

<b>Iwuji v North Fork Bank</b>
2007 NY Slip Op 32404(U)
July 31, 2007
Supreme Court, Suffolk County
Docket Number: 0009529/2006
Judge: Emily Pines
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Supreme Court - State of New York  
Commercial Division, Part 46, Suffolk County

**Present:**

**Hon. Emily Pines**  
Justice Supreme Court

**Motion Dates:** 05-08-2007  
05-16-2007

**Submit Date:** 05-17-2007  
**Motion No's.:** 001 MD  
002 MG

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DOROTHY C. IWUJI,  
  
Plaintiff,

Attorney of Plaintiff  
JONES DAY  
By: Michael F. Stoer, Esq.  
222 East 41<sup>st</sup> Street  
New York, New York 10017

-against-

NORTH FORK BANK,  
  
Defendant.  
\_\_\_\_\_X

Attorney of Defendant  
CERTILMAN BALIN ADLER & HYMAN LLP  
By: Mather J. Bizzaro, Esq.  
90 Merrick Avenue  
East Meadow, New York 11554

**ORDERED**, that the motion (motion sequence number 001) by Defendant to strike Plaintiff's jury demand is denied; and it is further

**ORDERED**, that the cross-motion (motion sequence number 002) by Plaintiff for summary judgment is granted.

Plaintiff commenced this action by filing of a Summons and Verified Complaint on April 3, 2006 and issue was joined by Defendant's service of a Verified Answer on or about May 8, 2006. The complaint alleges violations of **Uniform Commercial Code §4-A-204** and **Banking Law §676** based upon Defendant's purported failure to follow security procedures on Plaintiff's bank account, permitting unauthorized withdrawals from said account and refusing to reimburse Plaintiff for the withdrawn funds.

**THE FACTS**

Pursuant to Rule 19-a of the Rules of the Commercial Division of the Supreme Court, each party submitted a Statement of Material Facts (“SMF”). The relevant facts, as garnered from the record are set forth herein.

Two allegedly unauthorized transfers were made from plaintiff’s bank account with defendant in July and August 2004; however, long before this time, a series of incidents occurred, which places this action in context. Plaintiff, a resident of Ikeduro, Imo State, Nigeria, had a savings account in Green Point Bank (“Green Point”), the corporate predecessor to Defendant North Fork Bank. On or about March 24, 1999, Green Point transferred \$4,025.00 from Plaintiff’s account, #6519036625, pursuant to a faxed wire transfer request purportedly bearing Plaintiff’s signature. On or about April 28, 1999, Plaintiff advised Green Point that she had not authorized this transfer. After Plaintiff completed a Forged Withdrawal Affidavit and Agreement, on or about July 23, 1999, Green Point credited Plaintiff’s account the \$4,025.00 plus \$13.37 in lost interest. Plaintiff thereafter wrote to Green Point, thanked them for refunding her money and asked what security procedures were being put in place to protect the contents of her account.

Defendant’s Assistant Branch Manager Helena Slaczka (“Slaczka”) appeared for an Examination Before Trial on October 4, 2006. Slaczka testified that upon receipt of such a letter from plaintiff the bank would “close the account or put a block on the account so no withdrawals would go through at all.” (**Slaczka EBT at p. 48**). However, rather than follow its stated procedures, Green Point merely wrote plaintiff and advised that no future withdrawals by fax would be accepted. It is undisputed however, that Plaintiff’s account was not closed or blocked at this time.

On or about January 10, 2001, Green Point received a request, via DHL, bearing the signature “D.C. IWUJI” and purporting to authorize the wire transfer of \$22,100.00 from Plaintiff’s account #6510603399, to an account at Crestar Bank. Plaintiff contends that Green Point telephoned her on January 16, 2001, to confirm that she was authorizing the wire transfer. No funds were disbursed from Plaintiff’s account pursuant to the January 10, 2001 request and on January 19, 2001, Plaintiff wrote to Webber at Green Point to thank the bank for verifying the transfer request before making the transfer and advising that she definitely did not make the request to transfer funds. Plaintiff also asked whether there was something that could be done to protect against this situation and stated that if not, she might have to close her account with Green Point. Slaczka testified at her deposition that, in general, where faced with such a letter indicating two attempts to remove funds fraudulently from

an account, she would strongly suggest that the person close the account and either open it at another bank or at least change the account number. (**Slaczka EBT at p. 78**). Again, it appears that neither of these steps were taken or suggested to Plaintiff.

Subsequently, on April 11, 2002, July 12, 2002 and August 2, 2002, Plaintiff sent handwritten letters to Green Point requesting that it pay \$10,000 from her account into her Fleming Premier Banking Account in the United Kingdom. However, these requests were not honored by Green Point. Based upon this consistent pattern of conduct, plaintiff came to believe that Green Point had imposed an “in-person” withdrawal requirement on her account. (IWUJI EBT at p.143-146).

### **The 2004 Transfers**

On July 26, 2004, Green Point received a request to debit the sum of \$30,000 from account # 6510603399 and to transfer the sum to JP Morgan Chase Bank USA with further credit to Natwest Bank, Waltham Cross branch, London; the beneficiary of the transfer was “William Ninedys”. The address on the July 26, 2004 transfer request stated: “UNECA/SRDC, MAISON D’FRANCE, B.P. 744, NIAMEY NIGER”. Plaintiff alleges that her correct address, which the bank had on file was “UNECA/SRDC, MAISON DE L’AFRIQUE, B.P. 744, NIAMEY, NIGER”. Defendant alleges that there is an issue as to whether the latter address was on file with the bank and also whether there was more than one address on file for Plaintiff with the bank.

This request, purportedly contained the signature of “Dorothy Chika Iwuji”. Plaintiff contends this signature was not hers, but rather was forged. Slaczka testified at her deposition that when she received the July 26, 2004 request, she checked the signature card for Plaintiff on file with Green Point and that the signature was a “perfect match”. (**Slaczka EBT at p. 108**). Slaczka testified that because she had no telephone number to contact plaintiff, she put the July 26, 2004 transfer request aside and waited for plaintiff to contact her. (**Slaczka EBT at p. 109**). Slaczka stated that an individual purporting to be plaintiff did contact Green Point several times, but that she was unable to effectively communicate with her because she had a heavy accent. However, Slaczka did ask the person on the telephone for her date of birth as confirmation and the individual gave the date of birth of plaintiff that was on file with Green Point. Slaczka testified that she asked the woman on the telephone whether she was sure she wanted to take the money out and that she replied that she was helping her nephew who was going to college in London. (**Slaczka EBT at p. 127**).

Slaczka also testified that she asked a bank employee, Mr. Christopher, who was also Nigerian, to speak with the woman on the telephone to confirm the information she provided to Slaczka and that the answers regarding the date of birth and use of money was the same. (**Slaczka EBT at p. 128**). The bank thereafter processed the request and transferred the funds from Plaintiff's account.

Again on August 9, 2004, Green Point received another faxed request that it debit the sum of \$2,000.00 from Plaintiff's account # 6510603399 and wire transfer said amount to an account at "MIZUHO BANK" in "YACHIYODAI, CHIBA-KEN, JAPAN". The beneficiary of this transfer was "Odudu Samuel" and again the request bore the purported signature of Plaintiff. This request also had a different address for Plaintiff, listed as "PLOT NO. 231, CENSUS CLOSE, OFF BABS ANIMASHAUN STREET, SURULERE, LAGOS, NIGERIA". Plaintiff claims that this address was not hers and was never used by her in any correspondence with the bank. Defendant contends that there is an issue of fact regarding whether it has a record of this address. Slaczka testified that upon receipt of the August 9, 2004 transfer request, she again checked the signature card and when an individual purporting to be plaintiff telephoned the bank, she verified the date of birth. (**Slaczka EBT at p. 163**). Upon such verification, the transfer of funds was completed.

