

Estate of Merna v Simuro

2009 NY Slip Op 32189(U)

September 15, 2009

Supreme Court, Nassau County

Docket Number: 9256/05

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCAN

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ESTATE OF MARIE MERNA, by its
ADMINISTRATOR PATRICIA TUZZIO,

Plaintiff,

-against-

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.:9256/05
Motion Seq. No.: 05

VALERIE T. SIMURO and JPMORGAN
CHASE BANK, N.A.,

Defendants.

DECISION AND ORDER

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Defendant JPMorgan Chase Bank (“JPMorgan Chase”) moves for an order granting it summary judgment as to Plaintiff’s complaint, or, in the alternative, striking Plaintiff’s demand for a jury trial.

Plaintiff Patricia Tuzzio, Administrator of Marie Merna’s estate seeks to recover the funds Defendant Valerie T. Simuro (“Simuro”) illegally appropriated from the Estate’s Chase checking and savings accounts (the “Accounts”) from June 2003 through December 2004. After Tuzzio retained Simuro as the Estate’s attorney and opened the Accounts with her, Simuro forged Tuzzio’s name on checks drawn on the checking account and transferred funds from the Accounts without Tuzzio’s permission. It is not refuted that Simuro acknowledged, under oath, that she alone was responsible for all the thefts (Exhibit E, pgs. 54-55 annexed to JPMorgan Chase’s motion). JPMorgan Chase contends the Plaintiff did not timely notify the bank of the fraudulent withdrawals by Simuro. JPMorgan Chase contends there is a one-year limitation under UCC § 4-406(4). It also alleges that the account agreement modified the one-year limitation to a sixty (60) day limitation and a fourteen (14) day limitation.

The Plaintiff contends she discovered the forgeries initially on January 5, 2005 when, for the

first time, the Plaintiff had obtained the account statements. The Plaintiff immediately notified Chase (as it was then known pre-merger with J.P. Morgan). Subsequently, Simuro was arrested, convicted and disbarred. Simuro had been charged with fraudulently taking more than \$2.6 million from various other accounts. Some of those accounts had been from the same branch as the Plaintiff's account. Thus, the Plaintiff contends the one-year limitation began to run on January 5, 2005 when the Plaintiff first received knowledge of the statements and the fraudulent use of estate funds by Simuro. The Plaintiff also maintains that the other shorter time periods claimed by JPMorgan Chase do not apply since Chase lacked ordinary care and good faith in paying the checks to Simuro. Finally, the Plaintiff contends she never received nor signed for the alleged forty plus page account agreement wherein the shorter time limitations could be found.

Under the UCC, a check bearing a forgery of the customer's signature is an "item" not "properly payable" and, therefore, it may not be charged against the customer's account (*see Monreal v Fleet Bank*, 95 NY2d 204 [2000]).

As noted by the Court of Appeals, the UCC imposes certain reciprocal duties on the customer, and a failure to comply with the duties shifts the burden of loss for the forgeries from the bank to the customer. UCC § 4-406 imposes upon a customer the duty to inspect its statement and canceled checks with reasonable care and promptness. A failure to do so causes a preclusion of a claim against the bank for repeated forgeries by the same wrongdoer. The rationale is that after the first such forged check and statement containing the forgery are made available to the customer, the customer is in a better position to know a forgery or an unauthorized check payment.

When a customer requests that a bank mail a statement either to him or herself or another person and the bank complies, the statements are considered "made available" to the customer (*Robinson Motor Xpress, Inc. v HSBC Bank, USA*, 37 AD3d 117 [2d Dept 2006]). Under the UCC provision suits are barred to recover amounts paid by the bank or forged endorsements unless the customer gives written notice of the forgery within one year of the time account statement was made available, and the customer fails to report the alleged forgery to the bank within one year, the bank is not liable for the

forged endorsements (*Robinson Motor Xpress Inc. v HSBC Bank, USA, supra*).

The Plaintiff stated the first time the statements were available to the Plaintiff was January 5, 2005. The Plaintiff stated she never knew the statements of an estate account went out once a month, that she, the Plaintiff, did not know that only Simuro was receiving the statements (see Exhibit F, pgs. 99-100 annexed to Plaintiff's affirmation in opposition).

When the statements are provided as directed by the customer or in a manner of which the customer does not object, the statements are "made available" within the meaning of the UCC provision (*see Woods v MONY Legacy Life Ins. Co.*, 84 NY2d 280 [1994]).

Here, Simuro requested she receive the bank statements. If a senior experienced bank officer had explained to the Plaintiff the statement procedure (do you want Simuro only to get the statements? Would you, the Plaintiff, like copies also for your protection as administrator?) the Plaintiff's position could have been more illuminated with such experienced advice.

Here, the record evidence that the signatures were forged which has not been disputed. If a banking institution contends a party, such as the Plaintiff, substantially contributed to the forgery under UCC § 3-406, the bank must show that there was no contributory negligence on its part and that the bank exercised reasonable commercial standards in verifying signatures or checks presented to it for payment. A bank's failure to demonstrate its observance of reasonable commercial standards in such circumstances places liability squarely with the bank (*see Zambia National Commercial Bank Ltd. v Fidelity International Bank*, 855 F.Supp. 1377 [S.D.N.Y. 1994]; *Royal Insurance Co. of America v Citibank, N.A.*, 306 AD2d 158 [1st Dept 2003]).

The UCC provision barring suits to recover amounts paid by a bank on a forged endorsement unless the customer gives written notice of an alleged forgery within one year of the time the account statement was made available, is derived from the depositor. There is a common law duty to examine drafts and statements furnished by the bank and report alterations or forgeries within a reasonable time (*Woods v MONY Legacy Life Insurance Co., supra*).

In *Woods v MONEY Legacy Life Insurance Co., supra*, a Plaintiff failed to object after receiving

confirmation of the change of address (that the estate attorney was to receive the statements). Here, there is no indication that the Plaintiff knew or was aware that only Simuro was to receive the statements. There is nothing in the record to indicate that once the Plaintiff signed the blank account card she, the Plaintiff, was aware that she would not ever receive the account statements.

The Chase officer that assisted the Plaintiff (with Simuro present) open the accounts was Philip Antico (his deposition is annexed to JPMorgan Chase's motion as Exhibit H). Antico was an experienced officer of the bank who recently retired from the banking industry after 42 years of service. The following are excerpts from Antico's deposition. The page numbers refer to that exhibit.

Antico was on a first-name basis with Simuro and Simuro called Antico "Phil" (p. 45); Simuro had opened a half dozen estate accounts at the bank when Antico was the account officer (p. 46); Simuro made the appointment to open the estate accounts (pgs. 49-50); when a customer opened an account, Antico asks the questions (p. 54); all of Antico's questions were answered by Simuro (p. 55); Plaintiff said very little (p. 55); Antico said nothing about bank statements (p. 56); the signatory on the account was the Plaintiff (p. 57); statements, by Simuro's request, were to be mailed to Simuro's office (p. 58); Antico did not inform the Plaintiff that she, the Plaintiff, would not receive copies of the statements (p. 72); the terms and conditions of the account were in an envelope along with "starter" checks, deposit slips, etc., and "somebody" took them (pgs. 72-73); Antico does not remember if the Plaintiff or Simuro took the envelope (p. 73); when asked if Simuro was a "special" client, Antico did not deny same (p. 58).

Also illuminating is the deposition of Kevin Finley, an account security specialist for JPMorgan Chase (see Exhibit G annexed to Plaintiff's affirmation in opposition; the following page numbers refer to that exhibit). Finley stated that if a check in an account presented for payment is out of sequence—of 25 numbers on checks; drafts for a larger than ordinary amount is grater than average, and the amount is greater than average, it will be sorted out for a bank employee to review (pgs. 14-15). The review consists of the signature card on the account being checked (p. 50). Finley testified that special attention would be given to accounts opened within three (3) months of the suspicious check since there

is a lot of new account fraud (p. 104).

As far as the record herein, even though the account in question had a \$150,000.00 check (fraudulently) written against it by Simuro, no one contacted or alerted the Plaintiff as to the \$150,000 check.

Finley's testimony serves as evidence that bank's inspection procedures were so superficial that they did not offer a realistic opportunity to detect forged checks. Such evidence supports a determination that the bank acted without ordinary care in paying forged checks (*see Putnam Rolling Ladder Co., Inc. v Manufacturers Hanover Trust Co.*, 74 NY2d 340 [1989]). Therefore, the customer would not be precluded from asserting a claim against the bank for forgeries by the bank's failure to inspect the statement and canceled checks with reasonable care and promptness (*Id.*)

The court notes an interesting excerpt from the Court of Appeals in a recent opinion of *Regatos v North Fork Bank*, 5 NY3d 395, 405 (2005) on bank security:

“Policy argument support an actual notice requirement. An invariable statutory rule provides a bright line for banks and their customers, bringing reliability and certainty to these dealings. Constructive notice is far less exact, leaving too much room for varying interpretation and disorder. If the bank had complied with its security procedures, it would have recalled Regatos the same day it received each purported transfer order, thereby providing him with actual notice of the events.

