

<b>DMDB Adults, Inc. v Bank of Am. Corp.</b>
2011 NY Slip Op 34323(U)
October 6, 2011
Supreme Court, New York County
Docket Number: 103977/09
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

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DMDB ADULTS, INC. and DMDB KIDS, INC.,

Plaintiffs,

DECISION/ORDER  
Index No. 103977/09  
Motion Seq. No. 003

-against-

BANK OF AMERICA CORP. d/b/a BANK OF  
AMERICA,

Defendant.

**FILED**

**OCT 07 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

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BARBARA R. KAPNICK, J.:

By their Verified Complaint filed on March 23, 2009, plaintiffs seek to recover on alleged forged checks drawn on Bank of America ("BANA") by plaintiffs' bookkeeper, Debra Haber, in the amount of \$951,684.09.

Defendant BANA moves, pursuant to CPLR 2221(d), for leave to reargue the prior motion and cross-motion, which resulted in the Decision/Order of this Court, dated October 7, 2010 (the "Decision"), which

- (1) granted BANA's motion for summary judgment to the extent of dismissing plaintiffs' claims based on checks paid prior to December 2007 on the ground that plaintiffs are precluded from asserting said claims pursuant to NJ Uniform Commercial Code ("UCC") 4-406(f);
- (2) denied that portion of BANA's motion seeking to dismiss

additional claims brought by DMDB Adults on the ground that they are time barred by the 60-day contractual period as premature;

- (3) denied plaintiffs' cross-motion for summary judgment and that portion of BANA's motion seeking to dismiss certain claims as time barred under either the one-year rule or the 60-day rule on the grounds that there are material issues of fact as to whether or not defendant exercised ordinary care in paying those items;
- (4) denied that portion of defendant's motion seeking to dismiss plaintiffs' third cause of action for conversion for failure to state a cause of action; and
- (5) granted that portion of defendant's motion seeking to dismiss plaintiffs' fourth cause of action for fraud.

BANA seeks reargument on the ground that the applicable UCC provision precludes plaintiffs as the check "drawers" from stating a conversion cause of action against the "drawee" BANA, and because plaintiffs have failed to establish an issue of fact in that they have not met their statutory burden of establishing any lack of ordinary care on BANA's part, and upon reargument, granting defendant summary judgment dismissing plaintiffs' claims against it on the ground that BANA has established its defenses such that this Court should dismiss this action as a matter of law based, *inter*

alia, on the applicable provisions of the UCC and plaintiffs' failure to state a cause of action against it.

#### Discussion

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (citation omitted). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (citation omitted) or to present arguments different from those originally asserted (citation omitted).

*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22, 27 (1<sup>st</sup> Dep't 1992), *lv* *dism. in part and den. in part*, 80 NY2d 1005 (1992), *rearg den.* 81 NY2d 782 (1993).

The first issue to determine is whether this Court erred in denying BANA's motion for summary judgment dismissing plaintiffs' cause of action for conversion.

Defendant argues that plaintiffs are precluded from maintaining an action in conversion because, as a matter of law, plaintiffs are the "drawers" and NJ UCC 3-420(a) does not allow "drawers" to maintain an action in conversion.

Plaintiffs, on the other hand, argue that because their

signatures were forged, they are not "drawers" and NJ UCC 3-420(a) does not operate to bar their action for conversion.

After hearing oral argument on the record on April 6, 2011 and considering the papers submitted on this motion, this Court determines that it did err in its earlier Decision in allowing plaintiffs to maintain their cause of action for conversion.

NJ UCC 3-420(a) provides as follows:

- a. The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. *An action for conversion of an instrument may not be brought by the issuer or acceptor of the instrument or a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or co-payee.* (emphasis supplied).

NJ UCC 3-105(c) defines an "issuer" as a "maker or drawer of an instrument." NJ UCC 3-103(3) defines a "drawer" as "a person who signs or is identified in a draft as a person ordering payment." (emphasis supplied).

This Court recognizes that NJ UCC 3-420(a) follows the rule

stated in *Stone & Webster Engineering Corp. v. First National Bank & Trust Co.*, 345 Mass 1, 184 NE2d 358 (Mass 1962) and makes clear that a "drawer" of a check (i.e. the person who signed the check) with a forged indorsement does not have a cause of action for conversion against the depository bank that took the check. The New Jersey courts, however, have not squarely addressed the issue of whether the same principal applies where the "drawer's" signature is forged, as is the allegation here. However, other courts have strictly construed Section 3-420 of the UCC as barring a drawer or issuer's claim for conversion, even when the issuer's signature was forged or unauthorized. See, e.g., *Borg v. J.P. Morgan Chase & Co.*, 2006 WL 2052856 at \*7 (W.D. Tenn. July 21, 2006); *Simmons v. Lennon*, 139 Md. App. 15, 29, 773 A.2d 1064, 1072 (Md. Ct. App. 2001).

