

Signature Bank v Scott Stone, P.C.

2009 NY Slip Op 30945(U)

April 23, 2009

Supreme Court, New York County

Docket Number: 113544/08

Judge: Martin Shulman

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

MARTIN SHULMAN
J.S.C.

PRESENT: _____

PART _____

Justica

Index Number : 113544/2008

SIGNATURE BANK

VS.

STONE, SCOTT, P.C.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO.

113544/08

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

this motion to/for _____

PAPERS NUMBERED

1, 2

3, 4

5

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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

FILED
APR 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 23, 2008

MARTIN SHULMAN 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: IAS PART 1

-----X
SIGNATURE BANK,

Plaintiff,

-against-

SCOTT STONE, P.C. and SCOTT STONE,

Defendants.

MARTIN SHULMAN, J. :

Index No. 113544/08
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COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff moves for summary judgment in this action to recover damages for breach of contract, overdraft, money paid by mistake, breach of endorsement warranty and unjust enrichment. Plaintiff bank commenced this action to recover an overdraft in the account maintained by defendant Scott Stone, P.C. ("Stone PC") which resulted from the deposit to that account of a counterfeit check in the amount of \$197,800, allegedly issued by Citibank, N.A., and Stone PC's utilization of \$197,300 of the credit given for the deposit before the check was returned unpaid to plaintiff. Defendant Scott Stone ("Stone") endorsed and deposited the check and also executed in favor of plaintiff an absolute, unconditional and continuing guaranty of all debts and obligations of Stone PC whenever and however accruing.

Stone claims that he fell victim to an internet scam by which he was induced to deposit the check to the credit of the Stone PC account. He received the check on July 24, 2008 and on the next day proceeded to plaintiff's branch office where he delivered the check to Arnold Sherman, an employee of plaintiff, and asked Sherman when the check would be available for "next day availability." Because the check appeared to be an official bank check, the Stone PC account was entitled to have "next day availability"

of the deposit credit per Federal Reserve Regulations. Sherman informed Stone that he needed to use a "next day availability" deposit ticket which Sherman filled out for Stone.

On Monday, July 28, 2008, Stone instructed Sherman to effect a wire transfer as soon as funds were available. As the credit for the deposit was available on that day, this funds transfer, in the amount of \$197,300, was effectuated at 10:46 a.m. to Hanvit Bank in Korea, through Wachovia Bank, International.

The check was returned to plaintiff on July 30, 2008, marked "counterfeit." Upon the return of the check, plaintiff's processing system automatically debited the amount of the returned item to the Stone PC account and sent a letter dated July 30, 2008 advising Stone PC of the dishonor of the check and the debit. As a result of the debit, the Stone PC account went into overdraft.

Plaintiff's employees contacted Stone to make arrangements to cure the overdraft. By letter dated August 18, 2008, plaintiff made a formal demand for payment to Stone PC. Defendants did not respond and plaintiff commenced this action.

Plaintiff now seeks an order granting summary judgment against defendants, jointly and severally, in the principal sum of \$197,300 with interest at the legal rate from July 28, 2008 until the date of entry of judgment, and against Stone, individually, for attorney's fees and legal expenses in an amount to be determined at an inquest, pursuant to CPLR 3212 (c). Plaintiff argues that the Stone PC account is subject to and governed by plaintiff's Business Accounts Agreements and Disclosures ("BAAD"). Page 5 of the BAAD, under the section "Uncollected and Returned Checks," provides that plaintiff receives all deposited checks as an agent for collection and any

uncollected or returned check may be charged back and debited to any account maintained by Stone PC. Stone is allegedly liable in his individual capacity due to his execution of the personal guaranty.

Plaintiff contends that had defendants had any concern about the collectability of the check, they should not have asked to be granted or utilized next day availability. Alternatively, Stone allegedly should have asked plaintiff to handle the deposit on a collection basis or waited a few days until the check processing procedure could be completed.

In opposition to the motion, defendants argue that the motion is premature because there has been no opportunity to conduct discovery and receive information exclusively in plaintiff's possession. Defendants also contend that plaintiff has acted in a negligent or unreasonable manner. They cite Uniform Commercial Code ("UCC") §4-212 (4), which requires that a bank receiving checks from depositors must use "ordinary care" in settling those checks. According to the UCC, ordinary care in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which that person is located, with respect to the business in which that person is engaged. *See Whitehall Packing Co., Inc. v First Nat'l City Bank*, 55 AD2d 675 (2d Dept 1976).

