

**PREPARED BY THE COURT**

PANCAKE REPUBLIX, LLC,

Plaintiff,

vs.

CONNECTONE BANK and CHANEL  
ROJAS,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: **BER-L-5663-16**

Civil Action

**OPINION**

**THIS MATTER** comes before the Court pursuant to a Motion Summary Judgment, filed on or about April 26, 2018, by Douglas A. Stevinson Esq. from the law offices of Windels Marx Lane & Mittendorf, LLP, counsel for Defendant ConnectOne Bank (hereinafter “Defendant”). The Plaintiff Pancake Republic, LLC (hereinafter “Plaintiff”), by and through its attorney, William J. Pinilis, Esq. from the law offices of Pinilis Halpern, LLP, filed opposition to the Defendant’s motion. Oral argument was heard on June 8, 2018.

**FACTUAL BACKGROUND**

This action arises out of a series of forgeries. Plaintiff is a business operating as a restaurant. Mr. Bobby Bournias (“Mr. Bournias”) was at all relevant times the owner of Plaintiff Pancake Republic. Before opening his restaurant, Mr. Bournias earned his law degree from Seton Hall University in 1999 and was employed as a mergers and acquisitions attorney at the “Wall Street” law firm of Sullivan and Cromwell. In lieu of hiring an accountant, Mr. Bournias handled the finances and accounting of the restaurant himself. The Plaintiff maintained a number accounts with the Defendant Connectone, including the two business accounts at issue in this case, which the Plaintiff used as operating accounts, and for which the Plaintiff maintained a checkbook. These

accounts were governed by Defendant Connectone's standard Business Deposit Account Agreement ("The Agreement").

In paragraph 10, the Agreement contemplated the following with regard to the review of the Plaintiff's checks:

Further, most checks and other items are processed automatically, i.e., without individual review of each check or item. Therefore, unless we agree in a separate writing, in our sole discretion, upon your request and due to unique circumstances to conduct individual review of checks or other items for more than one signor, you agree that we are acting within common and reasonable banking practices by automatically processing checks and other items, i.e. without individual review of each check or item. You agree to indemnify, defend, and hold harmless from and against all loss, costs, damage, liability, and other injury (including reasonable attorney fees whether incurred at trial, on any appeal therefrom or otherwise) that you or we may suffer or incur as a result of this practice.

Concerning statements reflecting account activity, the Account Agreement provides in paragraph 23 that: "We will provide you with a periodic statement showing account activity. You must notify us within 30 days after we mail or otherwise make available to you of any discrepancies. If you fail to notify us, you will have no claim against us..."

In the summer of 2015, Mr. Bournias hired his sister-in-law Chanel Rojas ("Defendant Rojas"), who was subsequently made a manager and Mr. Bournias' assistant. In July of 2015, prior to leaving for a vacation, Bournias provided Defendant Rojas with a key to his office, so she could access his computer in his absence. From about July 2015 to about March 2016, Defendant Rojas allegedly forged and negotiated approximately fifty checks from Plaintiff's two business accounts. Upon his return, Mr. Bournias failed to reconcile the Plaintiff's checkbook for the two bank accounts, despite receiving overdraft notices for the months of June, July, August, September, and October. The parties do not dispute that Mr. Bournias failed to open the mail for months, allowing

the monthly statements from the Defendant Connectone to accumulate in his office without his review. At least two of the overdraft notices had been generated as a result of the checks forged by Defendant Rojas.

Finally in March 2016, Mr. Bournias opened the monthly bank statements reflecting the activity in the Plaintiff's two business accounts. It was then that Mr. Bournias first discovered several of the forged checks which had been made payable to Defendant Rojas. Subsequent investigation of the bank records by Mr. Bournias showed that Defendant Rojas forged fifty checks, for a total amount of \$216,567.00. Apparently she effectuated this defalcation by tearing entire sheets out of the Plaintiff's checkbook during the time Mr. Bournias was on vacation.

