Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-074

JUNE TERM, 2003

Chittenden Trust Company v. Russell-Norman Payne	}	APPEALED FROM: Windsor Superior Court DOCKET NO. 318-6-02 Wrcv Trial Judge: Alan W. Cook

In the above-entitled cause, the Clerk will enter:

Plaintiff Chittenden Trust Company (hereinafter " the bank") brought suit against defendant for breach of a promissory note. Defendant appeals the superior court' s order granting the bank' s motion for summary judgment and dismissing defendant' s counterclaim. We affirm.

In March 2001, defendant executed and delivered to the bank a $20,000 promissory note pursuant to a line-of-credit loan transaction with the bank. Defendant defaulted on the loan, and the bank filed suit to collect the principal, interest, late charges, attorney' s fees and costs due under the terms of the promissory note. In response, defendant filed a " cross-bill" seeking a set-off against the amount due based on his theory that the loan transaction was an exchange of mutual credits. The superior court granted the bank' s motion for summary judgment and dismissed defendant' s counterclaim, stating that defendant had failed to set forth any recognized cause of action. On appeal, defendant argues that the superior court erred in granting the bank' s motion for summary judgment, dismissing his counterclaim, and finding that the E-A-C: Trust had never entered an appearance in the case.

Apparently, defendant's theory is that because the bank created new money from the intrinsic value of his promissory note and then lent that money back to defendant, the bank and defendant are mutual creditors, and defendant is entitled to a set-off of the money he lent to the bank. In defendant' s own words:

> In summary, the cross-bill alleges that the Bank received the petitioner' s promissory note as the **deposit** of a **money equivalent asset** and, upon receipt, the Bank converted that **money equivalent asset**, the promissory note, into " new money," and then loaned that " new money" back to petitioner.
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> The substance of the allegation is that the Bank did not lend its own capital or other depositor' s money to the petitioner, but rather used the legal intrinsic value of the petitioner' s promissory note to create " new money" in the form of credits to a demand deposit bank liability checking account, and then loaned that " new money" back to the petitioner. The net result was that, in substance, the petitioner funded the loan to himself by means of depositing his valuable, **money equivalent asset**, the promissory note, with the Bank, and that the Bank merely acted as an exchange agent, or money-changer, by converting the intrinsic value of a promissory note into a more liquid form of " money," in the form of credits to a demand deposit bank liability checking account, and then made a loan of that more liquid form of " money" back to the petitioner.

In defendant' s view, the transaction established mutual credits, and thus the bank was, and still is, indebted to defendant for the value of the promissory note deposited with the bank. Moreover, according to defendant, because the issue of whether he and the bank are mutual creditors is a fact question that can be resolved only by examining the bank' s books to determine the origin of the money the bank loaned him, the superior court erred in dismissing his counterclaim and granting summary judgment to the bank.

Defendant is correct that a motion to dismiss for failure to state a claim upon which relief can be granted tests " the law of the claim, not the facts which support it." Daniels v. Vt. Ctr. for Crime Victims Servs., 173 Vt. 521, 522 (2001) (mem.); see Winfield v. State, 172 Vt. 591, 593 (2001) (mem.) (motion to dismiss for failure to state claim should not be granted unless no facts or circumstances exist that would entitle plaintiff to relief; in reviewing trial court' s disposition of motion to dismiss, " we assume that all well pleaded factual allegations in the complaint are true, as well as all reasonable inferences that may be derived therefrom"). Here, however, defendant is positing a legal theory, and a frivolous one at that, not alleging material facts that are in dispute. Defendant would have us remand this case for trial to allow him to show that the modern banking practices somehow create " new money" out of a borrower' s promissory note, make the borrower and lender mutual creditors, and thereby allow the borrower to be credited for the loan balance following default. There are no facts or law to support a theory converting appellant' s promissory note into money to be credited against the loan balance following default. Insofar as defendant offers no other defense to the bank' s collection action, the superior court properly granted summary judgment to the bank and dismissed defendant' s counterclaim.

Nor do we find any merit to defendant' s claim that the E-A-C: Trust and its trustees " are validly and rightfully joined" with defendant as co-petitioners in his cross-bill. Defendant appeared pro se when he filed his original counterclaim. Two months later, without approval of the court, he filed an amended counterclaim brought on behalf of himself, the trust, and its trustees. Only defendant signed the amended counterclaim, however. At no time did defendant file a motion for joinder of the trust or any of the trustees. Nor did the trust or any trustee file a motion to intervene. Given these circumstances, the superior court did not err in finding that neither the trust nor the trustees had ever entered an appearance or otherwise joined in the case. Moreover, defendant has failed to demonstrate any prejudice resulting from the court' s finding.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice