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CIVIL DIVISION
Case No. 21-CV-01619

Autobahn Body Works, Inc. v. Corey Dike et al

DECISION ON MOTION FOR SUMMARY JUDGMENT

Plaintiff Autobahn Body Works, Inc. (“Autobahn”) sues Defendant Community Bank N.A. (“the Bank”) and two individuals to recover for losses it suffered when those individuals forged checks drawn on Autobahn’s account with the Bank. On the Bank’s earlier motion to dismiss, the court dismissed Autobahn’s negligence and breach of contract claims, observing that “Autobahn’s exclusive remedy, if any, must lie in the UCC.” The court went on to observe that “Autobahn’s UCC claim survives, but it hangs by a gossamer thread.” The Bank now seeks to cut that thread. The court grants the motion.

BACKGROUND

The facts are undisputed. The Bank submitted a detailed statement of undisputed material facts, supported, as required by V.R.C.P. 56(c)(1), by references to competent evidence in the record. In response, Autobahn observed simply that the date of its signature of the Bank’s revised Account Agreement is uncertain. This falls far short, however, of properly disputing that or any other assertion of undisputed fact. Thus, the facts set forth in the Bank’s statement are deemed undisputed for the purposes of this motion. *See* V.R.C.P. 56(e)(2).

Autobahn operates an auto body repair business. It employed Defendant Corey Dike for an unspecified period of time. Autobahn held a checking account with the Bank, subject to an Account Agreement executed in December 2017 (the “2017 Account Agreement”) and revised as of November 2019 (the “2019 Account Agreement”).

Autobahn alleges that four employees were authorized to sign checks for its account with the Bank, and Mr. Dike was not among them. Autobahn admits, however, that Dike had access to the business checkbook, which was stored in the office where he worked. In addition, despite Mr. Dike’s not being an authorized signatory on Autobahn’s account, Autobahn permitted him “to occasionally fill out and sign checks for vendors only.” Using this access, Mr. Dike ostensibly forged checks from Autobahn’s account.

In April 2018, Mr. Dike allegedly began writing checks from Autobahn’s account to himself and his girlfriend, Defendant Ashley Kemp, and forging the signature of an authorized Autobahn employee. Nothing in either Account Agreement obligates the Bank to contact the account holder to verify the legitimacy of a check written on the account based on the identity of the person presenting the check or the payee, or for any other reason. Rather, under the terms of both the 2017 and 2019 Account Agreements, Autobahn plainly bore the responsibility to monitor its account activity by reviewing its account statements and identifying any unauthorized activity. Specifically, the 2017 Account Agreement provided:

REVIEW OF YOUR STATEMENTS – You must examine your statement of account with “reasonable care and promptness.” If you discover any inconsistencies, unauthorized signatures, forgeries, or alterations, you must promptly notify us in writing of the relevant facts. As between you and us, if you fail to do either of these duties you will bear the entire loss. Your loss could include items on the statement, or other items with unauthorized signatures or alterations by the same wrongdoer, which we pay before we receive written notice from you. You agree the time that you have to examine the statement and report to us will not exceed 30 days from the earlier of the date the statement is made available to you by mail or electronically.

Similarly, the 2019 Account Agreement provided:

REVIEW OF YOUR STATEMENTS – You must examine your statement of account with “reasonable care and promptness.” If you discover (or reasonably should have discovered) any inconsistencies, errors, unauthorized signatures or activity, forgeries, or alterations, you must promptly notify us in writing of the relevant facts. As between you and us, if you fail to do either of these duties you will bear the entire loss. Your loss could include items on the statement, or other items with unauthorized activity, signatures or alterations by the same wrongdoer which we pay before we receive written notice from you. Unless we failed to exercise ordinary care, you agree the time that you have to examine the statement and report to us will not exceed 30 days from the earlier of the date the statement is made available to you by mail or electronically. You further agree that 60 days from the earlier of the date the statement is made available to you by mail or electronically, you cannot assert a claim against us on any items in that statement and as between you and us, the entire loss will be yours, without regard to whether or not we exercised ordinary care. This limitation is in addition to that limitation included earlier in this paragraph. Our liability (if any) under these provisions may be reduced (including to \$0) by other limitations and provisions set forth throughout this Agreement.

