

Andrew S. Hodes, P.C. v North Fork Bank, N.A.
2007 NY Slip Op 33171(U)
October 4, 2007
Supreme Court, Nassau County
Docket Number: 4965-04/
Judge: Daniel Martin
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SHORT FORM ORDER**SUPREME COURT OF THE STATE OF NEW YORK**

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

ANDREW S. HODES, P.C.

Plaintiff.

- against -

Sequence No.: 002
Index No.: 004965/04

NORTH FORK BANK, N.A.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendant's motion for summary judgment dismissing the complaint is hereby granted in part and denied in part as set forth below.

The following facts are undisputed. Plaintiff Alan S. Hodes, P.C., a legal practice, opened a checking account in connection with the operation of said practice with defendant bank in October, 2001. At that time plaintiff's president, Alan S. Hodes, Esq. executed a corporate resolution designating defendant as a depository for plaintiff. Mr. Hodes also executed a signature card which identified Mr. Hodes as president and which only authorized him as the signatory on the operating account. The resolution provides at paragraph 10 that:

"That unless the Corporation shall notify the Bank in writing within fourteen calendar days of the delivery or mailing of any statement of account and cancelled check, draft or other instrument for the payment of money (hereinafter referred to as 'Instrument') of any claimed errors in such statement, or that the Corporation's signature upon any such returned instrument was forged, or that any such Instrument was made or drawn without the authority of this Corporation or not in accordance with the signature arrangement set forth in paragraphs 2 or 3 hereof, or that it was raised or otherwise altered, or unless this Corporation shall notify said Bank in writing within six months after the delivery, or

mailing of any such Instrument that any endorsement was forged, improper, made without the authority of the endorser or missing, said statement of account shall be considered correct for all purposes and said Bank shall not be liable for any payments made and charged to the account of the Corporation or for any other errors in the statement of account as rendered to it. No legal proceedings or actions shall be brought by this Corporation against the Bank to recover any payment of any instrument upon which any signature or endorsement has been forged or was improper, or which was drawn, made, accepted or endorsed without the authority of the Corporation or the endorser or not in accordance with the signature arrangements stated in paragraphs 2 or 3 hereof, or which was raised or altered, or on which an endorsement was missing unless (a) the Corporation shall have given the written notice as provided hereinabove, and (b) such legal proceedings or actions shall be commenced within one year after the date when such statement and cancelled Instruments were delivered or mailed to the Corporation in the case of an unauthorized signature or any alteration on the face or back of the item or one and one-half years in the case of an unauthorized endorsement. ”

In or around July, 2003 Mr. Hodes, plaintiff's president, was diagnosed with cancer and periodically hospitalized for treatment in connection therewith until December, 2003. Between March, 2003 and December, 2003 plaintiff's paralegal/bookkeeper, non-party Desiree Penalvert negotiated a number of checks containing forged signatures against plaintiff's account.

Plaintiff alleges that the total number of forged checks negotiated by Ms. Penalvert numbered ninety-three and totaled \$101,571.91 in embezzled funds. Plaintiff commenced the instant action asserting causes of action against defendant bank for 1) negligence in defendant's failure to reconcile the signatures on the checks with that on the signature card; 2) strict liability pursuant to the Uniform Commercial Code; and 3) breach of contract. Defendant has answered. Defendant moves for summary judgment dismissing the complaint herein upon the bases that 1) as a matter of law plaintiff may not maintain this action due to its failure to inspect statements of plaintiff's account which were regularly provided by defendant and which would have enabled plaintiff to discover the fraud and notify the bank of same within a reasonable time; 2) plaintiff's cause of action for negligence may not be maintained because a bank and a customer have a contractual relationship; and 3) all disputed checks for which statements were provided to plaintiff in excess of one year prior to the commencement of this action are barred by operation of law.

