SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0414-16T1

ROBERT J. TRIFFIN,

Plaintiff-Appellant,

v.

TWC ADMINISTRATION LLC, and
WILLIAM OSBOURN,

Defendants-Respondents,

and

DYMOND OTTEY,

Defendant.

Argued November 27, 2017 – Decided December 29, 2017

Before Judges Sabatino, Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Special Civil Part, Docket No. DC-5684-16.

Robert J. Triffin, appellant, argued the cause pro se.

Amelia T. Taylor argued the cause for respondents (Wong Fleming, attorneys; James K. Haney and Amelia T. Taylor, on the brief).

PER CURIAM

Plaintiff Robert Triffin appeals from the trial court's order, on cross-motions for summary judgment, dismissing his Special Civil Part complaint against defendants TWC Administration LLC and its officer William Osbourn. The complaint was based on a check drawn by Osbourn and a cosigner against TWC's bank account.[1] The check was payable to defendant Dymond Ottey,[2] allegedly a TWC employee, in the amount of $301.17. Triffin purchased the check from a check casher after the bank dishonored it. Triffin sought judgment for $832.04, the face value of the check plus costs and fees.

Reviewing the motions de novo, see Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010), we reverse the grant of summary judgment to defendants and affirm the denial of summary judgment to plaintiff. Regarding Triffin's motion, he has failed to provide us with his moving papers or other competent evidence to enable us to determine that he is a holder in due course and entitled to judgment in his favor. See Cmty. Hosp. Grp. v. Blume Goldfaden, 381 N.J. Super. 119, 127 (App. Div. 2005) (stating an appellate court is not "obliged to attempt review of an issue when

[1] For convenience, we hereafter refer to both defendants jointly as TWC, except where otherwise indicated.

[2] Ottey did not respond to the complaint and is not a party to the appeal.

the relevant portions of the record are not included"). As for TWC's motion, we reject TWC's arguments that (1) N.J.S.A. 12A:4-404 required Triffin to present the check within six months of its date; and (2) Triffin obtained the check with notice of its dishonor, preventing him from attaining holder-in-due-course status.

Some basic facts are undisputed. The $301.17 check was dated August 20, 2015, and bore the restrictive legend "NOT VALID AFTER 180 DAYS." On August 24, 2015, Ottey cashed the check with Rio Check Cashers. The check appears to bear Ottey's endorsement. Rio then deposited the check, which the bank dishonored on August 27, 2015 and returned to Rio with the message "Refer to Maker." On March 21, 2016, Rio assigned to Triffin all its rights to payment.

It was also undisputed that in addition to cashing the check with Rio, Ottey had electronically deposited the check. However, other allegations related to the check are unproved by competent evidence. TWC alleged, without evidential support, that Ottey electronically deposited the check before cashing it with Rio. TWC relied on its counsel's certification. But see Sellers v. Schonfeld, 270 N.J. Super. 424, 428-29 (App. Div. 1993) (stating that an attorney's certification that does not reflect firsthand knowledge is inadmissible evidence on a summary judgment motion

under Rule 1:6-6). Triffin alleged in his complaint, upon information and belief, that if the bank did pay the check based on an electronic deposit, it should not have done so, because it lacked an enforceable endorsement under the terms of Ottey's electronic depository agreement with her bank. But see Jacobs v. Walt Disney World Co., 309 N.J. Super. 443, 454 (App. Div. 1998) (stating that "factual assertions based merely upon 'information and belief' are patently inadequate" under Rule 1:6-6) (citation omitted). Triffin also alleged, without the support of a certification from Rio's principal, that Rio was unaware of any defense TWC may have had when Rio cashed the check. By contrast, in the assignment agreement, Rio's general manager certified only that Rio "had no notice that the . . . check[] had been dishonored" when Rio cashed it.

On April 29, 2016, Triffin filed suit against TWC, Osbourn and Ottey. In its responsive pleading, TWC alleged that Triffin had failed to state a claim; he lacked standing; he was not a holder in due course; and the check was not valid after 180 days. TWC also "reserve[d] the right to add or rely on additional defenses." In support of its cross-motion for summary judgment, TWC contended that Triffin had not proved Rio was a holder in due course; he was not a holder in due course because he purchased the

check with notice of its dishonor; and, in any event, his claims were barred by N.J.S.A. 12A:4-404.

The trial court found that Rio was a holder in due course, based on the assignment agreement's statement of no notice of dishonor. But, the court denied Triffin holder-in-due-course status because he was aware of the dishonor when he purchased the check. The court also agreed that N.J.S.A. 12A:4-404 barred Triffin's claim.

On appeal, Triffin contends he stands in Rio's shoes. Therefore, he, like Rio, is a holder in due course; and N.J.S.A. 12A:4-404 does not bar his claim against the drawer. We agree with his second contention, and partially agree with the first, subject to further proceedings.

1.

Turning first to Triffin's holder-in-due-course status, we reject TWC's contention that Triffin's notice of dishonor precluded his status as a holder in due course. As in another check case involving Triffin, "[p]laintiff does not contend that he is a holder in due course of the instrument by virtue of it being negotiated to him for value, in good faith, without notice of dishonor . . . " Triffin v. Cigna Ins. Co., 297 N.J. Super. 199, 201 (App. Div. 1997).

Rather, he contends he was a holder in due course by virtue of acquiring, as transferee, all of Rio's rights as transferor. That may be so. Pursuant to the so-called "shelter rule," "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course" unless "the transferee engaged in fraud or illegality affecting the instrument." N.J.S.A. 12A:3-203(b); see also Cigna Ins. Co., 297 N.J. Super. at 202; Triffin v. Maryland Child Support Enforcement Admin., 436 N.J. Super. 621, 633 (Law Div. 2014). So, if Rio were a holder in a due course, Triffin would be, too, since there was a transfer and there are no allegations of fraud or illegality.

