STATE OF VERMONT
CALEDONIA COUNTY, SS

CHITTENDEN TRUST COMPANY d/b/a CHITTENDEN BANK Plaintiff v. STANLEY W. BARTLETT d/b/a BARTLETT DESIGNS Defendants	SUPERIOR COURT Docket No. 166-08-06 Cacv

Decision on:
Plaintiff's Motion for Summary Judgment

This is an unfortunate case precipitated by an almost stereotypical internet fraud. An online correspondent, purporting to be an extremely wealthy Italian crude oil merchant in the last throes of esophageal cancer, persuaded Defendant to help him do good with his last $14-million, in consideration of which the correspondent promised a cool 20% for Defendant and his family, together with 10% to cover the overhead. As a preliminary part of this arrangement, the correspondent induced Defendant to accept a large check, part of which he was to keep and the more substantial part of which he was to wire to a strangers overseas. Defendant deposited the check at Plaintiff bank. The bank credited Defendant's account, and from the credit, Defendant transferred money to the Netherlands and Japan.

It turned out that the check was a forgery. But by the time the drawee bank denied payment and alerted Plaintiff to the fraud, Defendant had drawn away almost all of the illusory balance.

I. History in Brief

Plaintiff, caught short by the bogus deposit, filed its Complaint on August 18, 2006, claiming breach of contract, fraudulent misrepresentation, and negligent misrepresentation. Defendant filed an Answer and Counterclaim on October 12, 2006, seeking to interplead the drawee bank, Wachovia, and making a counterclaim for restitution. On March 2, 2007, Plaintiff amended its complaint, with Defendant's assent, to include a claim for breach of warranty under 9A V.S.A. §§ 4-207 & 4-208.

Defendant's attorney withdrew from the case on July 9, 2007, and Defendant entered his *pro se* appearance the same day. Defendant filed a document purporting to be another counterclaim on October 17, 2007. By Order of November 26, 2007, the court struck the second counterclaim, noting that Defendant had asserted a counterclaim for

restitution with his October 2006 Answer and Counterclaim. By Order of January 29, 2008, the court dismissed Defendant's request for interpleader, which had been mooted by assignment.

II. The Instant Motion

Now before the court is Plaintiff's Motion for Summary Judgment, filed December 14, 2007. Unilever USA, the maker named in the altered check, and Wachovia, the drawee bank identified in the altered check, have assigned to Plaintiff any and all claims they may have had in relation to the subject check. See Assignment of Claim & Release, Ex. 1 to Plaintiff's Motion to Dismiss Defendant's Request for Interpleader, filed November 26, 2007.

Plaintiff contends that it is "is entitled to judgment as a matter of law for Mr. Bartlett's breach of the U.C.C. transfer and presentment warranties" of 9A V.S.A. § 4-207(a)(transfer) and 4-208(a)(presentment). Defendant opposes the motion without addressing warranty issues; instead, Defendant argues that Plaintiff had an obligation to "do due diligence" before crediting deposited funds to his account, and Defendant contends that Plaintiff's reliance on photocopies of the original check means that Plaintiff's motion must fail for lack of evidence. See Defendant's Answer to Motion for Summary Judgment, filed January 11, 2008, § III.

a. Summary Judgment Procedure

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Price v. Leland*, 149 Vt. 518 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which he or she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989).

Plaintiff filed a statement of undisputed material facts on December 14, 2007. "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." V.R.C.P. 56(c)(2).

On January 11, 2008, Defendant filed a document captioned "Defendant's Answer to Motion for Summary Judgment." This document gives generalized denials of Plaintiff's statement of undisputed facts, mixes the denials with legal arguments and conclusions, and cites the record only in relation to Wachovia's affirmation that it destroyed the subject check in the normal course of business, which is not a material

issue. "The statements of material facts ... shall consist of numbered paragraphs and shall contain specific citations to the record." *Id.* Defendant's filing is not a proper statement of disputed facts, and leaving aside procedural formalities, it does not identify record evidence controverting Plaintiff's statement of undisputed facts.

"Although [courts] will not permit unfair advantage to be taken of one who acts as her own attorney, it is not the trial court's responsibility to offer affirmative help to a *pro se* litigant." *Nevitt v. Nevitt*, 155 Vt. 391, 401 (1990) (citing *Olde & Co. v. Boudreau*, 150 Vt. 321, 322 (1988)). The court has searched the record to ensure that Defendant's unfamiliarity with Rule 56 procedures will not precipitate an injustice. Because the record contains nothing to controvert Plaintiff's material facts, ordinary adherence to Rule 56 does not unfairly disadvantage Defendant. Consequently, all of Plaintiff's facts "will be deemed to be admitted." V.R.C.P. 56(c)(2).

b. Undisputed Facts

The following facts, derived from Plaintiff's Rule 56 statement, are not genuinely disputed.

Defendant maintained an ordinary business checking account at Plaintiff bank. The account was governed by an Account Agreement, which provided in part, "We will give only provisional credit until collection is final for any items, other than cash, we accept for deposit." The Account Agreement further provided that Plaintiff would be entitled to "set off"—that is, confiscate from the account—any debt owed it by Defendant. Finally, the Account Agreement provided that Defendant would be liable for overdrafts, collection costs, and fees.

