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ROBERT C. WILSON, J.S.C.

PREPARED BY THE COURT

CUSTOM TRAVEL INCENTIVES & PROMOTIONS INC., Plaintiff, vs. BANK OF AMERICA, COMMERCE BANK, N.A., TD BANK NORTH, DONNA P. LUHN, TRINA P. JACONIA and GREGORY P. LUHN Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-2714-12** Civil Action **OPINION**

THIS MATTER comes before the Court on a motion by Defendant TD Bank North[1] (hereafter "TD Bank") pursuant to R. 4:37-2(b) for an involuntary dismissal at trial which provides in part as follows:

> "after having completed the presentation of the evidence on all matters other than the matter of damages, the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor."

The movant claims that the Plaintiff has not met the elements necessary to meet their burden of a prima facie case for a violation of the Uniform Commercial Code. In order to establish a cause of action for a violation of the Uniform Commercial Code for conversion of an instrument under N.J.S.A. 12A:3-420(a), the Plaintiff must demonstrate that the instrument was

[1] The Court notes that Defendant Bank of America and Trina P. Jaconia were dismissed as settled prior to trial and the action against Donna Luhn was stayed by the United States Bankruptcy Court, while Gregory P. Luhn was never served with the complaint in this action.

taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank made or obtained payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. As a necessary element of the cause of action, the Plaintiff needed to demonstrate that TD Bank made a payment with respect to the checks for a person not entitled to enforce the instrument or receive payment.

The Court received the following evidence at trial. The Plaintiff, Custom Travel Incentives & Promotions, Inc., is a New Jersey Corporation with its sole principal being Lawrence Karg. In 2005 Mr. Karg retained the services of Gregory Luhn based on the belief that Mr. Luhn was an attorney in New Jersey that specialized in tax law. Mr. Karg was unaware at the time that Mr. Luhn was disbarred as an attorney and a convicted felon. Mr. Luhn induced Mr. Karg to believe that Mr. Karg should pay Mr. Luhn the estimated income tax payments which Mr. Luhn would deposit into his IOLTA trust account and then wire the money to the United States Treasury and the State of New Jersey, Division of Taxation. Mr. Karg intended Mr. Luhn to be the payee of the checks and wrote Mr. Luhn's name in the "pay to order line". Unbekwnost to Mr. Karg, Mr. Luhn did not use any of the funds delivered to him to pay the Plaintiff's estimated taxes but rather stole the money for his own personal purposes.

Mr. Luhn did not have a bank account during the applicable time period. Rather, Mr. Luhn's wife, Donna Luhn, had a checking account at TD Bank. Mr. Luhn used his wife's account at TD Bank to deposit the checks the Plaintiff made payable to Mr. Luhn. Plaintiff's checks, which were introduced into evidence during trial, were made payable to Gregory Luhn. Mr. Luhn then indorsed the back of the check with his signature and that of his wife's. Donna Luhn testified that on a majority of the checks the signature representing her name was not her signature, however, Donna Luhn did testify that on some of the checks the signature appeared to

be her true signature. All of the checks were deposited into the account at TD Bank between April 5, 2006 and April 13, 2009. Additionally, Donna Luhn testified that she was aware that her husband, Mr. Luhn, was working as a business consultant and that the checks were payment for his services. Donna Luhn authorized her husband to deposit the funds into her account at TD Bank because she was unaware that there was anything wrong with the money. During direct examination, Donna Luhn testified that while she was not entitled to money from the Plaintiff, she believed that her husband was entitled because he was doing work for the Plaintiff. The factual evidence at trial does not support the necessary element that the check was deposited by someone not entitled to enforce the instrument. In actuality, Mr. Luhn was entitled to enforce the instrument and did so by signing the instrument over to his wife's account at TD Bank with her knowledge and approval.

Plaintiff's counsel previously submitted the following eight cases support the position that Plaintiff has a valid claim against the Defendant Bank under the Uniform Commercial Code. The Court finds as a matter of law, that the cases Plaintiff relies upon are not applicable to the case at hand and are in fact quite distinguishable from these specific facts.

In First Atl. Credit Union v. Perez, 391 N.J. Super. 419 (App. Div. 2007) following an automobile accident the Defendants insurance carrier drew a check jointly payable to the Defendant and Plaintiff, who had a secured interest in the automobile. The Defendant presented the check to Lira Capital which cashed the check without the endorsement of the Plaintiff as co-payee and gave the proceeds to the Defendant. Id. at 423. The Plaintiff thereafter brought a suit against the Defendant and Bank of America, which was the bank the funds were deposited into. The matter was eventually settled out of court and the appeal concerned attorney's fees that Bank of America was demanding from Lira Capital.

