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Margot J. Garant, Inc. v Suffolk County Natl. Bank
2015 NY Slip Op 50119(U)
Decided on February 11, 2015
Supreme Court, Suffolk County
Emerson, J.
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Decided on February 11, 2015

Supreme Court, Suffolk County

Margot J. Garant, Inc., and MARGOT J. GARANT, Plaintiffs,

against

Suffolk County National Bank, Defendant.

66873-14

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Elizabeth H. Emerson, J.

Upon the following papers numbered 1-42 read on this motionfor preliminary injunction and cross-motion to dismiss ; Order to Show Cause and supporting papers 1-8 ; Notice of Cross Motion and supporting papers 9-37 ; Answering Affidavits and supporting papers39 ; Replying Affidavits and supporting papers40-42 ; Other 38 ; it is,

ORDERED that the motion by the plaintiffs for a preliminary injunction was resolved pursuant to a so-ordered stipulation dated September 23, 2014; and it is further

ORDERED that the cross motion by the defendant for an order dismissing the complaint is granted.

The plaintiff Margot Garant, an attorney with an office in the Village of Port Jefferson, New York, represents clients in real estate transactions. On July 9, 2014, a client named Yang Jun was referred to her in connection with the purchase of a home in Port Jefferson. The record reflects that Garant never met Yang, who claimed to be from China, and that they communicated with each other via email. On July 17, 2014, Garant received a check for the purchase in the amount of $399,585.60 from John Owen of CI Investments, with whom Yang purportedly had investments. The check was drawn on the account of Euro Vinyl Windows & Doors, Inc., at the Bank of Nova Scotia in Ontario, Canada. On July 24, 2014, Garant brought the check to the Port Jefferson branch of the defendant, Suffolk County National Bank ("SCNB"), and deposited it into her attorney escrow account. The deposit was rejected because the check was drawn on a foreign bank and had to be sent out for collection. On July 25, 2014, Garant was given the option of having the funds wired into her escrow account or sending the check out for collection. She chose the latter. The check was sent to SCNB's Operations Department, which mailed it to the Federal Reserve Bank of Atlanta on July 31, 2014. After the Federal Reserve processed the check and mailed it to the Bank of Nova Scotia, SCNB received a provisional credit therefor in the amount of $399,585.60. On August 8, 2014, SCNB provisionally credited that amount to Garant's escrow account. However, unbeknownst to SCNB, the Bank of Nova Scotia had rejected the check as forged/counterfeit on August 7, 2014, and mailed it back to the Federal Reserve Bank of Atlanta. August 12 and 13, 2014, Yang sent Garant three emails with instructions for wiring some of the funds to his wife or ex-wife. Each email contained different instructions. The third and final email directed Garant to wire $265,000 to an account entitled *Overseas Consultants* at Ameriserve Financial Bank in Pennsylvania, which she did on August 13, 2014. On August 18, 2014, SCNB received an envelope postmarked August 14, 2014, from the Federal Reserve Bank of Atlanta. Enclosed therein was a *Cash Letter Summary* dated August 13, 2014, returning the check. Also enclosed were the check itself and the Bank of Nova Scotia's return slip indicating that the check was being returned as forged/counterfeit. SCNB telephoned Garant on August 18, 2014, to

advise her that the check had been "recalled." On August 19, 2014, SCNB revoked the provisional credit and charged back Garant's escrow account $399,585.60.

Garant and her corporation, Margot J. Garant, Inc. (the "plaintiffs"), commenced this action against SCNB for a judgment declaring that it is not entitled to exercise the right of setoff against Garant's attorney escrow account and directing it to return $399,585,60 to that account, for breach of warranty and breach of the duty of care under the UCC, for negligent misrepresentation, for fraudulent misrepresentation, for promissory estoppel, for breach of fiduciary duty, and for attorney's fees under the UCC. SCNB moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