After Mr. Bournias informed Defendant Connectone about the fraudulent checks, the bank immediately closed the accounts, created new accounts, and placed stops on all outstanding checks. Defendant Connectone worked with Mr. Bournias to pay any legitimate outstanding checks which had been issued to third-parties, and completed forgery affidavits concerning the fifty forged checks.

Afterwards, Defendant Rojas pled guilty and was sentenced to three years in prison in connection with the forged checks. The Plaintiff then brought this lawsuit against Defendants Rojas and Connectone Bank, alleging several causes of action stemming from the fraud perpetrated by Defendant Rojas.

### **SUMMARY JUDGMENT STANDARD**

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that

the moving party is entitled to a judgment or order as a matter of law.” R. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. § 4:37-2(b) or R. § 4:40-1, or a judgment notwithstanding the verdict under R. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that “there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a ‘genuine’ issue of material fact for purposes of R. § 4:46-2.” Id. at 540.

### **RULE OF LAW AND DECISION**

#### **I. The Plaintiff’s Case is Exclusively Governed by the Uniform Commercial Code.**

The Plaintiff has levied causes of action against the Defendant under the UCC and the New Jersey Consumer Fraud Act. This Court first considers whether the UCC exhaustively governs the Plaintiff’s case. The relationship between a bank and its customer with respect to negotiable instruments, including checks, is governed by the UCC. See Travelers Indemnity Ins. Co. v. Good, 325 N.J. Super. 16, 21 (App. Div. 1999). The UCC is an integrated statutory enactment, comprehensively governing that relationship. Id. Courts have consistently, and without exception, held that the risk allocation provisions of the UCC occupy the field, and that a bank customer is not able to assert a negligence claim. See ADS Associates Group, Inc. v. Oritani Sav. Bank, 219 N.J. 496, 516 (2014) (rejecting common law negligence claim against bank under UCC where the common law remedies contravene the remedies afforded under the UCC); City Check Cashing,

Inc. v. Manufacturers Hanover Trust Co., 166 N.J. 49, 62 (2001) (“in the check collection arena, unless the facts establish a special relationship between the parties created by agreement, undertaking or contact, that give rise to a duty, the sole remedies are those provided in the [Uniform Commercial] Code”); Psak, Graziano, Piasecki & Whitelaw v. Fleet Nat. Bank, 390 N.J. Super. 199, 205 (App. Div. 2007) (finding that the UCC’s comprehensive remedy addressing plaintiff’s claim for improper payment on check “precludes a common-law negligence claim” against either depository or paying bank).

The relationship between the UCC and the Consumer Fraud Act (CFA) in relation to forged checks was addressed by the Appellate Division in Estate of Paley v. Bank of America, 420 N.J. Super. 39 (App. Div. 2011). The plaintiff in Paley maintained a money market account with Bank of America. Id. at 43. The plaintiff’s home health aide forged checks on the account. As a result, the plaintiff commenced suit against both Bank of America and the home health aide. The only claim that was adjudicated at trial was the CFA claim. Id. at 46. Although the jury returned a verdict in favor of the plaintiff under the CFA, the trial court granted Bank of America’s motion for JNOV on the ground that “the UCC provided ‘a remedy for the precise situation presented with explicit rules.’” Id. at 47. Affirming the dismissal of the CFA claim, the Appellate Division held that absent a special relationship between the customer and the bank, the customer could not assert a claim under the CFA because permitting same would “conflict with the comparative negligence provision of the UCC, would dilute the protections afforded to banks by the UCC, and would likely lead to inconsistent jury verdicts.” Id. 42-43.