Since plaintiffs were identified on the checks as the ones ordering payment, they are the "drawers," whether or not they authorized the checks to be drawn. See *Borg, supra* at \*8.

In light of the foregoing authority, which all interpret the identical UCC provision that is at issue here, and the plain language of NJ UCC 3-420(a) and 3-103(3), the Court finds that plaintiffs' claim for conversion must be dismissed.

With respect to whether the Court misapplied the Repeater Rule defense, NJ UCC 4-406(d) and (e), defendant argues that the Rule places the burden on the plaintiff to come forward with evidence to show that the bank failed to exercise ordinary care in paying the checks and that its failure substantially contributed to their loss. Defendant argues that plaintiffs failed to meet their burden when they offered only conclusory and unsupported statements that BANA failed to exercise ordinary care. Defendant also argues that it does not have a duty to check signature cards and that automated check processing procedures have been held to comport with UCC's standard for ordinary care.

Defendant further argues that the case relied upon by plaintiffs and cited by this Court in its prior Decision, is inapposite. In *Travelers Indem. Co. v. Good*, 325 NJ Super 16, 737 A2d 690 (NJ Super Ct App Div 1999), plaintiff conceded that the bank's policy of not sight reviewing checks under \$5,000.00 was reasonable. The Court in *Travelers*, however, held that plaintiff was entitled to discovery to determine whether the bank adhered to its policy and reviewed checks above the threshold amount. In this case, BANA argues that it submitted both uncontroverted bank officer testimony demonstrating that the bank adhered to its policy, and uncontroverted expert testimony proving that the bank's policies met the statutory ordinary care standard.

In opposition, plaintiffs argue that the record is sufficient to support a colorable claim of lack of ordinary care by BANA, where checks payable to cash were being endorsed by someone other than the recorded owners of the account. Plaintiffs urge that because BANA was the depository bank and the collecting bank, its actions should be scrutinized in more detail.

Upon review of Volumes I and II of the Exhibits in Support of Bank of America's Motion to Reargue, it is clear that BANA complied with its obligations pursuant to NJ UCC 4-406(a) by providing statements to plaintiffs on a monthly basis, which identified the checks paid and either provided the cancelled checks or their images for the customer's review.

NJ UCC 4-406(c)<sup>1</sup> then shifts the burden to the customer to review its account statements and cancelled checks promptly and

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<sup>1</sup> NJ UCC 4-406(c) provides as follows:

- c. If a bank sends or makes available a statement of account or items pursuant to subsection a. of this section, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

report any forgery to the bank. Dean Hecker, one of the owners and the Treasurer of the plaintiff corporations, stated the following in his Affidavit, sworn to on April 12, 2010:

33. In order to cover up the forgeries, when the bank statements and checks were sent by BOA to the plaintiffs at 32 North Dean Street, Debra Haber would review them and remove the actual checks bearing the forged signature and her endorsement and shred them.

\* \* \*

36. When I or William Hecker would review the bank statements periodically, we would compare the dollar amounts of the checks on the bank statement with the check register which would match correctly.

37. Neither I, nor William Hecker reviewed the bank statements sufficiently to catch the omitted or missing checks that Debra Haber had shredded, and thus were unaware of her fraudulent conduct as it was perpetuated.

\* \* \*

54. Although, the plaintiffs did not look at each check when it was received the monthly statements from BOA, this act did not contribute to the making of the forged and unauthorized checks by Debra Haber. Therefore, plaintiffs' failure to reconcile the bank statements promptly did not substantially contribute to the losses or the proceeds from the forged checks.

Because it is conceded by plaintiffs that they failed to meet their duty to review imposed by NJ UCC 4-406(c), NJ UCC 4-406(e) places the burden on the customer to establish both the bank's lack

of ordinary care in paying the checks and that such failure substantially contributed to the customer's loss. If such a showing is made, then the customer is entitled to recover under the UCC's comparative fault allocation of liability.

Here, upon review of the record below, the Court finds that plaintiffs failed to meet their burden to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact on the issue of whether BANA failed to exercise ordinary care in paying the forged checks. Plaintiffs' mere conclusions and unsubstantiated allegations as to BANA's lack of ordinary care were insufficient to defeat defendant's motion for summary judgment. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Accordingly, this motion for leave to reargue is granted, and upon reargument, this Court grants defendant's prior motion for summary judgment in its entirety and denies plaintiffs' cross-motion for summary judgment.

The Clerk shall enter judgment dismissing the action against defendant Bank of America Corp. d/b/a Bank of America with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: Oct 6, 2011



Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.

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