However, we are not prepared to hold on this record that Rio was a holder in due course. Although Rio's general manager certified he was unaware of a dishonor before cashing the check, he was silent on the other requisites of holder in due course status. See N.J.S.A. 12A:3-302.

We are also unpersuaded by Triffin's contention that he was not obliged to prove Rio's holder-in-due-course status since, he claims, TWC failed to assert a predicate defense. He relies on Comment 2 to N.J.S.A. 12A:3-308(b), which states that a defendant must first assert a defense or claim in recoupment, see N.J.S.A.

12A:3-305, before a plaintiff, like Triffin, is required to prove holder-in-due-course status:

> If a plaintiff producing the instrument proves entitlement to enforce the instrument, either as a holder or a person with rights of a holder, the plaintiff is entitled to recovery unless the defendant proves a defense or claim in recoupment. Until proof of a defense or claim in recoupment is made, the issue as to whether the plaintiff has rights of a holder in due course does not arise. In the absence of a defense or claim in recoupment, any person entitled to enforce the instrument is entitled to recover. If a defense or claim in recoupment is proved, the plaintiff may seek to cut off the defense or claim in recoupment by proving that the plaintiff is a holder in due course or that the plaintiff has rights of a holder in due course under section 3-203(b) or by subrogation or succession. All elements of section 3-302(a) must be proved.
>
> [Official Comment 2 to N.J.S.A. § 12A:3-308 (emphasis added).]

However, a predicate defense was apparent from the pleadings. Triffin himself alleged in his complaint, albeit upon information and belief, that Ottey received payment electronically; TWC admitted that allegation in its answer. Certainly, if Ottey had already received payment, TWC had a defense in contract to Triffin's claim that it pay a second time. "[T]he right to enforce the obligation of party to pay an instrument is subject to . . . a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to

payment under a simple contract." N.J.S.A. 12A:3-305(a)(2). Thus, Triffin was obliged to prove his holder-in-due-course status.

2.

TWC also misplaced reliance on N.J.S.A. 12A:4-404 to support its contention that Triffin's claims were time-barred. Simply put, that section limits the time within which a party may seek payment from a bank. Here, Triffin seeks payment from TWC, the drawer. N.J.S.A. 12A:4-404 states: "A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith." (emphasis added). As one well-respected treatise explains: "Section 4-404 is relevant only in disputes between a drawee/payor bank and its checking account customer." William D. Hawkland & Lary Lawrence, Uniform Commercial Code Series, § 4-404:1 (2011); see also Amsterdam Urban Renewal Agency v. McGrattan, 458 N.Y.S.2d 67, 69 (App. Div. 1982).

A bank's authority to withhold payment of a check after six months does not affect the drawer's obligations. While a bank may dishonor a check that is more than six months old, pursuant to N.J.S.A. 12A:4-404, "the drawer remains liable to the person entitled to enforce the instrument . . . ." Hawkland, § 4-404:1.

"The drawer's liability is terminated only upon the running of the statute of limitations under Section 3-118." Hawkland, § 4-404:1. Under N.J.S.A. 12A:3-118(c), a three-year limitations period generally governs a claim against a drawer:

> Except as provided in subsection d. of this section [pertaining to certified, teller's, cashiers or traveler's checks], an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or 10 years after the date of the draft, whichever period expires first.

See also Maryland Child Support Enforcement Admin., 436 N.J. Super. at 634; Comment 3 to N.J.S.A. 12A:3-118 (stating "[s]ubsection (c) applies primarily to personal uncertified checks"). In sum, Triffin's claim against TWC was not barred by N.J.S.A. 12A:4-404.

Finally, we shall not address the enforceability of the restrictive legend stating that the check was "NOT VALID AFTER 180 DAYS." TWC does not invoke the legend in its arguments before us, choosing instead to rely on N.J.S.A. 12A:4-404. In any event, we note that Rio presented the check well before 180 days ran, and one may question whether the legend should be fairly read to cut off Rio's rights against the drawer – which Triffin obtained by

assignment — simply because suit was commenced more than 180 days after dishonor.[3]

3.

In sum, the parties' cross-motions for summary judgment should have been denied without prejudice. Triffin's claim was not barred by N.J.S.A. 12A:4-404. On the other hand, Triffin was entitled to the benefit of the shelter rule. Yet, he was obliged to prove that Rio was a holder in due course in order to prove his own holder-in-due-course status. On remand, he may marshal such proofs in support of a renewed motion for summary judgment, or at trial. TWC may likewise present any additional evidence in support of its defenses.

[3] The enforceability of such legends against a bank is questionable. See Hawkland, § 4-404:2 (stating that a bank should be free to pay a check notwithstanding a customer's imprint "void after 60 days"); see also Aliaga Med. Ctr., S.C. v. Harris Bank N.A., 21 N.E.3d 1203, 1208 (Ill. App. Ct. 2014) (stating bank was entitled to pay check despite "void after 90 days" legend, because customer "failed to properly stop payment"). As relates to a claim against the drawer, the trial court in Maryland Child Support Enforcement Administration viewed the same legend as inconsistent with the statute of limitations in N.J.S.A. 12A:3-118(c). 436 N.J. Super. at 634. See also Fred H. Miller, UCC Article: Modernizing the UCC for the New Millennium: Introduction to a Collection on the New UCC, 25 Okla. City U. L. Rev. 189, 205 (2000) (attaching memorandum to National Conference of Commissioners on Uniform State Laws by the research director of the permanent editorial board for the U.C.C., stating that the most recent revision of Articles 3 and 4 left undone "[t]he status of checks bearing legends such as 'void after 90 days.'").

Reversed and remanded. We do not retain jurisdiction.