In moving for summary judgment defendant must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to oppose the motion plaintiff must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

In his supporting affidavit Drew Crowley, defendant's regional district manager avers:

1) that pursuant to the corporate resolution and signature card, only Mr. Hodes is authorized as a signatory to the subject account;

2) that between September 30, 2002 and January 31, 2004 defendant bank regularly sent monthly bank statements in connection with said account along with copies of all canceled checks to the address listed in the account for such mailings;

3) on January 14, 2004 Mr. Hodes executed eighty-three forged check affidavits on plaintiff's behalf which constituted defendant's first notice of said forged instruments; and

4) on March 12, 2004 defendant credited plaintiff's account with \$5,575.81 representing those forged checks which were presented for payment during plaintiff's statement cycle on which the first contested item appeared plus fourteen days after the statement was made available to plaintiff.

At his deposition Mr. Hodes testified as follows. It was plaintiff's custom for its only employee who preceded Ms. Penalvert, Josephine Spano, to handle the firm's banking including receipt, review and reconciliation of bank statements. While Ms. Spano was authorized to prepare checks from the subject account, only Mr. Hodes could execute the checks. In June, 2002 when she came to work for plaintiff, Ms. Penalvert assumed Ms. Spano's banking responsibilities. Mr. Hodes acknowledged that plaintiff received the monthly statements but that he did not recall ever reviewing one after Ms. Penalvert was hired. In March, 2003 after Ms. Penalvert informed Mr. Hodes that the operating account was overdrawn, he directed her to pay more attention to the account and resolve the fact that it was overdrawn. Mr. Hodes himself did not attempt to contact defendant but allowed Ms. Penalvert to continue to handle plaintiff's banking until December, 2003. Mr. Hodes admitted that he did not review any bank statements prior to December, 2003 at which time he requested that Ms. Penalvert provide him with the statements. When she told him she was unable to provide same because she had thrown them out, Mr. Hodes testified that he requested copies of same be provided him by the bank. In January, 2004 Mr. Hodes discovered that Ms. Penalvert, who had since "disappeared," had misappropriated the funds. At that time he first informed defendant of the forged checks. (*See*, deposition transcript of Alan S. Hodes, pp. 28-29, 44-46, 48-49, 50, 53, 54-55, 64-67, 69, 73, 85-87, 88, 91, 95).

Generally, a bank is strictly liable for the payment of any checks which are not "properly payable." See, Uniform Commercial Code §3-404(1) and 4-404(1). Where, however, the "bank sends its customer a statement of account accompanied by items paid in good faith in support of the debit entries...the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof." UCC §4-406(1). The depositor is precluded from asserting that the bank failed in its duty and is strictly liable pursuant to UCC §4-404(1) as to subsequent checks which are allegedly forged where the bank demonstrates that the customer failed to examine the statement which contains the subsequent item and notify the bank within a reasonable period not to exceed fourteen days after the first forged check and statement reflecting same is made available to the customer. UCC §4-406(2)(b). *See, also, Putnam Rolling Ladder Co., Inc. v. Manufacturer's Hanover Trust Co.*, 74 N.Y.2d 340 (1989); *James Miller Marine Services, Inc. v. MTW Check Cashing Corp.*, 16 A.D.3d 378 (2nd Dep't 2005). Pursuant to UCC §4-406(3) the preclusion set forth above does not apply where the customer demonstrates that the bank used a lack of ordinary care in paying the checks. Further, any action commenced in excess of one year following the delivery of a statement to the customer reflecting an alleged forged

instrument will be time barred as to that item regardless of fault. UCC §4-406(4). *See, also, Matin v. Chase Manhattan Bank*, 10 A.D.3d 447 (2nd Dep't 2004).

Defendant has demonstrated that plaintiff failed to review its statements and notify defendant in a prompt manner of the cashing of the forged checks. Even though it appears that it is Ms. Penalvert, the forger of the disputed checks, who was responsible for reviewing the statements, same does not operate to serve as an excuse for why plaintiff failed to properly review same. It has been held that where a dishonest employee intercepts the bank's statements which, it is undisputed were provided to the customer, that the bank is still afforded the protection of UCC §4-406(4). *See, Robinson Motor Xpress, Inc. v. HSBC Bank, USA*, 37 A.D.3d 117 (2nd Dep't 2006).