The Court of Appeals recently decided a case that is remarkably similar to the one at bar. In Greenberg, Trager & Herbst, LLP v HSBC Bank USA (17 NY3d 565), the plaintiff, a law firm, received an email from Northlink Industrial Limited ("Northlink"), a Hong Kong company, looking for legal representation to collect debts owed by its North American customers. The plaintiff agreed to represent Northlink and requested a $10,000 retainer. Northlink sent [*2]Greenberg, Trager & Herbst ("GTH") a Citibank check from a Northlink customer in the amount of $197,750 with instructions to take its $10,000 retainer out of the check and wire the balance to Citibank in Hong Kong. GTH deposited the check into its attorney trust account at HSBC on Friday, September 21, 2007. HSBC provisionally credited GTH's account in the amount of $197,750 on the next business day, Monday, September 24, 2007. HSBC sent the check to the Federal Reserve Bank of Philadelphia for presentment to Citibank. Citibank rejected the check because the routing number was not recognized by its automated sorting system and sent the check back to HSBC the next day, September 25, 2007.[FN1] HSBC repaired the routing number; determined that the check belonged to Citbank, Las Vegas; and sent it to the Federal Reserve Bank of San Francisco. On September 27, 2007, in response to an inquiry by GTH regarding whether the check had "cleared," HSBC advised GTH that the funds were "available." Later that day, GTH wired $187,750 from its account to Hong Kong pursuant to Northlink's instructions. On September 28, 2007, HSBC confirmed to GTH that the wire transfer had been consummated. On October 2, 2007, HSBC received a notice from Citibank that the check had been dishonored as "suspect counterfeit" and so advised

GTH. HSBC then revoked its provisional settlement [FN2] and charged back GTH's account.

GTH commenced an action against HSBC and Citibank sounding in negligence and negligent misrepresentation.[FN3] GTH claimed that Citibank was negligent in breaching its obligation to implement effective procedures for detecting counterfeit checks and that HSBC was negligent for failing to inform GTH and charge back the check when it was first returned by Citibank on September 25, 2007. GTH also claimed that HSBC negligently misrepresented to it that the check had cleared and that the funds were available for transfer. Both HSBC and Citibank moved for summary judgment dismissing the complaint, which was granted by the Supreme Court. The Appellate Division affirmed, as did the Court of Appeals (Pigott, J., dissenting in part). The Court of Appeals applied the Uniform Commercial Code to the negligence claims to find that they were properly dismissed. As for the negligent-misrepresentation claim, the Court found that GTH's reliance on HSBC's statement that the check had "cleared" was unreasonable as a matter of law. Finally, the Court rejected GTH's estoppel argument. Finding that neither Citibank nor HSBC had breached any duty owed to GTH, the Court agreed with the Appellate Division that GTH was in the best position to guard against the risk of a counterfeit check by knowing its client.

This court finds Greenberg to be controlling. Like GTH, the plaintiffs seek to hold a defendant bank liable for a counterfeit check. While the plaintiffs do not assert a negligence [*3]claim against SCNB, they assert claims under the UCC and argue that SCNB did not comply therewith. The Court of Appeals applied the UCC in Greenberg, finding that the manner in which checks are processed by banks is governed by the UCC. The opinion provides an instructive summary of the relevant provisions of the UCC, which is lengthy, but bears repeating here.

"The manner in which checks are processed by banks is governed by the Uniform Commercial Code. The UCC defines a "Depositary bank as "the first bank to which an item is transferred for collection" (UCC 4-105 [a]). A "Collecting Bank" is defined as "any bank handling the item for collection except the payor bank" (UCC 4-105 [d]). A "Payor

Bank" is defined as "any bank by which an item is payable as drawn or accepted " (UCC 4-105 [b]). An "Intermediary Bank" is defined as "any bank to which an item is transferred in course of collection except the depositary or payor bank" (UCC 4-105 [c]).

"In a typical check presentation scenario, a bank customer deposits a check at its bank, the depositary bank. After deposit by the customer, the depositary bank either presents the check to the payor bank, or as is more commonplace, the depositary bank sends the check to a clearing house, which acts as an intermediary bank. Once the depositary bank sends the check to the intermediary bank, the depositary bank become a collecting bank. The intermediary bank then presents the check to the payor bank (at which time the intermediary bank is also a collecting bank). When the check is received by the payor bank, it either pays the check, returns the check or dishonors the check.

"The UCC prescribes the duties the various banks owe to a depositor. A collecting bank must use ordinary care in presenting a check or sending a check for presentment, sending notice of dishonor or nonpayment or returning a check, and settling the check when the collecting bank receives final settlement from the payor bank (*see* UCC 4-202 [1]). A collecting bank has until midnight of the next banking day (its "midnight deadline" [UCC 4-104 (h)]) to take the above actions when receiving a check, notice of dishonor or final settlement of the check (*see* UCC 4-202 [2]). In other words, whenever a collecting bank receives a check from a depositor or notice or settlement from the payor bank it must act on it by midnight the next banking day.

