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

PRESENT: ~~JANE S. SOLOMON~~ PART 55

0600394/2005

RUESCH INTERNATIONAL INC
VS
CITY & SUBURBAN FEDERAL

SEQ 1

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO.

MOTION DATE 7/25/05

MOTION SEQ. NO.

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
OCT 20 2005
COUNTY CLERK'S OFFICE
NEW YORK

JANE S. SOLOMON

Dated: 10/14/05

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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RUESCH INTERNATIONAL, INC., Index No. 600394/05

Plaintiff,

-against- DECISION and ORDER

CITY & SUBURBAN FEDERAL SAVINGS BANK,

Defendant.

----------X

SOLOMON, J.

In this action, defendant City & Suburban Federal Savings Bank indorsed and transferred a $105,000 check to plaintiff Ruesch International, Inc. The drawee bank subsequently refused to pay, and dishonored the check. Plaintiff contends that, pursuant to the valid and enforceable indorsement contract, it is entitled to payment by defendant of the full amount of the draft. Plaintiff now moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, in the amount of $105,000, upon the ground that this action is based upon an instrument for the payment of money only. For the reasons set forth below, plaintiff's motion is granted.

FACTS

Plaintiff is a non-bank financial institution engaged in the money services business, including the provision of foreign currency exchange and international payment services (Aff. of Marc Van Doorn, plaintiff's Vice President and Chief Financial Officer, ¶ 2). Defendant is a savings association, which has its principal place of business in Yonkers, New York, and maintains branches in New York county (id., ¶ 3).

On April 14, 2004, defendant placed an order for $105,000 by presenting to

plaintiff an indorsed draft in the amount of $105,000 (id., ¶ 4; Exh 1). The draft, a check dated March 30, 2004, is purportedly issued against an account at the Canadian Imperial Bank of Commerce (CIBC) and made payable to Atilla Szabo, 3065 Sedgwick Avenue, Bronx, NY 10468 (id., ¶ 4; Exh 2). It was payable in United States dollars, even though the payor, Solectron Global Services, and CIBC are Canadian.

Mr. Szabo, the original payee, indorsed the draft to defendant by affixing his signature. In turn, defendant indorsed it to plaintiff by typing on the reverse: "Pay to the order of Ruesch International" (id., ¶ 5; Exh 2). The indorsement was signed by an agent of defendant (id.). In other words, rather than process the draft through standard bank processing channels, defendant sold it to plaintiff.

On April 15, 2004, plaintiff presented the draft for deposit to its account at the Royal Bank of Canada (id., ¶ 6). Thereafter, on April 26, 2004, plaintiff issued its check to defendant for $104,987, representing a deduction of $13 in fees (id., ¶ 7; Exh 4). Accompanying the payment was a writing containing the following terms and conditions with respect to defendant's repayment obligation:

> Enclosed please find a U.S. dollar payment for the foreign funds converted by Ruesch International. Please refer to the previously sent Transaction Receipt for an outline of the details.
>
> This check represents conditional payment, pending final receipt of good funds. In the event that the original check is returned to Ruesch, you will be responsible for prompt reimbursement for the full amount, plus the returned check fee and any bank charges.

Id., ¶ 7; Exh 5.

On May 11, plaintiff received written notice of dishonor from the Royal Bank of

Canada. The notice reflects that CIBC, the drawee bank, returned the check unpaid because it was a "Counterfeit Item" (id., ¶ 8; Exh 6). On May 12, 2004, plaintiff notified defendant that the check had been dishonored and requested payment of $105,000, plus a $25 returned check fee (id., ¶ 9; Exh 7). Defendant refused, claiming that any indorsement liability has been discharged.

DISCUSSION

Pursuant to CPLR 3213, plaintiff now seeks enforcement of the indorsement and payment of the full $105,000, plus interest, owing to it. Alternatively, plaintiff seeks enforcement of the terms of its contract with defendant, which requires that, in the event the draft is returned and not paid, defendant shall make payment for the draft.

