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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF Justice PART 8

Merchants Bank of NY

- v -

Glickman, Issac

INDEX NO. 603167/01

MOTION DATE 6/26/02

MOTION SEQ. NO. 004

MOTION CAL. NO. 86

The following papers, numbered 1 to _____ were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: AUG 26 2002

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
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THE ILIERCHANTS BANK OF NEM' YORK, A DIVISION OF VALLEY NATIONAL BANK,

Plaintiff,

-against-

Index No. 603167/01
Mot. Seq. No. 004

ISAAC GLICKMAN a/k/a ISAAC GLIKMAN,

Defendant

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DIANE A. LEBEDEFF, J.:

Plaintiff Merchants Bank of New York ("Merchants" or the "Bank"), moves for an order granting summary judgment (CPLR 32 12) on its claim to collect the unpaid principal balance of four promissory notes (the "Notes"). Defendant Isaac Glickman raises several defenses in opposition, and argues that facts necessary to oppose the motion are within the exclusive knowledge of the Bank

Facts

In December of 2000, Glickman delivered the four Notes, each in the principal amount of $26,353, and signed in blank, to Dajoy Diamonds, Inc ("Dajoy") (see Exhibits **F,** answers to interrogatories) Each Note bears the signature of defendant Isaac Glickman, over the handwritten name "Isaac Glikman," and the bank account number of GRD Incorporated (see plaintiffs Exhibit 1) On one of the four Notes the corporate name "GRD Inc " is written near Glickman's signature

Defendant does not contend that his signatures on the Notes are forged, but alleges that the Notes were "incomplete at the time [his] signature was placed thereon" (Exhibit G, response to Notice to Admit, paras 1-4), and were subsequently "filled in by someone other than me" (Glickman aff , para 21), and without his authorization (answer, para 9). On or about December 12, 2000, Dajoy indorsed the Notes to the order of Merchants in consideration for Merchants' extension of credit to Dajoy (Attanasio aff., para. **3).**

On hlay 9, 2001, Glickman stopped payment on the Notes (Complaint, para. 7). When the Notes came due in May and June, 2001, Merchants sought payment from the GRD Inc. account, but there were insufficient funds in the account (Attanasio aff., para. 6). This suit seeking to collect from defendant as the individual signatory followed.

Prima Facie Case

To establish a *prima facie* case, plaintiff must show only that it is the holder of instruments, that the signatures thereon are admitted or established, and that payment was denied (UCC 3-301, 3-307, see *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Allen*, **232** A D 2d 80, 87 [1st Dept 1997]; *Chamberlain v. Amato*, 259 A D 2d 1048, 1049 [4th Dept 1999], defendant's "making of the instrument and failure to make payment were all that plaintiff, as holder, [is] required to establish in order to recover on the note") If defendant can establish a "genuine defense," then the burden shifts to the holder to establish its status as holder in due course (UCC 3-307[3]; *First International Bank v. L. Blankstein & Son*, 59 N Y 2d 436.444 [19831)

hlerchants has established its *prima facie* case by presenting evidence in admissible form demonstrating that it is the holder of the Notes, the Notes were executed by Glickman,

and Glickman has defaulted in payment.

As addressed below?.the defendant asserts ten affirmative defenses. In opposition to the motion, he emphasizes the following defenses: (i) he is not personally liable because the Bank knew the Notes were drawn on the corporate account of GRD Inc.; (ii) the Notes were altered on their face to increase the amount of principal due from $2 1,353, to $26,353, and/or were completed without authorization after he signed them in blank; and (iii) the Bank was not a holder in due course because it knew or should have known that Dajoy was having financial difficulties and that Notes indorsed to the Bank by Dajoy had been dishonored.

