITH: I'm sorry; go ahead.

7 JUDGE GRAFFEO: Your adversary says that
8 you haven't - - - the bank didn't follow all the
9 procedures that were required for the line of credit,
10 such as the notification.

11 MS. LEVIN: Okay.

12 JUDGE GRAFFEO: What's your posture on
13 that?

14 MS. LEVIN: Well, the - - - Capital One's
15 position is that in fact the two - - - the two areas
16 that my adversary has identified as lacking ordinary
17 care are not at all evidence of lacking ordinary
18 care. But the court didn't have to reach that
19 decision, because in this situation, the depositor
20 failed to identify any forged checks within fourteen
21 days.

22 JUDGE GRAFFEO: Did they - - - did they
23 give - - - did they give the notification that was
24 required?

25 MS. LEVIN: They did not give the

1 notification within fourteen days. In fact, what
2 happened here was the bookkeeper was forging checks
3 for two years. The last forged check was in December
4 of 2009.

5 In February, the - - - the depositor was
6 alerted to the fact that there may be a forged check,
7 because a bank statement from June of 2009 with an
8 allegedly forged check was found in the trunk of her
9 car.

10 At that point in time, what the depositor
11 did was go to a local branch and request three years
12 worth of bank statements, none of which he had
13 reviewed by his own admission. And then he went off
14 on vacation for a week. And then he came back, and
15 he reviewed the bank statements and then he waited
16 another twenty days, before he provided written
17 notification to the bank.

18 JUDGE SMITH: Let me - - - let me take you
19 back, if I could, to the language that is - - - that
20 does apply or that applies to this sort of thing, the
21 4-103(1). "The effect of the provision of this
22 Article may be varied by agreement except that no
23 agreement can disclaim a bank's responsibility for
24 its own failure to exercise ordinary care or can
25 limit the measure of damages for such lack or

1 failure".

2 Doesn't that - - - isn't the purpose of
3 that essentially to say the Code prescribes the rules
4 for - - - where the bank lacks ordinary care, that
5 the parties don't?

6 MS. LEVIN: No, no, Judge Smith. What - -
7 - what that - - - what that statute does is say that
8 the parties are free to vary the terms of - - - of
9 the provisions in Article 4, with two limitations,
10 one being that the bank cannot disclaim its duty to
11 exercise reasonable care and act in good faith - - -

12 JUDGE SMITH: But disclaim - - - you say
13 that the disclaim means to eliminate entirely.

14 MS. LEVIN: Eliminate it entirely, and here
15 it wasn't eliminated.

16 JUDGE SMITH: They can't - - - they can't
17 cut down the damages for it?

18 MS. LEVIN: They could limit their
19 liability. That is not - - - they're not reducing
20 the damages; they're simply limiting their liability,
21 which is proper. And here, what happened is they
22 limited their liability to fourteen days. And every
23 depositor - - - the depositor is in the best
24 situation - - -

25 JUDGE SMITH: I - - - I - - - if the

1 statute means - - - maybe I've asked this, but if the
2 statute means what you think it means, and you assume
3 the people who wrote the statute - - - who wrote the
4 one-year limitation into 4-406 or whatever it is - -
5 - were sophisticated people, wouldn't - - - didn't
6 they know that every bank in the country is, of
7 course, going to shorten the year by as much as it
8 can?

9 MS. LEVIN: I - - - I can't get into the
10 intents of the drafters, but if they did it - - -

11 JUDGE SMITH: Well, oh, come on, that is
12 what the case is about.

13 MS. LEVIN: If they did it - - - they - - -
14 if 4 - - - if 4-103, what was absent from Article 4,
15 I could understand the argument, Judge Smith, but 4-
16 103 precisely anticipated that the banks would want
17 to limit their liability, because by the banks
18 limiting their liability, it benefits the depositors.
19 The depositors can then - - -

20 JUDGE SMITH: Well, limiting - - - limiting
21 their liability they can't do. They can't limit the
22 measure of damages.

23 MS. LEVIN: But they could limit the time
24 within which a depositor can claim - - -

25 JUDGE SMITH: I guess - - - I guess what

1 I'm saying is, in light of the purpose of the
2 statute, and the fact that you have this rather
3 carefully arranged system, and what - - - what - - -
4 and maybe it's as fine - - - finely tuned as we said
5 it was in Regatos, shouldn't we read "disclaiming
6 responsibility" to include a shortening of the time
7 to assert it?

8 MS. LEVIN: I - - - I don't believe so,
9 Judge Smith, and I believe that if this court were to
10 reach that conclusion, it would be contrary to - - -
11 to the other ten states that have reached this
12 decision, and in fact, would not be in conformity
13 with the objectives of the UCC, which is to - - - to
14 encourage efficiency and finality of commercial
15 transactions through a uniform and predictable
16 application of a body of law.