The rationale of CPLR 3213 is "to provide a speedy and effective means of securing a judgment on claims presumptively meritorious" (Interman Indus. Products, Ltd. v R.S.M. Electron Power, Inc., 37 NY2d 151, 154 [1975]). In order for a party to make out a prima facie case pursuant to CPLR 3213, proof must be submitted demonstrating an instrument requiring from the defendant the payment of money only, and a failure to make the payments called for under the instrument (Seaman-Andwall Corp. v Wright Mach. Corp., 31 AD2d 136 [1st Dept 1968], affd 29 NY2d 617 [1971]; SCP (Bermuda) Inc. v Bermudatel Ltd., 224 AD2d 214 [1st Dept], lv dismissed 87 NY2d 1056 [1996]). Once the plaintiff has met this burden, the defendant must come forward and establish the existence of a triable issue of fact or defense (id).

Defendant contends that CPLR 3213 is not applicable to this action, because a fraudulently indorsed check is not an instrument for the payment of money only. However, under New York law, a check is considered an "instrument for the payment of money only," nonpayment for which is subject to the CPLR 3213 procedure (Thunderball Marketing, Inc. v

Riemer, 273 AD2d 29, 30 [1st Dept 2000] [checks sued upon were "prototypical examples" of instruments for the payment of money only]; JT Magen & Co., Inc. v Toscorp, Inc., 272 AD2d 202, 202 [1st Dept 2000] [checks sued upon were "straightforward instruments for the payment of money only"]; First Inter-County Bank of New York v DeFilippis, 160 AD2d 288, 289 [1st Dept 1990], appeal denied 77 NY2d 801 [1991]).

Here, the instrument in question is the check with an unrestricted indorsement by defendant to plaintiff. "A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument" (UCC 3-122 [3]). "Notice of dishonor is a demand" (id.). With respect to the liability of the indorser, section 3-414 of the New York Uniform Commercial Code (UCC) provides, in pertinent part:

> (1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

UCC 3-414 (1). Thus, "when sued upon his contract of indorsement, an endorser [of an instrument] is absolutely liable thereon" (Welbilt Concrete Constr. Corp. v Kornicki, 26 AD2d 661, 662 [2d Dept 1966], citing Curtis v Davis, 215 NY 395 [1915]).

In the absence of triable issues of fact, a court may grant summary judgment in favor of a plaintiff against a defendant liable under the theory of indorsement contract (see e.g. Amev Capital Corp. v Kirk, 169 AD2d 802 [2d Dept 1991] [affirming summary judgment against indorser of note pursuant to UCC 3-414 [1]]; Central State Bank v Kilroy, 57 AD2d 940 [2d Dept 1977][affirming summary judgment in favor of plaintiff against drawer and endorser]).

Here, the undisputed facts establish that defendant is liable under a valid and enforceable contract of indorsement. Moreover, all of the conditions for indorser liability – presentment, dishonor and notice of dishonor (see UCC 3-414 [1]) – have been met. Plaintiff received delivery of the indorsed check from defendant on April 14, 2004 (Van Doorn Aff., Exh 1). Plaintiff submitted the payment for deposit to the Royal Bank of Canada on April 15, 2004 (id.; Exh 3). The check was dishonored by CIBC, the drawee bank (id.; Exhs 2, 6). Plaintiff received the notice of dishonor on May 11, 2004 (id; Exh 6). On May 12, 2004, plaintiff provided written notice of the dishonor and nonpayment to defendant (id; Exh 7).

Accordingly, defendant is liable to plaintiff pursuant to UCC 3-314 (see Amey Capital Corp. v Kirk, 169 AD2d 802, supra]), and summary judgment in lieu of complaint is warranted (see First Inter-County Bank of New York v DeFilippis, 160 AD2d 288, supra [due execution of a check and an insufficient pleaded defense of fraud warranted the granting of summary judgment in lieu of complaint on the dishonored check]; see also Thunderball Marketing, Inc., supra).

In response, defendant asserts several defenses which, it contends, absolve it from liability. That a defendant interposes defenses which involve issues or facts going beyond the instrument itself does not alter the availability of the CPLR 3213 procedure (see Thunderball Marketing, Inc., 273 AD2d at 30 [citations omitted] ["Defendant's assertion of defenses dehors the checks sued on does not take these ... instruments for the payment of money only outside the ambit of CPLR 3213"]; First Inter-County Bank of New York v DeFilippis, 160 AD2d at 289 ["The defenses set forth, alleging impropriety in the underlying contract as the reason for the stoppage of payment of the check, do not alter the character of the check as an instrument for the

and the bank cashes the instrument, drawing on the funds of the drawer. In that case, the true owner is the individual to whom the funds should have been paid – the proper payee – who did not receive the funds because of the intervening act of forgery, or the drawer, on whose account the funds were drawn.