Plaintiff alleges that when she received her bank statement for the period between August 13, 2004 and September 11, 2004, the statement listed an ending balance of \$647.85, for an account with a balance that had exceeded \$32,000 and on October 5, 2004, she telephoned the bank and reported the unauthorized transfers. It is undisputed that Plaintiff did report to the bank that she did not request any wire transfers and asked the bank to refund the amounts removed from her account, together with interest. On November 19, 2004, Slaczka completed a Loss Report regarding the July 26, 2004 and August 9, 2004 allegedly unauthorized transfer requests totaling \$32,000. In that report, Slaczka refers to a July 19, 2004 letter from Plaintiff requesting the \$30,000 transfer. Significantly, this letter has never been produced or located.

By letters dated August 22, 2005 and September 21, 2005, Plaintiff's counsel requested that Defendant refund Plaintiff the full amount of \$32,000.00 transferred from Plaintiff's account. By response from Defendant's counsel dated November 17, 2005, Defendant advised that it would not be refunding the \$32,000.00 to Plaintiff and the within action ensued.

Regarding the issue of the jury trial demand, the submissions reflect that on or about February 22, 2005, Defendant became successor by merger to Green Point Bank. Subsequent to the merger, defendant states that it sent certain information, entitled "Important Information about your

Green Point accounts” (“Account Information”) to its customers. In that document it states “Waiver of Trial By Jury: You and we agree to give up our right to trial by jury in any legal proceeding or lawsuit involving your account(s). Plaintiff filed a Note of Issue dated March 27, 2007 in which she demanded a trial by jury.

### THE MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for summary judgment granting her the relief requested in the Complaint, to wit, the return of \$32,000 transferred by Defendant out of her account pursuant to two separate payment requests. Plaintiff also seeks a refund of fees and lost interest. In support of the motion, Plaintiff has annexed, *inter alia*, the pleadings, Verified Bill of Particulars dated June 12, 2006, deposition transcripts of Plaintiff, Slaczka, and Anthony Bumbalo, Assistant Manager for Customer Service. In sum, Plaintiff argues that she is entitled to recover under **UCC §4-A** since the bank’s security procedures were not commercially reasonable. She argues, moreover, that even if they were reasonable, the bank did not follow them. In addition, she asserts that since Plaintiff timely notified the bank, she is also entitled to interest. Plaintiff also argues that she is entitled to recover under **Banking Law §676**, since the withdrawals from her account were accomplished via two unauthorized signatures.

Specifically, plaintiff argues that the security procedures placed on her accounts were not commercially reasonable in light of the two previous uncontested fraudulent wire transfers and one stopped request. She claims that the bank took no affirmative steps to prevent future fraud, such as closing the compromised account, noting the prior fraud in their customer records and/or even indicating Plaintiff’s customary method of withdrawal. Additionally, Plaintiff argues that the bank’s process of merely verifying the July and August 2004 transfer requests with Plaintiff’s date of birth was not commercially reasonable and that the bank should have known that the addresses on the requests did not match what was on file with the bank. Plaintiff also argues that the Defendant did not follow its own written procedures and policies when it transferred the funds in July and August of 2004 in that Slaczka did not call Plaintiff to confirm the wire transfer request but rather waited until a person purporting to be Plaintiff called Defendant.

Regarding notice to Defendant, Plaintiff argues that she contacted Defendant 54 days from the date the statement on which the fraudulent wire transfers would have appeared, thus, within the bank's own 60 day notice requirement. Therefore, she argues that she is entitled to interest on the allegedly wrongfully transferred funds.

Alternatively, Plaintiff argues that she is also entitled to recover under **Banking Law §676** because Defendant transferred the funds based upon unauthorized signatures.