Personal Liability

Defendant argues that the Bank should have known that he did not intend to be personally liable on the Notes because the account number written under his signature is for the corporate account of GRD, Inc., and because the Bank knew that Glickman was an officer and authorized signatory for the GRD, Inc., account (Glickman aff., para. *5)*. The issue is controlled by UCC 3-403 (2)(b), which provides in relevant part: "an authorized representative who signs his own name to an instrument ... except as otherwise established between the immediate parties, *is personally obligated if the instrument does not show that the representative signed in a representative capacity*" (emphasis added). Under UCC 3-404(3), a signature is made in a representative capacity when "the name of an organization [is] preceded or followed by the name and office of an authorized individual."

Even assuming Glickman was acting as an "authorized representative" of GRD, Inc., when he signed the blank Notes, his signature on the Notes gives rise to personal liability because the company name appears on only one of the Notes, and plaintiffs office or title is

not indicated on any of them (see *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 [1978]; *Bankers Trust Co. v. Javeri*, 105 A D.2d 638 [1st Dept 1984]). Since Merchants is not an "immediate party" to the Notes. but a transferee, defendant cannot establish another understanding concerning his individual liability (*Bankers Trust Co. v. Javeri*, *supra*, 105 **A** D 2d at 638)

Accordingly. the defenses relating to defendant's personal liability (the third, fourth and sixth affirmative defenses), are insufficient.

Unauthorized Completion and Material Alteration

Glickman asserts as affirmative defenses that he is not responsible because the Notes appear on their face to have been materially altered, and were completed without authorization. Defendant does not offer any explanation concerning the circumstances leading to his signing the Notes in blank, or his understanding with Dajoy concerning the extent, if any, of its authority to complete the Notes after he signed and delivered them.

Under UCC § 3-115(1), a note "signed while still incomplete in any necessary respect" can be enforced when completed "in accordance with the authority given." The party claiming that completion was unauthorized has the burden of establishing the lack of authorization (UCC 3-115[2]) If unauthorized completion is established, the instrument may be enforced under the same rules applicable to material alterations (UCC 3-407)

Under section 3-407. alteration of a negotiable instrument by a holder will result in the discharge of the obligation where the alteration is both fraudulent and material (UCC 3-407 [2][a]), but unauthorized completion is not a defense against a holder in due course (*Equilease Corp. v. Indemnity Ins. Co. of North America*, 183 A.D 2d 645 [1st Dept 19931,

see also UCC 3-404. notice that an "incomplete instrument had been completed" is not notice of a defense. unless the holder had notice that such completion was "improper"). "To constitute a material alteration under the Code, the alteration must 'chang[e] the contract of any party thereto in any respect' (UCC 3-407[1]), *i.e.*, it must work some change in the rights, obligations, or relations of the parties" (*Davis Auction House, Inc. v. Ontario Nat. Bank*, 201 A.D.2d 878, 24 [4th Dept. 1994], citations omitted).

There is a "strong presumption" that a person who signs an incomplete note has given the holder implied authority to complete the blanks (*National Bank of Albany v. Lester.*, 194 N.Y. 461 [1901]; *Indemnity Ins. Co. of North America v. American Deseret Ltd. Partnership.*, 887 F. Supp. 521 [S.D.N.Y.,1993], affd. 56 F.3d 460 [2d Cir. 1995]). The rule "is based on the doctrine of equitable estoppel that 'where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it '" (*Fireman's Fund Ins. Co. v. Bank of New York,* 146 A.D.2d 95, 98 [1st Dept 19891. quoting *National Safe Deposit Co. v. Hibbs*, 229 U S 391, 394 [1913]; see also UCC 3-406, one whose "negligence substantially contributes" to allegedly unauthorized completion is precluded from asserting lack of authority as a defense against a payor "who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business").