"A payor bank must, by its "midnight deadline" (UCC 4-104 [h]), pay the item (*see* UCC 4-302), return the item or send written notice of dishonor or nonpayment (*see* UCC 4-301). Final settlement of a check occurs when the payor bank has paid the item or fails to return the check, or send written notice of dishonor or nonpayment of the check by its midnight deadline (*see* UCC 4-301[1]; 4-302 [a]).

"Pursuant to the Expedited Funds Availability Act (12 USC § 4001 *et seq*), banks are

required to make funds from a deposited check available for the depositor's withdrawal within certain short time periods (*see* 12 USC § 4002 [b] [1]). The purpose of the "[a]ct is to provide faster availability of deposited funds" (*Hass v Commerce Bank,* 497 F Supp 2d 563, 565 [SDNY 2007]. This availability is provisional and the collecting bank has the right to charge back the amount if the check is dishonored or the bank fails to receive a settlement for the check (*see* UCC 4-212). (17 NY3d at 575-576)."

To the outsider, modern check processing resembles a high-stakes game of hot potato. Banks pass checks from hand-to-hand in order to avoid being caught with the check at the expiration of their midnight deadline. The system appears to work amazingly well in the ordinary course of business (U.S. Fid. & Guar. Co. v Federal Reserve Bank of NY, 590 F Supp 486, 499 [SDNY], *affd* 786 F2d 77), but time is of the essence. If a check is delayed for a long enough time during its route from the depositary bank to the payor bank, the check may not reach the payor bank for approval before the depositary bank, assuming payment, permits funds to be withdrawn against it (Id. at 489), providing an opportunity for the type of fraud to which Garant fell victim. Federal District Court Judge Whitman Knapp described how this type of fraud is accomplished in Northpark National Bank v Bankers Trust Co. (572 F Supp 524, 525-526). Judge Knapp wrote:

"Two features of the modern check collection process are central to the understanding of this fraud. The first is that, notwithstanding the colloquial suggestion to the contrary, checks deposited for collection do not generally "clear." That is, provisional credits —on the customer's account at the depositary bank and on the accounts of intermediary banks involved in the collection process—become final by the mere passage of time, rather than by an advice of actual payment. *See* Uniform Commercial Code (UCC) § 4-213 [footnote omitted]. *See also* 6 Reitman Banking Law § 135.08 (1981). It being statistically unlikely that a particular check will not be paid, *see* UCC § 4-212, comment 1, the practicalities of the process call for giving actual notice (down the chain of collection) only in the event a check is *not* paid. Accordingly, the temporary hold which a depositary bank customarily places on the withdrawal of proceeds from a check deposited for collection is intended to give the collection chain an opportunity to notify the depositary bank, if it be necessary, that the check has not been paid. Thus, the hallmark of the normal completion of collection —*i.e.*, the check having been paid—is the receipt of *no notice* by the depositary institution.

"The second important feature is that the collection process has been, of course, automated by the use of check-sorting computers. *See Bank Leumi Trust v Bally's Park Place* (S.D.NY 1981) 528 F. Supp. 349, 350-51. The vast amount of items processed allows no practical alternative. *See* 68 Annual Report, Board of Gov. of the Fed.Res.Syst. 233, table 9 (1981) (more than 16 billion checks handled in [*4]1981); Aldom, Purdy, Schneider & Whittingham, Automation in Banking 13-15 (1963); UCC § 4-101 comment. Along the bottom of a check's face there are so-called "MICR numbers" [footnote omitted] which identify the drawer's bank, branch, and account number. A computer "reads" these numbers and automatically routes the check to the appropriate destination for collection. The initial destination depends, therefore, entirely on the MICR routing number printed on the check.

"With the foregoing in mind it is clear how a fraud of this type is accomplished. Its object is to cause a worthless check deposited for collection to take a sufficiently long detour in its progress to the drawee bank, to insure that the notice of non-payment will not arrive at the depositary bank until after the expiration of the hold which it placed on the availability of the proceeds from transit items [footnote omitted]. Having received no such notice before the expiration of the hold, the depositary bank supposes the items to have been paid and allows its proceeds to be withdrawn. By the time notice arrives the malefactor has, of course, absconded with the spoils. The crucial detour is caused by imprinting the fraudulent check with the wrong MICR routing number— *i.e.*, one that does not correspond to the bank designated on the face of the check as the drawee bank, but to a different bank, preferably one that is distant from the institution designated as the drawee bank on the face of the check."