Even where customers enter “hold mail” agreements with their banks, the actual notice rule still applies. Just as the one-year notice limitation is an inherent aspect of the customer's right to recover unauthorized payments, the actual notice requirement provides the bedrock for the exercise of that right. Permitting banks to enforce “agreements” to accept constructive notice would defeat article 4-A's guarantee of recovery for unauthorized payments.”

Of course, JPMorgan will point to the fact that Plaintiff's attorney—Valerie T. Simuro—the mini-Madoff—told Mr. Phillip Antico that she, Simuro, would be receiving the statements of the account, not the Plaintiff, and the Plaintiff did not object.

Generally, a bank may assume that a person acting as a fiduciary will apply entrusted funds to

the proper purpose and will adhere to the conditions of the appointment; a bank is not in the normal course required to conduct an investigation to protect funds from possible misappropriation by a fiduciary unless there are facts indicating misappropriation (*see Matter of Knox*, 64 NY2d 434 [1985]).

Here, Simuro, the mini-Madoff, had opened a few accounts at the branch in issue. Is it common practice for an estate attorney to escort the client/administrator to a bank and bank officer Simuro knew and then demand that she, Simuro, would get the account statements mailed to her so she could rob the estate blind? The bank apparently never picked up on Simuro's *Modus Operandi* and blunder of the other various estate accounts at that branch location.

The bank herein became more than a depository and conduit for the estate money. Did the bank have a duty to inform the Plaintiff that she, as administrator of the estate, could and should receive the statements of the account (Should not have Mr. Antico stated something like: "Mrs. Truzzio, based on my long career in the banking industry, I would advise that you, the administrator, also receive statements [at a small additional fee?] to protect your position and to communicate with your counsel.")

The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice; focus is on such matters as the size and setting of the transaction, whether deceptive or high pressure tactics were employed, use of fine print in the contract, experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1 [1988]).

As a general proposition, contract provisions waiving a jury trial are valid and enforceable unless an adequate basis to deny enforcement is set forth by the challenging party (*Fordham University v Manufacturers Hanover Trust Co.*, 145 AD2d 332 [1st Dept 1988]). Thus, even if a party had neglected to read the paragraphs containing the various provisions, this alone would not affect their

validity (*Barclays Bank of New York v Heady Electric Co., Inc.*, 174 AD2d 963 [3d Dept 1991]). Here, the Plaintiff denied she ever received the “package” containing the jury waiver. It is unknown whether the Plaintiff signed for the package—containing more than 40 pages—with the waiver [hidden] therein.

In the matter of *Estate of Ray*, 24 Misc3d 285, 874 NYS2d 891 (1st Dept 2004), the co-executor of the estate, an attorney, signed an acknowledgment that she received a copy of the rules and regulations governing the bank account and was thus found to be bound by the sixty (60) day limitation to report forged signatures by a co-executor. As noted, Mr. Antico indicated the envelope with the rules and regulations for the accounts “disappeared” from his desk (see Exhibit H, pgs. 72-73 annexed to JPMorgan Chase’s motion).

Mr. Antico had a stellar career at the Chase/JPMorgan Chase Bank. He had opened accounts with Simuro’s customers on other occasions. Ms. Simuro sought out Antico to open the Plaintiff’s estate account. Simuro had done legal work for Antico’s mother (see Exhibit H, pg. 42-43 annexed to JPMorgan’s motion). This could have clouded Mr. Antico’s judgment that the true customer was the Plaintiff. That Mr. Antico, in his stellar 42-year career would have informed the Plaintiff, the customer, that she, the Plaintiff, could get copies of the account statements (at an additional fee?) to monitor the account? Could Mr. Antico have offered copies of statements to be sent to the Plaintiff with the originals to Simuro? Did Mr. Antico get the memo from his security department that new accounts are the most prone to fraud? (See Exhibit G, p. 93 annexed to JPMorgan’s memo). True, hindsight is 20/20, but this Court must access the financial train wreck that is the Plaintiff’s cause of action.

The issue before the Court is whether the bank, based on the record before this Court, failed to exercise ordinary care under reasonable commercial statements? (See *Garage Management Corp. v Chase Manhattan Bank*, 22 AD3d 432 [1st Dept 2005]).