Defendant has not established that the completion of the Notes was unauthorized. Moreover, his admission that he signed the Notes in blank, thereby allowing the holder to complete them. precludes him from asserting unauthorized completion against Merchants, which. as shown below, has demonstrated that it is a holder in due course, having taken the

Notes in good faith, for value, without notice of defenses, and having paid them in accordance with reasonable commercial standards

As to the material alteration defense, the rule is that "words control figures" (UCC 3-118[c]), and each of the Notes provides for payment of the larger sum Further, the material alteration defense is not applicable under the facts alleged by defendant, because defendant admits that he signed the Notes in blank and offers no evidence concerning the agreement between himself and Dajoy As a result, there can be no showing that an alleged alteration changed the "rights, obligations, or relations" of the parties under the Notes

Even if defendant had raised a genuine defense of material alteration, under UCC 3-407, the defense cannot be asserted against a holder in due course and, as shown below, Merchants is a holder in due course

Accordingly, the first and second affirmative defenses are insufficient.

Bank's Holder in Due Course Status

Pursuant to UCC 3-302(1), a holder in due course is a holder, who takes a negotiable instrument for value, in good faith, and without notice that the instrument is overdue or has been dishonored, or of any defense or claim against it on the part of another (see, *Chemical Bank of Rochester v. Haskell*, 51 N Y 2d 85 [19801) The answer asserts that there was a lack of consideration and that the Bank failed to investigate suspicious circumstances (sixth and eighth affirmative defenses)

The Bank has demonstrated that it credited Dajoy with funds in consideration for its endorsement of the Notes and plaintiff does not press the point in opposition to the motion Plaintiff instead hopes to obtain discovery to show that the Bank has knowledge of the

alleged suspicious circumstances that Dajoy had been discounting notes to the Bank "at a rapid and unusual rate" and that many of those notes had been dishonored, indicating that Dajoy was in financial difficulty (Glickman aff., paras. 3, 8). Defendant asserts that it needs discovery from the Bank to establish the Bank's knowledge of Dajoy's financial difficulties. Defendant also argues that the Bank knew that GRD, Inc., maintained only small balances in its account and normally engaged in transactions much smaller than the amounts involved in the Notes (answer, para. 33).

At most, defendant's allegations, even if substantiated, would establish only that the Bank had notice of "mere suspicious circumstances,'' which does not constitute notice *(Chemical Bank of Rochester v. Haskell, supra*, 51 N.Y.2d at 93). The Bank "was not bound to be alert for circumstances which might possibly excite the suspicions of wary vigilance" *(Regent Corp., U.S.A. v. Azmat Bangladesh, Ltd.*, 253 A.D.2d 134 [1st Dept. 19991, internal quotation marks omitted). The inquiry into "good faith" as defined by UCC 3-302 is what, in fact, the holder actually knew *(Chemical Bank of Rochester v. Haskell, supra* at 91-92). If the Bank "did not have actual knowledge of some fact which would prevent a commercially honest individual from taking the drafts, then its good faith would be sufficiently shown. Constructive knowledge is insufficient and it is irrelevant what a reasonable banker in [the] Bank's position should have known or should have inquired about" *(Regent Corp., U.S.A. v. Azmat Bangladesh, Ltd., supra).*

Accordingly, the affirmative defenses of failure to investigate and lack of consideration (seventh eighth affirmative defense) are inadequate, and Merchants has established its holder in due course status.

The remaining affirmative defenses asserted in the answer are insufficient to raise a material issue of fact The defense of failure to state a cause of action (fifth affirmative defense) is mere surplusage. and plaintiff presents no facts are arguments in support of any other defenses under the UCC. listed without detail in the ninth affirmative defense Finally, the allegation that the Bank failed to honor a stop payment order is without merit because Merchants had already made payment on them in good faith when Glickman purported to stop payment (see UCC 3-4 18) and, in any event, Glickman's account has not been charged for any payments

Conclusion

Plaintiffs motion for summary judgment is granted. No sooner than five days after service of a copy of this order with notice of entry and the proposed judgment on defendant, the clerk is directed to enter judgment for the plaintiff in the amount of $105,412, plus interest, costs and disbursements, upon the presentation of appropriate papers.

So ordered.

Dated: August 26 , 2002

J.S.C.