Defendants state that plaintiff's representative, Arnold Sherman, took it upon himself to examine and approve the counterfeit check. They aver that Sherman's approval of the check confirms the fact that plaintiff apparently had no procedures in place to ascertain whether the check was counterfeit, despite having received various warnings and alerts from the New York State Department of Banking, the Federal Trade

Commission and/or Office of Currency and Control. They argue that plaintiff's conduct presents an issue of fact precluding the granting of summary judgment.

Stone further argues that plaintiff is not entitled to attorney's fees pursuant to the guaranty. Stone asserts that paragraph 4 of the guaranty, entitled "Indemnity," provides that the guaranty "shall not extend to liabilities, damages, losses, obligations, judgments and expenses arising from the gross negligence or willful misconduct of [plaintiff]." (Bracketed matter added). Stone contends that due to plaintiff's negligence and/or misconduct, plaintiff is not entitled to such fees in this action.

In its reply papers, plaintiff states that in serving its motion papers, it specified that all opposition papers be served in accordance with CPLR 2214 (b), i.e., at least seven days prior to the return date set forth (January 23, 2009). At defendants' counsel's request, plaintiff's counsel consented to a stipulation that all opposition papers be received by him, in hand, on or before February 23, 2009. Defendants served their papers by facsimile transmission, which was not approved by plaintiff's counsel. Plaintiff claims that the service was improper and null. The court acknowledges defendants' default but will consider their opposition as there is no evidence of prejudice to plaintiff.

Plaintiff refers to UCC §4-212 (1), which provides that the risk of loss for the non-payment of a deposited check remains with the depositor until final settlement occurs, and the dishonor of the check revokes any provisional settlement and leaves risk of loss for the non-payment with the depositor. Plaintiff asserts that defendants in their haste in sending a wire transfer before assessing the validity of the check are responsible for the overdraft and are liable to plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).

Prior to a final settlement, the collecting bank is merely the agent for collection of the check deposited by the owner and any settlement is merely provisional. *See Chase v Morgan Guarantee Trust Co.*, 590 F Supp 1137, 1138 (SD NY 1984). When a final settlement is not made on a check because it is valueless, the collecting bank is entitled to revoke the provisional settlement made on the check and charge the account in order to obtain a refund. *See Call v Ellenville Nat'l Bank*, 5 AD3d 521, 523 (2d Dept 2004). If a collecting bank has credited a customer's account for an item and even allowed the customer to make a provisional withdrawal, but fails to receive a final settlement for that item, it may charge back the customer's account. *See Hanna v First Nat'l Bank of Rochester*, 87 NY2d 107, 118-119 (1995).

UCC §4-212 (4) holds a bank liable for a charge-back only if the bank has been negligent "with respect to the item." The bank is liable only when its negligence causes the dishonor that requires charge-back. Allowing an overdraft generally does not constitute a failure by a bank to exercise ordinary care. *See Chase v Morgan Guarantee Trust Co.*, 590 F Supp at 1139.

The court finds that plaintiff did not fail to exercise ordinary care pursuant to UCC §4-212 (4). Therefore, the risk of loss for the dishonor of the subject check is on defendants and Stone is individually liable pursuant to his guaranty.

Pursuant to CPLR 3212 (c), the issue of damages shall be set down for a hearing.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the complaint is granted and defendants' defenses are dismissed; and it is further

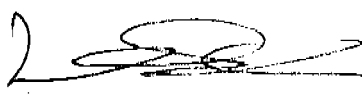
ORDERED that the New York County Clerk is directed to enter judgment in favor of plaintiff Signature Bank and against defendants Scott Stone, P.C. and Scott Stone, jointly and severally, as prayed for in the complaint in the amount of \$197,300.00, with interest as calculated by the Clerk at the statutory rate from July 28, 2008, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of plaintiff's action that seeks the recovery of attorney's fees is severed and an assessment thereof is directed, and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of the proper fees, if any, to place this action on the appropriate trial calendar for the assessment directed herein.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: April 23, 2009



Martin Shulman, J.S.C.

FILED
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COUNTY CLERK'S OFFICE
NEW YORK