A bank was not liable to a customer for commercial bad faith in connection with checks allegedly forged by a bank employee where the customer had explicitly authorized the bank to honor checks drawn on the account that were payable to cash or such employee (*Joseph v Bank of New York*, 302 AD2d 318 [1st Dept 2003]) (emphasis added).

Also, the Plaintiff was unaware of the fact that Simuro had been forging the Plaintiff's name on the estate checks. There was no ratifying by the Plaintiff or any of Simuro's acts either expressly or impliedly (see *Midtown Copying & Duplicating Services, Inc. v Bank of New York*, 268 AD2d 252 [1st Dept 2000]).

JPMorgan stresses the Plaintiff's possession of credit cards and regular checking accounts and business acumen, i.e., she should have known better. Where are such personal account statements sent? To her home for the Plaintiff's examination: Here, it appears the statements for the estate accounts (for which the Plaintiff admits she did not know the procedure) were almost "automatically" sent to Simuro based on Simuro's past utilization of the bank branch and her familiarity with one of the officers. The Plaintiff's wishes (was she ever directly asked?) were apparently never considered.

True, the bank did not select attorney Simuro on the Plaintiff's behalf to represent the estate, but she, Simuro, was not Chase's "customer." While the bank did not have to stand totally as the Plaintiff's watchdog, the bank did have security "red flags," and it could have alerted the Plaintiff to place her in the best position to do the Plaintiff's job. If the Plaintiff was the accounts' calvary, the bank could have been her scout forewarning her and helping her read the signals of fraud, danger and otherwise.

While a bank and its customers may agree to vary the provision of the UCC concerning risk of loss from a forged check, the agreement may not abrogate a bank's responsibility to exercise good faith and ordinary care (UCC § 4-406[i]; *Herzog, Engstrom & Koplovitz, P.C. v Union Nat. Bank*, 226 AD2d

1004 [3d Dept 1996]).

UCC § 4-406(3) shifts the loss of repeated forgeries back to the bank when the customer, although in breach of its own duty to inspect the canceled checks and statements, is able to establish that the bank lacked ordinary care in paying the forged checks (UCC § 4-406[3]; *Monreal v Fleet Bank*, 95 NY2d 204 [2000]; *Putnam Rolling Ladder Co., Inc. v Manufacturers Hanover Trust Co.*, 74 NY2d 340 [1989]).

Did JPMorgan Chase's security department notify the Plaintiff of the large withdrawal of \$150,000 check? Did they notify Simuro? Did JPMorgan Chase notify anyone? Should it have? What is the function of the security department? Does the bank and its security department officers know what the definition of "security" is? These are all questions for trial.

As noted, JPMorgan Chase has security guidelines and protocols for accounts. It is unclear whether they were ever utilized for the account in issue. JPMorgan Chase's personnel were aware that account irregularities usually occurred in the first six (6) months of the account. Was the Plaintiff at all informed of this? Did anyone inform the Plaintiff that she could be sent copies of the account on a monthly basis (for a small additional charge?) to safeguard the estate assets or at least directly see where funds were going? No. Was the Plaintiff treated like a fifth wheel instead of the valued customer? Was Simuro's relationship with branch officers too "cozy" to the detriment of the Plaintiff? Did the account agreement provide that the statement would be mailed to the address on the signature card (the Plaintiff's) unless the address was changed by a document executed by an authorized signatory (the Plaintiff?).

Did Simuro assume the role of customer/attorney? Did Simuro's relationship with Antico put her, Simuro, into a "special" category (in Antico's eyes) that made the Plaintiff, inexperienced in the

field of estate accounts (unlike the mini-Madoff, Simuro), a non-entity, or invisible customer whereby Antico saw Simuro as the “customer?”

Did Chase, by the conduct of its employees, facilitate Simuro’s position?

As to the conflicting versions of what occurred, the credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662 [2d Dept 2007]; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397 [2d Dept 1997]).

Based on the record before this Court, there are many issues of fact as to whether the bank could have done more to protect the Plaintiff’s account (as noted Simuro was convicted of taking more than \$2.6 million from various accounts including Plaintiff’s) (see Plaintiff affirmation in opposition, ¶ 2). Also, there are issues as to when the Plaintiff actually received the account statements and if she even received the rules and regulations (i.e., shorter reporting periods and a waiver of a jury trial).


As such, the Defendant’s application for summary judgment and to strike the jury demand is **denied**. It is hereby

ORDERED, the parties are directed to appear in DCM for a Recertification Conference at 9:30 a.m. in DCM on September 30, 2009.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: September 15, 2009
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.