Finally, the 2019 Agreement also provided that any “action or proceeding . . . to enforce an obligation, duty, or right arising under this Agreement or by law with respect to, or relating to your account or any

account service must be commenced within one year after the cause of action accrues. The discovery rule shall not apply to toll the statute of limitations.”

Autobahn admits that it agreed to these provisions. Nevertheless, Autobahn failed to notify the Bank of Mr. Dike’s alleged fraud for nearly two years. During that time, the Bank sent monthly account statements. Each statement identified each check paid or cashed by item number, date of payment, and amount; it also included an image of each check. Autobahn first notified the Bank of the alleged fraud in March 2020. It then waited another 15 months, until June 2021, to file this suit.

ANALYSIS

Against this background, Autobahn’s remaining claim clearly fails as matter of law. On the undisputed facts of this case, the UCC places the entire risk of loss squarely and exclusively on Autobahn. Equally, the two account agreements foreclose any recovery, on a claim brought under the UCC or otherwise.

Article 4 of the Uniform Commercial Code regulates “Bank Deposits and Collections.” In the realm of liability for payment of unauthorized items, it creates a risk-shifting regimen. Part 4 of the Article allows a bank to pay “an item that is properly payable from the account.” 9A V.S.A. § 4—401(a). An item is “properly payable” only “if it is authorized by the customer.” *Id.* Importantly for purposes of this case, “[a]n item containing a forged drawer’s signature . . . is not properly payable.” *Id.*, Official Comment 1. Thus, the UCC places the risk of loss for a forged check on the bank, as a matter of first principles.

This provision, however, does not free the customer from obligations with respect to forged checks. The UCC requires the bank to do one of two things with respect to all items paid on an account: return the items, or copies thereof, to the account holder; or “provide information in the statement of account sufficient to allow the customer to reasonably identify the items that have been paid.” 9A V.S.A. § 4—406(a). “The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.” *Id.* The burden then shifts to the account holder:

If a bank sends or makes available a statement of account or items pursuant to subsection (a) of this section, 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. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

Id. § 4—406(c).

If the bank proves that the account holder failed to fulfill these duties, the failure is fatal:

the customer is precluded from asserting against the bank . . . 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.

Id. § 4—406(d)(2). Finally, the UCC includes a statute of repose:

Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (subsec. (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or the alteration.

Id. § 4—406(f).

In combination, these provisions preclude Autobahn's entire claim. The undisputed facts make clear that the Bank more than met its obligations; it sent statements that both included copies of all items paid and identified each by item number, date of payment, and amount. Nevertheless, Autobahn did not bring the alleged forgeries to the Bank's attention until March 2020. Thus, per § 4—406(f), Autobahn "is precluded from asserting against the bank the unauthorized signature[s]" on any item shown on a statement sent more than one year before Autobahn gave notice of the forgery. This forecloses Autobahn's right of recovery for any item paid as reflected on statements sent before March 2019.

The statute then forecloses recovery for any items shown on statements issued between March 2019 and March 2020. It cannot be disputed that with statements that identified each check paid or cashed by item number, date of payment, and amount, and also included an image of each check—Autobahn had all the information it needed to have discovered the alleged forgeries. *See* 9A V.S.A. § 4—406, Official Comment 1 ("If the bank supplies its customer with an image of the paid item, it complies with th[e] standard [under § 4—406(a)]" to "provide information 'sufficient to allow customer reasonably to identify the items paid.'"); *id.* (supplying image of check covers the "exceptional circumstance[, f]or example, if a check is altered by changing the name of the payee, [in which] the customer could not normally detect the fraud [from the account statement alone]."); *ADC Rig Servs., Inc. v. JPMorgan Chase Bank, N.A.*, 641 F. Supp. 2d 617, 622 (S.D. Tex. 2009) (describing information sufficient for customer to detect unauthorized transactions). Thus, with respect to the first alleged forgeries, dating back to April 2018, Autobahn was obligated to have notified the Bank "promptly" after it "should reasonably have discovered" the forgery. 9A V.S.A. § 4—406(c); *see Am.*

Airlines Employees Fed. Credit Union v. Martin, 29 S.W.3d 86, 94 (Tex. 2000) (interpreting cognate provision of Texas statute: “This duty to detect and report is triggered when the bank meets its burden to provide the customer with enough information that the customer can detect that the unauthorized transaction has occurred.”). The court need not determine the precise contours of “promptness”; it is sufficient to observe that notice given in March of 2020 of forgeries that appeared on a statement sent in May or even June of 2018 could not conceivably be considered “prompt.” Thus, with respect to those early forgeries, Autobahn clearly failed to comply with the duties imposed by subsection (c). This means, in turn, that Autobahn is precluded from asserting against the Bank any subsequent forgery “by the same wrongdoer.” *Id.* § 4—406(d)(2). To avoid such preclusion, Autobahn was obligated to have reported the initial forgeries within 30 days of its receipt of information sufficient to identify an act of forgery—here, through copies of the allegedly forged checks, presumably sometime in 2018. There being no dispute—at least for purposes of this motion—that any items paid after March 2019 were all based on unauthorized signatures by Mr. Dike, Autobahn’s failure to discover and notify the Bank until March 2020 of the earlier forgeries precludes recovery for these items.¹

This conclusion means that, between § 4—406(f) and § 4—406(d)(2), the UCC forecloses recovery for all of the alleged forgeries at issue in this case. The same result obtains through analysis of the obligations and restrictions set forth in the 2017 and 2019 Agreements. The 2019 Account Agreement, the reader will recall, erects a complete bar to any claim not filed within a year after the cause of action accrues. Here, the cause of action can have accrued no later than March 2020, when Autobahn discovered the alleged forgeries; Autobahn did not file suit until 15 months later. To the extent that the 2019 Account Agreement could be argued not to apply to items presented and paid before its effective date, the 2017 Account Agreement sets up a regimen similar to that imposed by the UCC, but with clearer timeframes: “the time that you have to examine the statement and report to us will not exceed 30 days from the earlier of the date the statement is made available to you by mail or electronically.” The consequence of the account holder’s failure in this regard is equally simple and straightforward: “if you fail [either to examine your statement of account with ‘reasonable care and promptness’ or to promptly notify us in writing of the relevant facts] you will bear the entire loss.” Such losses “could include [not only] items on the statement” first evidencing the fraud, but subsequent items “by the same wrongdoer.” Autobahn did not report even the latest of the alleged

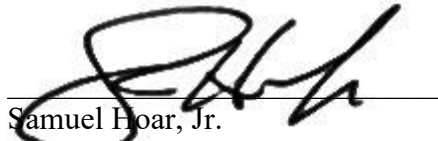
¹ 9 V.S.A. § 4—406(e) creates exceptions to the rule of § 4—406(d)(2) if the customer proves either that the bank “did not exercise ordinary care in paying the item” or that the bank “did not pay the item in good faith.” The court need not discuss the level of proof required for these exceptions, as Autobahn did not plead them, and made no effort in response to the Bank’s motion to prove anything. See *Union St. Corridor-Community Dev. Corp. v. Santander Bank, N.A.*, 191 F. Supp. 3d 147, 152 (D. Mass. 2016) (noting that customer bears burden of proof under cognate provision of Massachusetts statute).

forgeries under the 2017 Account Agreement until well more than 30 days after that agreement was superseded by the 2019 Account Agreement. Thus, none of those alleged forgeries was promptly reported. This means, in turn, that to the extent that the 2019 Account Agreement might not foreclose recovery on those items, the 2017 Account Agreement clearly does.

ORDER

The court grants the Bank's motion for summary judgment. All of Autobahn's claims against the Bank are dismissed with prejudice.

Electronically signed pursuant to V.R.E.F. 9(d): 5/31/2022 12:29 PM



Samuel Hoar, Jr.
Superior Court Judge