Here, the facts are nearly identical to Paley. Plaintiff fails to allege any special relationship with Defendant. Automated processing of checks has been recognized by our courts and the UCC itself as usual and customary given today’s commercial marketplace and cannot be a legitimate

subject of debate. See e.g., Paley, 420 N.J. Super. at 55; City Cash Checking, 166 N.J. at 58 (“In the normal course, presentment of a check triggers a bank’s electronic processing systems.”). If Plaintiff was to hold Defendant to a different standard of care for processing the checks at issue, then it would create “an irreconcilable conflict with the code specifically designed to bring uniformity to commercial transactions.” Paley, 420 N.J. Super. at 58; accord City Check Cashing, 166 N.J. Super. 62 (“In short, in the check collection arena, unless the facts establish a special relationship between the parties created by agreement, undertaking or contact, that gives rise to a duty, the sole remedies available are those provided in the Code.”). Thus, as Paley dictates, this Court must grant the motion with respect to the Plaintiff’s Consumer Fraud Act claims, such that they are dismissed with prejudice.

## **II. The Plaintiff’s Claims under the Uniform Commercial Code Fail as a Matter of Law.**

This Court, having determined that the Plaintiff’s claims are exclusively governed by the UCC, now considers whether Defendant Connectone is entitled to summary judgment on the remaining causes of action brought pursuant to the UCC.

### **A. The Plaintiff’s Causes of Action Related to the Checks Paid Prior to the Thirty Days Before the Plaintiff Gave Notice Pursuant to the UCC Must be dismissed because the Plaintiff Failed to Timely Notify the Bank as to Those Fraudulent Checks.**

As articulated above, the UCC governs the relationship between the bank and the customer with regard to negotiable instruments, and it exclusively governs the allocation of risk between the two parties. According to N.J.S.A. 12A:4-406, banks are afforded a safe harbor with respect to fraudulent items payed out by the bank, if they supply the customer with a monthly account statement. N.J.S.A. 12A:4-406. Specifically, the bank can make available “a statement of account

showing payment of items for the account” with sufficient information such that the customer can “reasonably identify the items paid.” N.J.S.A. 12A:4-406(a). If the bank does so, 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” the customer must then promptly notify the bank of the relevant facts. N.J.S.A. 12A:4-406(c). A time limit of one year is imposed generally on customers to report discrepancies on their account statements, “Without regard to care or lack of care of either the customer or the bank.” N.J.S.A. 12A:4-406(f).

Further, the existence of the Account Agreement here between the Plaintiff and the Defendant served to shorten certain obligations under the UCC. As stated in N.J.S.A. 12A:4-103(a) “The effect of the provisions of this chapter may be varied by agreement, but the parties to the agreement cannot disclaim a bank’s responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure.” N.J.S.A. 12A:4-103(a). The provision in the Account Agreement limiting customers to a one month period in which they must receive, review, and inform the bank is a valid alteration of the UCC’s terms. Therefore, Mr. Bournias had 30 days from his receipt of each monthly statement to review them and promptly report any of Defendant Rojas’ fraud to Defendant Connectone.

Unfortunately, here, the facts with respect to Mr. Bournias’ review of the monthly statements are undisputed. Defendant Connectone sent monthly statements to Mr. Bournias reflecting the activity in the Plaintiff’s accounts for eight months. These statement reflected all activity on those accounts, including the fraudulent checks. No accountant or bookkeeper was employed by the Plaintiff. Mr. Bournias utilized no process or procedure for reviewing bank statements or reconciling the Account against the checkbook himself. Mr. Bournias admits that he

neglected to open the statements which he received by mail each month. Most importantly, no party disputes that this is exactly what happened with the relevant bank statements during the relevant time period. The unopened monthly statements were allowed by Mr. Bournias to accumulate, starting in July of 2015, and were not reviewed until March of the following year. With the undisputed facts clearly illustrating that Mr. Bournias failed to check his account statements for eight months, no reasonable fact finder could conclude that the Plaintiff exercised reasonable promptness in accordance with its responsibilities pursuant to the Account Agreement and the provisions of the UCC. Thus, the Plaintiff is barred pursuant that Agreement from asserting a claim against Defendant Connectone with respect to the checks payed prior to the thirty days before the Plaintiff gave notice to Defendant Connectone.