UCC 3-419 (3) is inapplicable to the circumstances presented in this matter. First, it is clear that plaintiff was not the payee or the true owner of the draft. More importantly, unlike the situation contemplated by this section, the arms-length business transaction between plaintiff and defendant did not involve the payment by defendant of funds on a forged instrument. Indeed, all of the cases cited by defendant in support of the application of UCC 3-419 involve the payment by the depository institution on a forged, or otherwise improper, indorsement (see Moore v Richmond Hill Sav. Bank, 117 AD2d 27, 28 [2d Dept 1986] ["The main issue presented by this appeal is whether a 'depositary' or 'collecting' bank is liable for conversion pursuant to UCC 3-419 (1)(c) and in a common-law action for moneys hand and received when it has paid out funds on a forged instrument or a stolen check or draft"]; Alumax Aluminum Corp. v Norstar Bank, N.A., 168 AD2d 163, 165 [4th Dept 1991] ["Plaintiff commenced this action against defendant, alleging that the bank converted the check proceeds by improperly honoring the check when it was presented by its depositor without the endorsement or authorization of plaintiff"]; Knesz v Central Jersey Bank & Trust Co. of Freehold, 97 NJ 1 [1984] [applying UCC 3-419 [3] where true owner sought to recover from bank which paid on checks bearing his forged indorsement]).

Here, defendant did not act in a representative capacity as contemplated by UCC 3-419 (3), because it did not process this check through standard channels to honor its customer's

check. Instead, it sold the check on its own behalf to plaintiff – a non-banking institution. Section 3-419 (3) is inapplicable to this independent transaction (see Knesz v Central Jersey Bank & Trust Co., 97 NJ at 11, n2 ["In some situations ... a bank may immediately give cash to the forger or his transferee, or else provide non-provisional credit to the customer's account, which is then drawn upon. The Court recognizes the existence of authority that a bank under these circumstances does not act in a 'representative' capacity for its customer and is thus ineligible for immunity under § 4-319(3)"]).

Defendant next asserts that UCC § 3-418 bars its liability, citing the rule articulated in Banco Mercantil de Sao Paulo S.A. v Nava (120 Misc 2d 517, 522 [Sup Ct, NY County 1983]) that "a drawee who accepts or pays an instrument on which the signature of the drawer is forged is bound on its acceptance and cannot recover back on its payment." This section is entirely inapplicable, however, because the drawee bank – Royal Bank of Canada – did not accept and pay on the check (see Van Doorn Aff., Exh 6).

Defendant also contends that because the drawee bank or one of the intermediary banks failed to comply with its obligation, pursuant to UCC 4-302, to present the item for payment before its "midnight deadline," it is absolved from liability. It speculates that "the item had been subject to a 'late return' between Plaintiff and the drawee bank, by either the drawee or interim collecting bank, for the item to be returned to City & Suburban on May 12, 2004, long after the funds representing the deposited Check were in control of the depositor" (Def Mem at 10). However, defendant fails to set forth any evidence establishing that the Canadian banks missed such a deadline, so no issue of fact is presented.

Defendant next seeks denial of the motion on the ground that plaintiff failed to

join defendant's customer, Mr. Szabo. CPLR 1001 (a) provides that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Defendant's liability, however, is independent of its customer's (see 2 Hart & Willier, Negotiable Instruments § 8.05 [2004] [noting that multiple indorsers "become jointly and severally liable to subsequent holders" and that "[a]ll can be sued together or anyone of them can be sued by a subsequent holder"). Accordingly, joinder is unnecessary.

Is sum, defendant has not established any issue of material fact regarding its defenses. Accordingly, plaintiff's motion for summary judgment in lieu of complaint is granted. In light of this determination, it is unnecessary to consider plaintiff's alternative grounds under the repayment terms of its contract. Accordingly, it is

ORDERED that the motion is granted and the Clerk is directed to enter judgment in favor of plaintiff Ruesch International, Inc. against defendant City & Suburban Federal Savings Bank in the amount of $105,000 together with interest from April 14, 2004 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: October 14, 2005

ENTER:

JANE S. SOLOMON
J.S.C.