17 If this court were to do that, in fact, it
18 - - - and - - - and New York were to refuse to allow
19 a shortening of that one-year statute of repose, it
20 would have - - - it would really wreak havoc on the
21 commercial banking system. And New York is - - - is
22 the center of the commercial banking system in
23 America. So if the banks in New York couldn't
24 shorten the statute - - -

25 JUDGE SMITH: Tell me - - - tell me how it

1 would wreak the havoc. What - - - what's so terrible
2 about given the - - - given the one year the Code
3 says they're supposed to have?

4 MS. LEVIN: Well, what - - - it's really
5 against the public policy in reducing fraud, and if -
6 - - if the banks and depositors - - -

7 JUDGE SMITH: Then why did they write the
8 year - - - then why did they write the year into the
9 statute to begin with, if it's - - - it's against
10 public policy?

11 MS. LEVIN: Well, at - - - at the - - - at
12 the time in 4-406 that this was enacted, it was in
13 1962, and as Judge Lippman pointed out, we're in a
14 completely different modern age - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but you could
16 see an argument by policy - - - public policy - - -
17 would go the other way, and say that fourteen days is
18 too short, and that it really is, you know, makes
19 highly difficult the process of alerting you to these
20 errors. You can make that public policy argument
21 too.

22 MS. LEVIN: Well, well, I wouldn't make
23 that public policy argument - - -

24 CHIEF JUDGE LIPPMAN: I understand that,
25 but one could make it.

1 MS. LEVIN: One could make it, but I think
2 that - - -

3 CHIEF JUDGE LIPPMAN: What I'm saying is,
4 is it for the good of the industry - - -

5 MS. LEVIN: It's for - - -

6 CHIEF JUDGE LIPPMAN: - - - or is it for
7 the good of the customer?

8 MS. LEVIN: It's for - - - it benefits both
9 the banks and the depositors. In fact, what's
10 important - - -

11 CHIEF JUDGE LIPPMAN: How does it benefit
12 both of them?

13 MS. LEVIN: Okay, the way in which it
14 benefits the depositors, which I think maybe is the
15 court's - - - the court's concern is that it doesn't
16 - - - is that by reducing the - - - the notification
17 period, and - - - what that does is, it - - - it
18 makes - - - the banks can then anticipate the amount
19 of fraud that may, in fact, occur. And by doing
20 that, they're able to keep their fees lower. And in
21 fact - - -

22 JUDGE PIGOTT: You - - - you raised - - -
23 when you were talking about this particular party,
24 how outrageous it was that he went on vacation. Some
25 people take two weeks for vacation, and you want to

1 say, well, you - - - you went on vacation, so
2 therefore, we're immune from any suit you want to
3 bring against us on these things.

4 MS. LEVIN: Okay. To address that, Judge
5 Pigott, I'll say it - - - now, in this modern age,
6 you can - - - you can get a notification on your
7 phone when a check has been presented for payment.
8 You can access - - -

9 JUDGE PIGOTT: So you're saying while he's
10 on vacation at the beach, if he doesn't have brains
11 enough to check his iPad, we're out of - - - we're
12 immune.

13 MS. LEVIN: You could - - - well, you could
14 - - - you could also go online - - -

15 JUDGE PIGOTT: But isn't there a balance -
16 - - I guess that's what we're all reaching for. I
17 mean, it's very easy for the bank to say, if we can
18 get it down to ten days, we'll do it. If we can get
19 it down to seventy-two hours, we'll do it, because
20 they all - - - everybody has an iPhone.

21 But what we're looking at here is a statute
22 that gives them a year. You've cut it back more than
23 half. And - - - and then you - - - you say, and they
24 have the temerity to go to - - - to go on vacation.
25 They then go to work and they don't pay attention to

1 their - - - to their bank statements. And bank
2 statements now as you know are - - - are more
3 electronic. Rarely do people get actually checks
4 anymore.

5 So there's a lot that's changed, and the
6 question is, you know, where does it - - - where does
7 it help - - - I appreciate you want to keep your fees
8 down. But where does it help people who give you
9 their money and count on you?

10 MS. LEVIN: Well, I understand your
11 concern, but I think it's important; the bank's
12 position is that fourteen days is reason - - - is
13 reasonable as a matter of law. Because one need only
14 consult the statute itself - - -

15 CHIEF JUDGE LIPPMAN: It might not have
16 been reasonable thirty years ago, right? You
17 acknowledge that?

18 MS. LEVIN: Well, it was reasonable when
19 Justice - - -

20 CHIEF JUDGE LIPPMAN: Before this modern
21 age that you're talking about - - - modern
22 technology?

23 MS. LEVIN: Well, Justice Stallman who
24 decided PTA v. Manufacturers Hanover Trust determined
25 that fourteen days was reasonable in 1998. But I do

1 believe if you look at the statute itself - - -

2 JUDGE GRAFFEO: Why fourteen days instead
3 thirty or sixty? Some reasonable period of time so
4 that a depositor could attend to other things perhaps
5 during a two-week period.

6 MS. LEVIN: Well, some - - - some - - -

7 JUDGE GRAFFEO: And a lot of people are
8 accustomed to monthly looking at their bank
9 statements, not daily or weekly.

10 MS. LEVIN: I - - - I believe if - - - if
11 this court were to look at the language in 4-406(2),
12 it would have to determine that fourteen days is
13 reasonable, because in that very statute, in the very
14 section of the statute that we're discussing right
15 now, it - - - in the case of a repeat forger, it
16 specifically says that the - - - that the depositor
17 is under an obligation to review his bank statements
18 for a reasonable period, not to exceed fourteen days,
19 so that - - -

20 JUDGE READ: By the way, I take it,
21 fourteen days is the industry standard?

22 MS. LEVIN: I - - - I don't believe that
23 there's an industry standard. There certainly are
24 many banks that have fourteen days, many banks that
25 have thirty, many banks that have sixty.

1 CHIEF JUDGE LIPPMAN: It's not uncommon to
2 have fourteen.

3 MS. LEVIN: It's not uncommon, and it's - -
4 - and it's never been held to be unenforceable. It's
5 - - - it's never been held to be manifestly
6 unreasonable. It's also been upheld whenever it's
7 been presented, both - - -

8 JUDGE SMITH: But aren't - - - aren't there
9 - - - but aren't there a couple of Appellate Division
10 decisions that say it's unenforceable?

11 MS. LEVIN: I'm sorry, Judge?

12 JUDGE SMITH: Aren't there a couple of un -
13 - - of Appellate Division decisions that say it's
14 unenforceable?

15 MS. LEVIN: No, there are two Appellate
16 Division decisions, Third Department and a Fourth
17 Department. And neither one of them say it's - - -
18 go to 4-406(4). The go to 4-406(2), where they, in
19 fact, did disclaim the bank's responsibility to
20 exercise ordinary care. That's not what we have
21 there.

22 If at any point in time, the depositor were
23 to look at his statements and - - - within fourteen
24 days - - - and discover a forgery, that depositor has
25 the right to recover, upon demonstrating that the

1 bank failed to exercise ordinary care. That was not
2 what was at issue in either Aikens or Herzog.

3 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
4 you.

5 MS. LEVIN: Thank you.

6 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

7 MR. DOLLINGER: Thank you, Your Honor.

8 Your Honor, in Fourth Department Her - - -
9 Third Department Herzog case, there was repeated
10 forgeries. The account holder was able to show that,
11 in fact, there clearly was no review of any check
12 signatures where any checks were under 10,000
13 dollars. Clearly, in this record here, Ms. Immerso
14 acknowledged to the client that they don't look at
15 checks to check signatures.

16 The fact is in Aikens, in the Fourth
17 Department determination, 4-406(4) rejected the
18 bank's contention that the plaintiff was precluded
19 from asserting the claim that the bank was negligent
20 in handling the checks. The repeated course of
21 conduct is - - - is and should be enough to shift the
22 burden to the bank. If this court - - -

23 JUDGE ABDUS-SALAAM: Counsel, assume - - -
24 counsel, assuming that we did - - - I'm not saying we
25 will - - - but assuming we did determine that the

1 banks and its customers could shorten the period,
2 what would you say about the fourteen days?

3 MR. DOLLINGER: I - - - I would say that
4 somebody's entitled to take a vacation. Thirty,
5 sixty days might be reasonable, but - - -

6 CHIEF JUDGE LIPPMAN: You would agree,
7 though, with your adversary that the prevailing view,
8 where these cases have come up, is that fourteen days
9 is okay.

10 MR. DOLLINGER: I would say that I have
11 never read to the contrary, Your Honor, yes.
12 Unfortunately, this court in Putnam Rolling v.
13 Manufacturers in 1980 found just what I just said.
14 There is a burden that it shifts to the bank.
15 Unfortunately - - -

16 CHIEF JUDGE LIPPMAN: So yours is basically
17 a policy argument, that it's not fair?

18 MR. DOLLINGER: It isn't fair.

19 JUDGE GRAFFEO: If this had been a thirty
20 or sixty day time period, instead of fourteen days,
21 would your client still have detected the
22 embezzlement?

23 MR. DOLLINGER: My client - - -

24 JUDGE GRAFFEO: It went on for two years,
25 didn't it?

1 MR. DOLLINGER: My client would not have
2 detected the embezzlement, clearly. My client had a
3 right to rely upon the November 2008 statement from
4 the bank, the original will follow after by mail.
5 The fact is there were no originals ever. My client
6 was deprived of the opportunity to know that there
7 was a defalcation taking place from the line of
8 credit.

9 CHIEF JUDGE LIPPMAN: Okay, thank you both.

10 MR. DOLLINGER: Thank you.

11 CHIEF JUDGE LIPPMAN: Appreciate it.

12 (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 Clemente Bros. Contracting Corp. v. Hafner-Milazzo, No. 64, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: April 3, 2014