The case of Metuchen Sav. Bank v. Pierini, 377 N.J. Super. 154 (App. Div. 2005) involved a business owner who cashed a check which was jointly payable to the Defendant's business and a separate business. The Defendant indorsed the check, however, there was no endorsement from the other business, Ace Audio-Visual. The bank deposited the check into Defendant's business account and eventually upon the advice of counsel the Bank had to pay Ace Audio-Visual the amount payable on the check. Id. at 160. The Bank thereafter brought this action to recover that amount from the Defendant. The court found that the Bank paid Ace the amount of the check because by depositing the check in the account of Defendant's business with a missing endorsement, the bank committed conversion under the UCC and was therefore liable to Ace. The court held that the Bank was permitted to recover from the Defendant the sums he converted for which the Bank had to pay to Ace. The Defendant argued that the judgment should be offset by the Bank's comparative negligence but the court held that "there is a public policy reason to prohibit the defense because the account holder converted the funds. Attempts to convert must be deterred, and the defense should not apply where it would deprive the Bank of the money it was obligated to pay, and paid in full, as a result of the intentional wrongdoing of its depositor." Id. at 164. (internal citations omitted).

In New Jersey Lawyers' Fund for Client Prot. V. First Fid. Bank., N.A., 303 N.J. Super. 208 (App. Div. 1997) the facts were undisputed. It was discovered that a deceased attorney had settled a number of personal injury actions without the knowledge of his clients, forged their signatures on the settlement checks, negotiated the checks and stolen the funds. Id. at 212. The deceased lawyer had forged his clients signature and then converted the funds into his own account, rather than the account they were intended for by the maker of the instrument. The Plaintiff, after reimbursing the aggrieved clients, sought damages for conversion for paying the

checks with forged endorsements against the Defendant Banks. Id. at 212. The court held that under the UCC the Defendant was strictly liable for conversion for paying on forged endorsements. Id. at 228.

Leeds v. Chase Manhattan Bank, N.A., 331 N.J. Super. 416 (App. Div. 2000) concerned an attorney who had forged a check payable to his clients, the Leeds, to include his name as their attorney. The attorney subsequently deposited the check into trust account and drew a check to his clients, which included additional funds which did not belong to the Leeds. The Leeds brought an action against the attorney's bank that deposited the check for conversion. The Appellate Division held that under the UCC the Defendant Bank was liable to the Plaintiffs because the attorney had forged his name as an additional payee on the check. Id. at 421-22. It was undisputed that the attorney was not authorized by the Plaintiffs to indorse the check and had no right to receive or enforce payment on the check. Id. at 422.

In Nutt v. Chemical Bank, 231 N.J. Super. 57 (App. Div. 1989) following an unrelated lawsuit a check was made payable to the Plaintiff and his attorney. The attorney indorsed the check and then forged the Plaintiff's indorsement. Id. at 60. The Plaintiff claimed that he never received the funds from this attorney and filed a complaint against the Bank stating the Bank had breached its contract by paying a check to the attorney with an unauthorized signature. Id. In Nutt the attorney's forgery operated as the valid endorsement of the attorney himself, who was one of the two names on the instrument, however the drawer had specific orders that the Bank was to pay only if the endorsement of both payees were present.

The court in Humberto Decorators, Inc. v. Plaza Nat'l Bank, 180 N.J. Super. 170 (App. Div. 1981) held that the Defendant Bank could be held liable to the Plaintiff because the Bank

honored a check without the Plaintiff's endorsement. In Humberto the court found no legal difference between the absence of an endorsement and the forgery of an endorsement. The Bank was found liable for conversion because the Plaintiff never received the check that the Bank deposited into another account. Id. at 173.

In Travelers Indem. Co. v. Good, 325 N.J. Super. 16 (App. Div. 1999) the Defendant, as an employee of a law firm, forged the signature of the authorized signatory on eight checks drawn on the law firm's bank account with PNC Bank. After discovering the fraud the law firm's insurance carrier, the Plaintiff, compensated the firm for the loss. Id. at 19. The Plaintiff filed a Complaint against the Bank to recover the loss. The court found that the instrument was not properly payable because the drawer's signature was forged. Id. at 22. The Appellate Division did remand the case back to the Superior Court to determine if the payor bank could escape liability by establishing that it acted in accordance with reasonable commercial standards and exercised ordinary care. Id. (internal citations omitted).

