SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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RHOBAR, INC. and RHONA SILVER,

Plaintiff,

- against -

NBT BANK,

Defendant.

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Index No. 654438/2012

DECISION and ORDER

Mot. Seq. 01 and 02

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for damages arising from defendant's accepting a check for deposit into the NBT account of Rhobar Development Associates, LLC ("Development") when it was presented on or about June 28, 2007. The check, was originally payable to Rhobar, Inc. ("Inc."), was endorsed by Barry Newman, and made payable by Newman to Development.

Previously, NBT moved for summary judgment dismissing the action (motion sequence 1), and this court, misapprehending some of the facts, denied summary judgment as to the breach of contract claim, the first cause of action, as brought by Inc. only. NBT moves, by motion sequence 2 to stay these proceedings, pursuant to CPLR 2201, "until determinative issues are resolved" in a Supreme Court, Suffolk County action, *Rhona Silver, et al v. Barry Newman, et al.* (Suffolk county Index No 22581/2010)(hereinafter, "the Suffolk county action"). Plaintiffs do not oppose. Upon review of the new motion, this Court, *sua sponte*, amends its prior decision dated December 19, 2013, granting summary judgment as to all causes of action, and dismissing the action in its entirety.

NBT, in its motion for summary judgment, presented a copy of the check made payable to Inc., with its endorsement by Barry Newman. Newman identified himself as Vice President of Inc. in that endorsement. The Check was made

payable to Development, and deposited it in Development's NBT account.

NBT also appended the affidavit of Rhona Silver, sworn to on May 12, 2012 and submitted in opposition to Barry Newman's motion to dismiss the Suffolk County action. There, Ms. Silver asserted that Newman was chief executive officer of Inc. and managing member of Development. "From the fall of 2005 through July of 2007, defendant Newman oversaw, controlled and supervised the finances and development of all real estate collectively known as the Huntingtown Town House property [previously described as owned by three companies, including Inc. and Development]."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 A.D.3d 80, 91 [1st Dept. 2009]).

A holder in due course is a holder who takes the instrument for value and in good faith and "without any notice that it is overdue or has been dishonored or of any defense or claim to it on the part of any person." UCC 3-302[1]. To constitute notice of a claim or defense, "the purchaser must have knowledge of the claim or defense or knowledge or such facts that his action in taking the instrument amounts to bad faith." UCC 3-304[7]. The notice requirement requires actual notice of a defense or facts (see, *Chemical Bank v. Haskell*, 51

N.Y. 2d 85, 91-92 [NY 1980], *Hartford Acc. & Indem. Co. v. American Express Co.*, 74 N.Y. 2d 153, 162-63).

"An agent's authority to sign an instrument on behalf of his principal is to be determined according to general agency law. (UCC § 3-403, subd[1].) There is a rebuttable presumption that a signature is authorized. (UCC § 3-307, subd [1].)." *Hewett v. Marine Midland Bank, NA*, 86 AD2d 263, 268 (2d Dept 1982).

UCC § 3-307 (1) states:

> When the effectiveness of a signature is put in issue, (a) the burden of establishing it is on the party claiming under the signature; but (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

> Pursuant to UCC 4-406(4), a customer who claims a check contains an unauthorized indorsement must discover and report the unauthorized indorsement to the bank within three years "from the time the statement and items are made available to the customer" or "is precluded from asserting against the bank such unauthorized indorsement." The provision is not a statute of limitations fixing the time within which an action may be brought. Rather, it is a rule of substantive law which creates a statutory prerequisite of notice. Arrow Transport Systems, Inc. v. Fleetboston Financial Corporation, 800 NYS2d 342 (Sup Ct Nassau County, 2005)(internal citations omitted).

NBT shows that it was a holder in due course, without any notice of a claim that the check was improperly credited to Development's account. It asserts that under the Uniform Commercial Code, "Newman, Vice President" is presumed to have had the authority to endorse the check. Indeed, the complaint does not even allege that he lacked the authority to endorse the check on behalf of Inc.. Through the affidavit of Ms. Silver, NBT demonstrates that Newman was the chief executive officer of Inc.. As NBT points out, "An agent's authority to sign an instrument on behalf of his principal is to be determined according to general agency law. (UCC § 3-403, subd[1].) There is a rebuttable presumption that a

signature is authorized. (UCC § 3-307, subd [1].)." Hewett v. Marine Midland Bank, NA., 86 AD2d 263, 268 (2d Dept 1982).

Plaintiffs, in opposition to the motion under motion sequence 1, provided only an attorney affirmation. There is neither proof, nor the allegation that Newman was not authorized to sign or endorse the check on behalf of Inc. The plaintiffs simply allege that the bank had a "duty" to notify Inc. that the check had been specially endorsed to Development. Therefore, under the UCC and absent any timely allegation that Newman was not an authorized signatory, Newman's signature endorsing the Check to Rhobar Development is presumed to be authorized. NBT has therefore made a prima facie of showing of entitlement to summary judgment as a matter of law. Plaintiff fails to present evidence in admissible form to raise an issue of fact.

Further, there is no evidence of a "contract" between NBT and Inc.. What is now clear to this court is that NBT was not Inc.'s bank. Inc. asserts it is entitled to signature cards; however NBT would not be in possession of cards with Inc.'s authorized signatures.

"Mere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212(f), for postponing a decision on a summary judgment motion." *Kennerly v. Campbell Chain Co.*, 133 A.D. 2d 669, 670 [2nd Dept 1987]).

Wherefore, it is hereby

ORDERED that the Decision and Order previously filed under motion sequence 1 is amended to the extent that summary judgment dismissing the complaint on the first cause of action is also granted; and it is further

ORDERED that the action is dismissed in its entirety; and it is further

ORDERED that the stay requested under motion sequence 2 is now rendered moot.

This constitutes the decision and order of the court. All other relief requested is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 7/22/14

EILEEN A. RAKOWER, J.S.C.