Based upon the foregoing the court concludes that defendant has met its initial burden of demonstrating entitlement to summary judgment dismissing the complaint.

The court also concludes that defendant has *prima facie* demonstrated entitlement to dismissal of plaintiff's negligence claim. A checking account creates a contractual relationship between a bank and its customer and a cause of action for negligence may not be maintained based upon the breach of a duty imposed by contract. *See, Calisch v. Manufacturer's Hanover Trust Company*, 151 A.D.2d 446 (1st Dep't 1989).

Further, this action was commenced on April 14, 2004 and plaintiff alleges that the forged checks were first delivered and paid in March, 2003. Thus, the court concludes that defendant has also demonstrated entitlement to summary judgment at least dismissing all checks allegedly paid on by defendant and for which a statement was provided prior to April 14, 2004.

The burden now shifts to plaintiff to demonstrate a triable issue of fact which precludes summary judgment. *Zuckerman v. City of New York*, *supra*.

In opposition to the motion plaintiff first asserts that pursuant to the corporate resolution executed in connection with the opening of the account that plaintiff had six months and not fourteen days in which to report the forged checks to defendant. A review of said document, however, reveals that same is applicable to forged endorsements and not signatures on the check which, it should be noted, are expressly required to be reported within fourteen days of delivery of the statement reflecting the allegedly forged instruments.

Plaintiff next asserts that it appointed Ms. Penalvert, the forger of the subject checks herself, to review the statements as required by the bank's own rule which is set forth on its statements and says:

"If this is a business account, you agree that you will have at least two people review your statements, notices, and returned checks, or in the alternative, the person who reviews these will be someone who does not have authority to transact business on the account."

Thus, it is plaintiff's position that by appointing Ms. Penalvert to review the statements it

complied with defendant's own requirements for reviewing the statements and that defendant should therefore not be heard to claim that plaintiff failed to review the statements as required by the above referenced portions of the UCC.

Most compelling, however, is plaintiff's position that defendant failed to use ordinary care in cashing the checks. Plaintiff points to defendant's own guidelines to its employees which they are required to follow while processing checks. These guidelines include, *inter alia*, "red flags" or certain indicia which, if two or more of which are present during the negotiation of a check or checks merits "special attention" and the need to take "additional steps" on the bank's part. These guidelines include, *inter alia*:

- "2. The individual did not open his/her account at the branch where the check is being negotiated (inter-branch transaction); and
- 10. The individual presents two or more checks payable to himself/herself from the same maker, dated with the same date and/or bearing the notations described above."

It is undisputed that the account was opened at defendant's 1010 Northern Boulevard branch in Great Neck and that the checks were cashed at the 60 Cutter Mill Road branch. Further, having reviewed copies of the checks cashed, the court notes that on at least seven occasions Ms. Penalvert negotiated multiple checks. Mr. Hodes avers that he was never notified by the bank about whether the checks should be processed. Thus, it appears that plaintiff has met its burden of demonstrating that defendant failed to use ordinary care in processing the disputed checks by failing to comply with its own procedures which were in place to prevent fraud. *See, e.g., Putnam Rolling Ladder Co., Inc. v. Manufacturer's Hanover Trust Co., supra.*

Plaintiff having demonstrated that an issue of fact exists as to whether defendant used ordinary care in reviewing the subject checks, the court concludes that issues of fact exist which preclude summary judgment.

It should be noted that plaintiff failed to address at all the two branches of defendant's motion pertaining to dismissal of the negligence cause of action and dismissal of the complaint to the extent it seeks compensation for checks which were allegedly forged and whose statements were sent to plaintiff in excess of one year prior to commencement of this action.

Thus, it is directed that plaintiff's first cause of action is dismissed and the complaint is dismissed to the extent it seeks compensation for all checks reflected in statements sent to plaintiff in excess of one year prior to the commencement of this action.

So Ordered.

ENTERED

OCT 04 2007

NASSAU COUNTY

COUNTY CLERK'S OFFICE

A.J.S.C.



Dated: September 26, 2007