Defendant deposited the subject check at Plaintiff's Newport, Vermont branch on January 6, 2006. It purported to be drawn by Unilever, USA on an account at Wachovia Bank, N.A, and to be to payable to Defendant in the amount of $65,408.44, as a "utility payment." When Defendant deposited the check, he received a receipt with the warning that the deposit "is issued subject to any corrections resulting from our proof and verification process. All items credited here are subject to final payment." The check Defendant deposited had been altered to name him as payee; the true original, from which altered check was made, was to be paid to the Amareda Hess Corporation, not to Defendant.

Defendant had received the check following online correspondence with a fictive "Justin Lorenzo," who purported to be a dying Italian crude oil merchant eager to enlist Defendant's help distributing his millions and to give Defendant a few million dollars for his trouble. Defendant has never said how or why he would have expected his Italian correspondent to send money from the account of Unilever, USA of College Station, Texas as a "utility payment." Defendant never had any contact with Unilever prior to receiving what purported to be Unilever's check, and Defendant had no reason to expect a utility payment, or any payment, from Unilever.

Around January 11, 2006, Defendant phoned Plaintiff's White River Junction, Vermont branch to make a very large overseas wire transfer from his account. By this time, Defendant had credited the deposited funds to his account balance. Defendant's branch manager, Don Emanuele, became concerned and asked Defendant to come to White River Junction in person. Mr. Emanuele spoke with Defendant, warned him of his potential liability if the transfer were part of a fraud, and inquired about the nature of the transaction. Defendant disputes the seriousness of Mr. Emanuele's inquires and, without citing the record, insists that the wire transfer was approved before he and Mr. Emanuele spoke; however, there is no dispute that the two in fact spoke and that Mr. Emanuele's branch did subsequently, at Defendant's instruction, wire $54,870.00 from Defendant's account to an account in Japan.

On January 17, 2006, six days after wiring funds to Japan, Defendant drew $3,600 from his account and sent all but $100 of that amount by Western Union to someone in the Netherlands.

Finally, on February 1, 2006, Plaintiff notified Defendant that the $65,408.44 check he deposited on January 6 had been returned as fraudulent. Defendant traveled to White River Junction and provided a statement about the events to Mr. Emanuele. Plaintiff subsequently debited the $4,137.79 remaining in Defendant's account to set off its loss. Plaintiff has repaid $65,408.44 to the falsely-named drawee bank, Wachovia, and has received an assignment of that bank's claims in this matter.

c. Discussion

Plaintiff contends that the undisputed facts mandate judgment as a matter of law, because Defendant is strictly liable under the Uniform Commercial Code for presenting an altered check he was not entitled to enforce. Plaintiff relies on the transfer warranties of 9A V.S.A. § 4-207(a)(1) & (3) and the presentment warranties at 9A V.S.A. § 4-208(a)(1)-(2).

The transferor of a check warrants, *inter alia*, that he is entitled to enforce the check, that the signatures on the check are authentic and authorized, that it has not been altered, and that creation of it was authorized by the named drawer. 9A V.S.A. § 4-207(a). Substantially identical warranties are made as to presentment. *Id.* § 4-208(a). In the context of personal banking, transfer occurs when a bank customer makes a deposit, and presentment occurs when the check arrives for final payment at the bank on which it is drawn. The presentment warranties attach to previous transferors of a check, which include the original depositor. *Id.* § 4-208(a)(ii).

It is undisputed that the check Defendant deposited at Plaintiff's Newport branch was altered to name Defendant as payee; the signatures on it were not authorized; and the check was not authorized by Unilever, the entity identified as the drawer. Consequently, liability attaches under 9A V.S.A. § 4-207(b) and 4-208(b).

Much of Defendant's argument in opposition to summary judgment rests in the unsupported assertion that Plaintiff had an obligation to "do due diligence," or otherwise to refuse to credit his account until it had final and unassailable payment from the drawee, Wachovia. First, a drawee may recover damages for breach of the presentment warranties whether or not it exercised ordinary care in making payment. 9A V.S.A. § 4-208(b). Second, as Plaintiff points out, banks are required by regulation to make deposited funds available on a fixed schedule. "A depositary bank [in receipt of a nonlocal check] shall make funds deposited in an account by a check available for withdrawal not later than the fifth business day following the banking day on which funds are deposited." 12 C.F.R.§ 229.12(c)(1). Crediting an account in conformity with regulation does not make a bank the unwitting insurer of all fraudulent checks it cannot identify within five days. Third, the Account Agreement between the parties expressly provided that deposit credits were subject to final payment.

There is no merit to the Defendant's counterclaim for restitution of the setoff amount withdrawn from his account by Plaintiff to cover his overdraft debt. Setoff rights were part of the Account Agreement, and Defendant has not advanced any reason why the setoff provision should not be enforced as written. The setoff funds are not lost to Defendant; they are credited against damages.

Finally, Defendant argues that the Plaintiff cannot maintain an action against him because the original check was destroyed and Plaintiff relies on photocopies of it. The original check was destroyed in the ordinary course of business, and no genuine question has been raised as to the authenticity of the original or the accuracy of the images of it. Under these circumstances, "[a] duplicate is admissible to the same extent as an original." V.R.E. 1003.

There is no genuine issue of material fact as to Defendant's liability.

Order

For the foregoing reasons,

Plaintiffs' motion for summary judgment is GRANTED.

Attorneys Morgan and Brannen shall prepare forms of judgment supported by appropriate affidavits.

Dated at St. Johnsbury this 22nd day of May, 2008.

Harold E. Eaton, Jr.
Superior Court Judge