In opposition to the motion for summary judgment, Defendant has annexed the same deposition transcripts, together with copies of the July and August 2004 wire transfer requests. Defendant argues that there is a question of fact as to whether Plaintiff requested that the funds be transferred from the account and refers to the deposition of Anthony Bumbalo ("Bumbalo), Assistant Manager for Customer Service, where Bumbalo testified that he had experience in comparing signatures on a daily basis and that it was his opinion that the signatures on the July and August 2004 wire transfer requests matched the signature on file for Plaintiff. (**Bumbalo EBT at p. 231**). Slaczka also testified that she verified Plaintiff's date of birth with the individual who telephoned the bank (**Slaczka EBT at p. 126**). Thus, Defendant argues that there is a triable issue of fact as to whether Plaintiff requested that the funds be transferred from the account.

Defendant also argues that despite the previous fraudulent activity on her accounts, Plaintiff failed to request that the account be closed but rather, she repeatedly attempted to transfer funds from the account via handwritten letters in 2002 (**Plaintiff's EBT at p. 79-82**). Bumbalo testified that if Defendant had closed or blocked Plaintiff's accounts without her permission, it would expose itself to a substantial risk of liability. (**Bumbalo EBT at p. 233-234**). Defendant argues, therefore, that the burden was on Plaintiff to request that Defendant close the account because it could not unilaterally do so without exposure to liability.

Defendant contends that the comparison of the signatures on the signature card to the transfer requests and verification of the plaintiff's date of birth were commercially reasonable security procedures employed in this transaction. Additionally, given the fact that Plaintiff did not have a social security number, did not have a telephone number on file and Plaintiff testified that it was extremely difficult to communicate with her by telephone (**Plaintiff's EBT at p. 191-192**), Defendant argues that it would not have been commercially reasonable to contact Plaintiff in any other manner to confirm the authenticity of the transfer requests.

Defendant also argues that there is a material issue of fact as to whether Plaintiff timely and/or properly notified Defendant of the unauthorized transfers from her account. Defendant refers to Plaintiff's deposition testimony wherein she stated that she sent a letter, dated October 5, 2004, to the bank at "109 East 42<sup>nd</sup> Street, New York, New York 10017", even though the Account Information directed customers to report a loss to a different address, to wit, "1981 Marcus Avenue, Lake Success, NY 11042". Moreover, Defendant points to Plaintiff's testimony wherein she admitted that she consistently received her bank statements a month or two late, however she never attempted to change her address. (**Plaintiff's EBT at p. 29, 30-31**).

In reply, Plaintiff argues that there are no material issues of fact remaining and that it is clear that Plaintiff did not request the transfer of funds from her account. Plaintiff further argues that Defendant's security procedures were neither commercially reasonable nor followed by the bank.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 85, 487 N.Y.S.2d 316 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. *State Bank of Albany v. McAullife*, 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983). The role of a court in deciding a motion for summary judgment "is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist." *Dyckman v. Barrett*, 187 A.D.2d 553, 590 N.Y.S.2d 224 (2d Dept. 1992).

### UNIFORM COMMERCIAL CODE

U.C.C. §4-A-202 states in relevant part as follows:

- (2) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (a) the security procedure is a commercially reasonable method

of providing security against unauthorized payment orders, and (b) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer.

- (3) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is commercially reasonable if (a) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (b) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

U.C.C. §4A-201 specifically states that “comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is *not by itself* a security procedure” (emphasis added). U.C.C. §4-A-204 provides that:

- (1) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (a) not authorized and not effective as the order of the customer under Section 4-A-202, or (b) not enforceable, in whole or in part, against the customer under Section 4-A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding ninety days after the date the customer received notification from the bank that the order was accepted or that the customer’s account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.
- (2) Reasonable time under subsection (1) may be fixed by agreement as stated in subsection (1) of Section 1-204, but the obligation of a receiving bank to refund payment as stated in subsection (1) may not otherwise be varied by agreement.

In essence, these provisions establish a bank’s basic obligation to make good on unauthorized and ineffective transfers. *Regatos v. North Fork Bank*, 5 N.Y.3d 395, 804 N.Y.S.2d 713, 838 N.E.2d 629 (2005). However, this rule is subject to an exception “when the bank and its customer agree on a ‘security procedure’ to ensure that payment orders received by the bank are authorized and error-free.” *Regatos v. North Fork Bank*, 257 F. Supp. 632 (S.D.N.Y. 2003). If such a security procedure is in place, “the loss from the unauthorized funds transfer will be shifted to the customer when (1) the security procedure is commercially reasonable, and (2) the bank accepted the payment order (i) in good faith, and (ii) in compliance with the security procedure. *Regatos*, 257 F. Supp. at

642. Thus, a payment order accepted in good faith pursuant to a commercially reasonable security procedure is effective as the order of the customer, even if it is actually unauthorized. *Id.*

In the case at bar, the record reflects that the only security procedure in place on Plaintiff's account was a representation from defendant, after the first fraudulent wire transfer, that no subsequent withdrawals by fax would be accepted. It appears that, despite the first fraudulent transfer and second subsequent attempt at a fraudulent transfer, that Defendant took no other steps to safeguard Plaintiff's account. Defendant did not seek to close the account or advise Plaintiff to do so, nor did it even note the prior fraud in their customer records or otherwise flag the account. These were the security procedures the bank's Assistant Branch Manager testified should have been put in place. Instead, when it received the July and August 2004 wire transfer requests, Defendant did nothing more than compare the signature to that on file with the bank and verify Plaintiff's date of birth with an individual who telephoned the bank purporting to be Plaintiff.

Based upon the foregoing, Plaintiff has met her initial burden of demonstrating the absence of any material fact warranting a trial on the first cause of action seeking recovery under U.C.C. §4-A-204. The Court finds that as a matter of law, the security measures were not commercially reasonable given the totality of the circumstances surrounding the fraudulent transfers and attempted transfers from Plaintiff's account. In opposition, Defendant has failed to demonstrate the existence of a triable issue of fact. Rather, it is undisputed that Defendant imposed no additional security measures apart from comparing Plaintiff's signature to that on file (which by itself is not a security measure) and verifying her date of birth with an individual who was repeatedly calling the bank to ascertain the status of the transfer. Regarding the issue of timely notice, Plaintiff has also demonstrated that she complied with the sixty (60) day notice requirement in that she sent the notice on October 5, 2004, fifty-four (54) days from the date of the statement. In opposition, Defendant does not dispute receipt of the statement and thus any technical defects, to wit, sent to the wrong address, etc., is an attempt to exalt form over substance. Thus, there is no issue of fact, and the Plaintiff's motion for summary judgment on the first cause of action is granted and Plaintiff is entitled to judgment in the amount of \$32,000 plus interest.

#### **BANKING LAW §676**

Banking Law §676 provides in relevant part that "Any withdrawal of moneys from a savings account... which is made by means of an unauthorized signature is wholly inoperative as to the

person whose name is signed unless such person has authorized or ratified such withdrawal...”.


Here, plaintiff argues that because the signature on the July and August 2004 withdrawals was not authorized by her, the claim for relief under Banking Law §676 must be granted.

In opposition to the motion, defendant has failed to offer more than bald, conclusory allegations that plaintiff’s signature was authorized. In essence, defendant’s arguments amount to mere bootstrapping of its argument that it verified the signature on the signature card and the date of birth of the caller, as evidence that the signatures were authorized. Such arguments, without more, are insufficient to defeat plaintiff’s motion for summary judgment on her Banking Law §676 claim.

### CONCLUSION

Based upon the foregoing, plaintiff’s motion for summary judgment on the first and second causes of action in the amount of \$32,000.00 plus interest is granted. Defendant’s motion to strike Plaintiff’s jury demand is denied as moot in light of the determination herein. Submit Judgment on ten (10) days Notice of Settlement.

**DATED:** JULY 31, 2007  
RIVERHEAD, NEW YORK

  
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**EMILY PINES**  
J. S. C.