Here, the delay was not caused by a wrong routing number on the check, but by a foreign routing number. Because the check was drawn on a bank located in a foreign country (Canada), it had to be sent out for collection, and U.S. return item deadlines and policies did not apply to it (*see,* Federal Reserve Bank Services, *Foreign Check User's Guide*, https://www.frbservices.org/operations/foreigncheck/foreign_check_guide.html?id=31 & loc=1 [accessed August 20, 1014]). Sending the check out for collection meant that it had to be mailed to the Federal Reserve Bank of Atlanta, which then mailed it to the Bank of Nova Scotia. SCNB advised Garant that putting a foreign check through the collection process could take two weeks or more to be completed. The Federal Reserve warns foreign check customers that some foreign institutions take longer than 20 business days to pass credit and that they could experience a return on an item weeks after the

original credit is passed. In addition, an item sent "on collection" is not safe from return when, as here, the item is determined to be forged or fraudulent (Id.). The Federal Reserve, like the Appellate Division and the Court of Appeals, advises that it is important to "know your customer" (Id.).

The plaintiffs contend that SCNB is not entitled to charge back Garant's escrow account because it failed to comply with UCC 4-212 (1), which provides as follows:

"If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a settlement for the item which is or becomes final, the bank [*5]may revoke the settlement given by it, charge back the amount of any credit for the item to its customer's account or obtain refund from its customer whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge-back and obtain a refund terminate if and when a settlement for the item received by the bank is or becomes final (emphasis added)."

The plaintiffs contend that the failure to comply with the time requirements of UCC 4-212 (1) precludes a bank from exercising the charge-back remedy. The plaintiffs contend that, at this stage of the proceedings, the court cannot determine as a matter of law that SCNB acted within a reasonable time after receiving notice that the check was counterfeit. The plaintiffs contend that the check was rejected as forged/counterfeit on August 7, 2014, the day before SCNB credited it to the escrow account. However, SCNB did not actually charge back the escrow account until August 19, 2014, 25 days after the check had been deposited and 11 days after the account was credited. The plaintiffs contend that it is plausible that SCNB received some communication from the Bank of Nova Scotia immediately after it determined that the check was fraudulent. The plaintiffs argue that the electronic notification system described in Greenberg (17 NY3d at 573) provides immediate notification to banks that the payor bank has dishonored a check. Thus, the plaintiffs contend that modern banking offers a faster means of notification that a check has been dishonored than the U.S. mail. The plaintiffs contend that discovery is required to determine when SCNB learned that the check was counterfeit and how long after such notice it charged back the escrow account.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see*, Leon v Martinez, 84 NY2d 83, 87-88). In assessing a motion under CPLR 3211(a)(7), the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (Id. at 88). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (Id.).

UCC 4-212 (1) establishes a duty of care, not a condition to the right to charge- back (Northpark, *supra* at 529). The duty a collecting bank owes to a depositor is that of ordinary care in handling the item (Greenberg, 17 NY3d at 580, citing UCC 4-202). The UCC does not define "ordinary care," but it should be read as having its normal tort meaning (Id.). That being the case, the realities of the modern banking system cannot be ignored in evaluating a bank's negligence (Id.). As Judge Knapp noted in Northpark, ordinary care must be determined with regard to sound banking practice (572 F Supp at 534, *see also* U.S. Fid. & Guar. Co. v Federal Reserve Bank of NY, 590 F Supp at 499).

The court finds that SCNB exercised ordinary care in handling the check that is the subject of this action. As previously pointed out, U.S. return item deadlines and policies do not apply to checks drawn on banks located in foreign countries, and the Federal Reserve's *Foreign Check User's Guide* requires foreign items for deposit to be sent by U.S. mail, FedEx, UPS, or other courier to the Federal Reserve Bank of Atlanta. Thus, contrary to the plaintiffs' contentions, the electronic notification system described in Greenberg was not available to SCNB because the check was drawn on a foreign bank. Moreover, the documentary evidence conclusive establishes that SCNB first learned of the check's dishonor on August 18, 2014, when it received the *Cash Letter Summary* from the Federal Reserve returning the check. The documentary evidence also establishes that, by the time the Federal Reserve mailed the *Cash Letter Summary* to SCNB on August 14, 2014, Garant had already wired the funds to Ameriserve Financial Bank in accordance with Yang's instructions. SCNB exercised its right to charge back the plaintiffs' escrow account

on August 19, 2014, the day after it received notice of the check's dishonor. The plaintiffs' contention that SCNB knew or should have known of the check's dishonor on or about August 7, 2014, when the Bank of Nova Scotia determined that the check was fraudulent is sheer speculation and utterly refuted by the documentary evidence. Accordingly, the court finds that SCNB complied with UCC 4-212 (1) and acted within a reasonable time after learning of the check's dishonor.

The First Cause of Action for Declaratory Relief

The first cause of action seeks a judgment declaring that SCNB is not entitled to exercise a right of setoff against the plaintiffs' escrow account and directing SCNB to restore the $399,585.60 charged back to that account. As a general rule, a court should not entertain an action for declaratory judgment when there is no necessity for doing so (Holtzman v Supreme Court of the State of New York, 152 AD2d 724, 725). A declaratory judgment action is not appropriate when a conventional form of remedy is available. Resort to an action for declaratory relief is generally unnecessary and should not be encouraged when an action at law for damages will suffice (*see*, Bartley v Walentas, 78 AD2d 310, 312). The first cause of action for declaratory relief is duplicative of the plaintiffs' other causes of action to recover damages for the $399,585.60 charge-back. Accordingly, it is dismissed as unnecessary.

The Second Cause of Action for Breach of Warranty

Although the second cause of action is entitled *Breach ofWarranty under UCC 4-207 and 3-417*, the plaintiffs allege that SCNB breached the duty of care found in UCC 4-202, which provides, in pertinent part, that a collecting bank must use ordinary care in the exercise of its basic collection tasks. As previously discussed, the court finds that SCNB exercised ordinary care in handling the check that is the subject of this action. As for the breach of warranty, under UCC 4-207, each customer or collecting bank who transfers an item and obtains payment or acceptance thereof warrants to his transferee, inter alia, that he has good title to the item and that all of the signatures are genuine or authorized (Ridgewood Sav. Bank v Grubb, 11 Misc 3d 1093[A]). These are the same warranties imposed by UCC 3-417 on transferors of commercial [*6]paper. It is the transferor who gives the warranties to the next transferee in the chain. Thus, it was Garant who gave the

warranties to SCNB and not the other way around. Accordingly, the second cause of action is dismissed.

The Third Cause of Action for Breach of the Duty of Care Under UCC 4-202

As previously discussed, SCNB did not breach its duty of care under UCC 4-202. Accordingly, the third cause of action is dismissed.

The Fourth Cause of Action for Negligent Misrepresentation

The plaintiffs' claim of negligent misrepresentation is based on an alleged oral statement by SCNB advising Garant that the check had "cleared" and that the funds were "available," a bank statement showing that the funds were in the account on August 8, 2013, and SCNB's authorization of the wire transfer on August 13, 2014.

Liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified (Greenberg, 17 NY3d at 578). The relationship between a bank and its depositor is one of debtor and creditor, and an arm's length borrower-lender relationship does not support a cause of action for negligent representation (Id.). This is true even if there is a long-standing relationship between the customer and a particular bank employee (Id).

In Greenberg, GTH argued that HSBC was its agent pursuant to UCC 4-201 and, as such, owed it a fiduciary duty. In rejecting this argument, the Court of Appeals noted that the purpose of UCC 4-201 is not to impose a fiduciary duty on a collecting bank and that, until the collecting bank receives final payment, the risk of loss is upon the owner of the item rather than the bank (Id. at 579). The Court went on to say that GTH's claim of negligent misrepresentation could not succeed because it was based on an alleged oral statement by an HSBC representative that the check had "cleared." The court found this remark to be ambiguous in that HSBC may have intended it to mean only that the amount of the check was available (which it was) in GTH's account. Accordingly, the Court found GTH's reliance on the remark to be unreasonable as a matter of law (Id.).

Other courts that have considered this issue have reached the same result. In Call v Ellenville Natl. Bank (5 AD3d 521, 524), the Second Department found that the statutory allocation of risk found in the UCC should not be altered by the defendant bank's alleged representation to the plaintiff that the check had "cleared." In Fischer & Mandell LLP v Citibank, N.A. (632 F3d 793, 799), the plaintiff argued that Citibank's website "gratuitously" declared the funds to be "available" before they had been collected, implicitly representing that the funds had cleared and misleading the plaintiff into believing that they were available for wire transfer. The Second Circuit found that the District Court had properly rejected this argument [*7]and that "available" meant only that account balances were available for use on a provisional basis, subject to charge back if the check were returned, and not that the account balance represented collected funds.

The overwhelming weight of authority is in favor of SCNB on this issue. The Court of Appeals, the Second Circuit, and the Second Department have all declined to unsettle the statutory allocation of risk of loss found in UCC article 4 and have rejected claims of reliance on statements by banks, either express or implied, that funds were "available" or had "cleared." Those terms are not found in the UCC (*see*, Call, *supra*; Fischer & Mandell LLP v Citibank, N.A., US Dist Ct, SDNY, May 27, 2010, Sullivan J., n 8 [2010 WL 2484205], *affd* 632 F3d 793), and their meaning is ambiguous (Greenberg, *supra*). Any reliance thereon by the plaintiffs was unreasonable as a matter of law (Id.). Accordingly, the fourth cause of action for negligent misrepresentation is dismissed.

The Fifth Cause of Action for Fraudulent Misrepresentation

Reasonable reliance is an essential element of both fraud and negligent misrepresentation (Tonzi v Nichols, 24 Misc 3d 1249[A] at * 4-*5, *affd* 77 AD3d 1450). Accordingly, the fifth cause of action is also dismissed.

The Sixth Cause of Action for Promissory Estoppel

To establish an estoppel, a party must prove that it relied upon another's actions, that its reliance was justifiable, and that it prejudicially changed its position as a consequence of such reliance (Flushing Unique Homes, LLC v Brooklyn Fed. Sav. Bank, 100 AD3d 956, 958). As previously discussed, the plaintiffs' reliance on SCNB's alleged representations

was unreasonable as a matter of law. Moreover, the relationship between the plaintiffs and SCNB is governed by article 4 of the UCC, which represents the ultimate distillation of a painstaking process of evolution, pursuant to which the risk of loss in commercial matters has been attempted to be adjusted in a fair and equitable manner (Putnam Rolling Ladder, 74 NY2d 340, 348). The UCC's objective is to promote certainty and predictability in commercial transactions (Id. at 349). By prospectively establishing rules of liability that are not generally based on actual fault, but on allocating responsibility to the party best able to prevent the loss by the exercise of care, the UCC guides commercial behavior, increases certainty in the marketplace and efficiency in dispute resolution (Id.). It is not for the courts to unsettle the UCC's carefully drawn balance (Id. at 348-349). The Court of Appeals reiterated these principles in Greenberg when it rejected GTH's estoppel argument, finding that the UCC places the risk of loss on the depositor until there is a final settlement of the check and that GTH was in the best position to guard against the risk of a counterfeit check by knowing its client (17 NY3d at 581-582). Accordingly, the sixth cause of action for promissory estoppel is dismissed.

The Seventh Cause of Action for Breach of Fiduciary Duty

The relationship between a bank and its customer is one of debtor and creditor, and is not a fiduciary relationship, even if the parties are familiar or friendly or if there is a long-standing relationship between the customer and a particular bank employee (Greenberg, 17 NY3d at 578; Call 5 AD3d at 523). As previously discussed, the relationship is controlled by article 4 of the UCC, whose carefully drawn balance should not be unsettled by principles taken from tort law (Putnam, *supra* at 348-349). Accordingly, the seventh cause of action is dismissed.

The Eighth Cause of Action for Attorneys' Fees

In view of the dismissal of the breach-of-warranty claim under UCC 4-207, the plaintiffs' claim for attorney's fees under that section is also dismissed.

Dated:February 11, 2015

J.S.C.

Footnotes

Footnote 1: The Citibank check was processed electronically.

Footnote 2:"Settle" is defined by UCC 4-104 (*l*) as "to pay in cash, by clearing house settlement, in a charge or credit or by remittance, or otherwise as instructed. A settlement may be either provisional or final."

Footnote 3:GTH's claims for conversion and conspiracy were deemed abandoned.

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