Lastly, the Plaintiff relies on N.J. Steel Corp. v. Warburton, 139 N.J. 536 (1995) in which the Defendant was hired as an independent contractor by the Plaintiff and was given access to the Plaintiff's accounting systems. The Defendant devised a scheme where he used the Plaintiff's blank checks made out to fictitious payees whose names resembled the Defendant's company. The Defendant then forged the name of one or both of the authorized signatories for the Plaintiff and indorsed the check with "for deposit". Id. at 536. The checks were not indorsed on behalf of the payee nor were the checks indorsed for deposit into an account in the name of the payee. Id. After discovering the fraud the Plaintiff filed a complaint against the bank alleging that the bank was strictly liable for accepting checks without proper endorsements, among other claims. The Supreme Court held that under the Bank's procedures the Bank failed to exercise ordinary care

because the discrepancy between the payee name and the account name required the bank to reject the deposit. Id. at 552.

The factual scenarios in the above mentioned cases are totally distinguishable from the facts in this matter. The instruments, which number close to fifty checks deposited between April 5,2006 and April 13, 2009, were valid negotiable instruments. A negotiable instrument is a written instrument that is (1) signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money (3) is payable on demand or at a definite time, and (4) is payable to order or to bearer. U.C.C. §3-104(a). In this case, the Plaintiff drawer made an unconditional promise to pay Mr. Luhn a specified amount of money. The checks were payable on demand or at a definite time and all the checks were payable to the order of Mr. Luhn. Mr. Luhn was entitled to cash those checks. Mr. Luhn, not having a bank account of his own, indorsed his name on the back of the checks and either forged his wife's signature or validly obtained his wife's signature to deposit the checks into his wife's account at TD Bank. Mr. Luhn's wife was aware of the deposits under the impression that they were payments for services rendered to the Plaintiff. Unlike the aforementioned cases, the drawers' signature was not forged nor were any endorsements of a payee missing. Under the U.C.C. all of the checks were therefore proper negotiable instruments.

The Court finds that after affording the Plaintiff all inferences, the Plaintiff has been unable, as a matter of law, to demonstrate a prima facie case. At the conclusion of Plaintiff's case the Plaintiff was unable to demonstrate that the Defendant TD Bank made a payment with respect to the instrument for a person not entitled to enforce the instrument. Based upon the facts introduced during Plaintiff's case, the Plaintiff has been unable to show that Gregory Luhn was not entitled to enforce the instrument.

Furthermore, the Plaintiff failed to demonstrate what standing it has to bring this conversion action against TD Bank. The Plaintiff, a non-customer, had no direct dealings with TD Bank from which a duty could arise. Instead, Plaintiff's remedy is against its bank, Bank of America, the payor bank who debited Plaintiff's account upon Mr. Luhn's presentment of the checks to TD Bank. The court in Bank Polska Kasa Opieki, S.A. v. Pamrapo Sav. Bank, S.L.A., 909 F. Supp. 948 (D.N.J. 1995) addressed a similar scenario in which it held that under the U.C.C. Sec. 3-420(a) "an action for conversion of an instrument may not be brought by...the issuer or acceptor of the instrument." See Official Comment 1 to Sec. 3-420 ("there is no reason why a drawer should have an action in conversion. The check represents an obligation of the drawer rather than property of the drawer. The drawer has an adequate remedy against the payor bank for recredit of the drawer's account for unauthorized payment of the check.) In this instance, the Plaintiff drawer properly issued a check to Mr. Luhn. Mr. Luhn then indorsed the check over to his wife's account at TD Bank, a depository bank. The Plaintiff drawer has not shown any authority as what standing it has to bring a cause of action against TD Bank.

Additionally, TD Bank under U.C.C. §3-302 enjoys the protection of a holder in due course. A holder in due course is a person who in good faith has given value for a negotiable instrument that is complete and regular on its face, is not overdue, and, to the possessor's knowledge, has not be dishonored. TD Bank gave monetary value for the checks which appeared complete and regular on their face. It is undisputed that the signatures of the drawer and the payee were not forged. While the court would also agree that all but two checks are barred from suit by the statute of limitations as the maker clearly knew they had been cashed without objection until he filed the Complaint on April 3, 2012, the Court need not address that issue as we found TD Bank was a valid holder in due course.

Based on the foregoing, as a matter of law it is the decision of this Court that Plaintiff has been unable to demonstrate a prima facie case for conversion of a negotiable instrument under the Uniform Commercial Code against TD Bank. The instruments at issue in the case were properly exercised negotiable instruments payable to Mr. Luhn, in which Mr. Luhn exercised his authority to deposit into this wife's account at the Defendant Bank. The Plaintiff has not introduced any evidence to the contrary to support a position that TD Bank is liable to the Plaintiff for Mr. Luhn's misappropriation of the funds.

Based on the foregoing, Defendant TD Bank's motion for involuntary dismissal is hereby **GRANTED.**

HON. ROBERT C. WILSON