B. The Plaintiff's Claims for Checks Paid within the 30 Days of Providing Notice to the Bank are barred under the UCC's Repeater Rule.

The provisions of the UCC which allocate responsibility between the bank and the customer contemplate scenarios in which a repeat offender commits numerous frauds, imposing a duty on the customer to diligently review statements to discover the pattern. N.J.S.A. 12A:4-406(d)(2) states:

d. If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection c. of this section, the customer is precluded from asserting against the bank:

(2) the customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank.

N.J.S.A. 12A:4-406(d)(2).

Subsection (d)(2) canonizes the “Repeater Rule,” designed to allocate risk in the event that the same wrongdoer commits a pattern of fraud. The comments to subsection (d)(2) further illuminate the policy purposes underlying that provision.

One of the most serious consequences of failure of the customer to comply with the requirements of subsection (c) is the opportunity presented to the wrongdoer to repeat the misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine the statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items.

N.J.S.A. 12A:4-406, cmt. 2.

Here, Mr. Bournias utterly failed to act with reasonable promptness on his part. Nine months had elapsed, and all of Defendant Rojas’ fraudulent checks had been presented and paid by the depository bank. Upon Mr. Bournias notifying Defendant Connectone, it immediately closed the account and worked with the Plaintiff to open new accounts and determine if any pending checks were legitimate. Nothing in the record shows that Defendant Connectone continued to honor fraudulent checks after they had reason to know of Defendant Rojas’ fraud. As a consequence of these checks resulting from a fraudulent scheme perpetrated by a single, repeat wrongdoer, and Mr. Bournias’ failure to act with reasonable promptness in reviewing the Plaintiff’s monthly statements, the Plaintiff is barred from asserting claims for all the checks pursuant to the repeater rule.

**III. Defendant Connectone's Motion for Summary Judgment on its Breach of Contract and Indemnification Counterclaims is Denied As A Genuine Issue of Material Fact Exists.**

Defendant Connectone has asserted two counterclaims against the Plaintiff arising out of the Plaintiff's alleged breach of the Account Agreement. These include breach of contract and indemnification. For the reasons stated below, the Defendant's motion seeking summary judgment on these claims is **DENIED**.

In order to prove a breach of contract claim, a party must "a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustained damages. EnviroFinance Grp., LLC v. Envntl. Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015)(citing Murphy v. Implicito, 392 N.J. Super. 245, 265 (App.Div.2007)).

Here, the Defendant argues that the Account Agreement imposed a duty on the Plaintiff to review his monthly statements, in order to report any irregularities to the Defendant. The Defendant claims that the Plaintiff's failure to do so has made it necessary for it to defend the instant lawsuit an incur losses therefrom. Defendant claims that the Plaintiff's challenge to the reasonableness of the Defendant's check validation procedures is without merit and represents that the Plaintiff agreed that it was those reasonable procedures which caused Connectone's damages. Finally, that the indemnification clause in the Account Agreement clearly states that the Plaintiff must "indemnify, defend, and hold the Bank harmless from and against all loss, costs, damage, liability, and other injury...as a result of the Bank's practice of automatically processing checks."

Plaintiff claims that, there exists a genuine issue of material fact as to whether the Defendant Bank's practice of only reviewing checks in excess of \$10,000.00 is a reasonable

banking practice pursuant to the parties' Account Agreement. Specifically, the Plaintiff argues that the Account Agreement is ambiguous as to the exact procedures the Defendant utilizes in order to validate checks and that the Defendant's Chief Compliance Officer acknowledges in her deposition testimony that the Defendant's thirteen year old check validation procedures may not be reasonable under the Account Agreement. The Court finds that as here, where the Defendant's agent has stated their practice may not be reasonable, the question of reasonableness must be determined at the time of trial by the fact finder. The Court also notes that the question of both breadth and quantification of damages shall be determined by a jury. As a result, the Defendant's motion for summary judgment on their counterclaims must be denied.