

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

MIKHAIL SHAMIS	: DECEMBER TERM, 2004
v.	: No. 0973
CITIZENS BANK,	: (Commerce Program)
LEGG MASON WOOD WALKER, INC.,	
FOX INTERNATIONAL RELATIONS, INC.,	: Superior Court Docket Nos.
MICHAEL LISITSA, and	1043 EDA 2007
MICHAEL KOGAN	: 1044 EDA 2007

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OPINION

Albert W. Sheppard, Jr., J. July 10, 2007

This Opinion is submitted relative to plaintiff’s appeals of this court’s Orders of March 26, 2007 granting summary judgments in favor of defendants, Citizens Bank (“Citizens”) and Legg Mason Walker Wood, Inc. (“Legg Mason”).

For the reasons discussed, this court respectfully submits that its Orders should be affirmed.

BACKGROUND

This case involves the alleged conversion of a negotiable instrument. As such, it is governed by the UCC. Plaintiff and his wife owned a brokerage account with Legg Mason. In opening this account, plaintiff and his wife signed the Premier Asset Management Account Agreement (“Account Agreement”). The terms of the Account Agreement allowed plaintiff to issue checks against funds in his brokerage account. The Account Agreement states in relevant part: “Bank One¹ (the Bank) is authorized to honor checks presented against this checking account and is directed to forward said checks to Legg Mason to reimburse the Bank....”

In the summer of 2002, plaintiff was introduced to Michael Lisitsa (“Lisitsa”) by a mutual friend named Arcadi Schwartzman (“Schwartzman”). Lisitsa owned an investment company, Fox International Relations (“Fox”), which served as a broker for a company called Fiserv. Lisitsa advised plaintiff to invest in Fiserv, and directed him to contact Michael Kogan (“Kogan”). Plaintiff admitted in his September 16, 2005 deposition that before making his investment, he neither asked for nor received any background information with respect to Fiserv, Fox, Lisitsa, or Kogan; that he did not do any independent research on these companies; and that he did not understand the business relationship among Fiserv, Fox, Lisitsa, and Kogan.

On August 28, 2002, plaintiff issued a check from his brokerage account for \$100,000.00. Pursuant to Kogan’s instructions, the check was made payable to “Fiserv” and was sent directly to Kogan to be invested. Around this same time, Fox issued plaintiff a promissory note (“the Note”), which served as his investment contract with

¹ On July 1, 2004, Bank One Corporation merged with Morgan Chase & Co. The combined company is presently known as J.P. Morgan Chase & Co.

Fox. Under the terms of the Note, plaintiff would receive 8% interest annually on his investment. Other than the Note, plaintiff did not receive any other paperwork with respect to his investment in Fiserv. Further, plaintiff did not have any other contact with either Lisitsa or Kogan until January 2003.

In January 2003, plaintiff received a letter, an IRS Form 1099, and a check from Fox in the amount of \$2,110.00, which purported to represent the interest plaintiff earned on his investment in Fiserv. The letter was drafted by Kogan, but signed by Lisitsa and sent on Fox letterhead. The letter stated that Fox's investment strategies had "outperform[ed] all major market indices."

While plaintiff assumed that he had invested in Fiserv, in reality, upon receipt of plaintiff's check, Kogan deposited it into his personal account at Citizens.² In accord with the Account Agreement, the check was honored by Bank One and Legg Mason reimbursed Bank One with funds from plaintiff's brokerage account. In 2003, Kogan pled guilty to fraud in U.S. District Court for the Eastern District of Pennsylvania and is presently incarcerated.

In June 2004, Lisitsa contacted plaintiff and informed him that Kogan had misappropriated plaintiff's check. Importantly, plaintiff never demanded his money back from Lisitsa, nor did he question how it was possible for him to earn interest on an investment that was never actually made.

Plaintiff filed the instant action against Citizens and Legg Mason alleging one count of "improper payment of check on fraudulent endorsement." Citizens joined Lisitsa and Fox claiming fraud, contribution and indemnity, and civil conspiracy. Lisitsa and Fox joined Kogan as a fourth-party defendant. Defendants, Citizens Bank, Legg

² The check was endorsed 'for deposit only.'

Mason, and Fox and Lisitsa, have all moved for summary judgment. This court granted summary judgments in favor of both Legg Mason and Citizens Bank. The motions of third-party defendants, Fox and Lisitsa, were denied as moot. Plaintiff now appeals.

DISCUSSION

Plaintiff appeals from this court's entry of two Orders dated March 26, 2007 - - one granting summary judgment in favor of Citizens Bank, and the other granting summary judgment in favor of Legg Mason.

Plaintiff argues that this court's grant of summary judgment in favor of Citizens was improper. In support of its position, plaintiff argues that this court erred in finding that: (1) plaintiff did not have a cause of action against Citizens under Section 3-420, (2) Kogan was the intended payee of plaintiff's check, (3) plaintiff's claim is barred by the "Padded Payroll" Rule under Section 3-405, and (4) plaintiff's claim against both Citizens and Legg Mason is barred by the Uniform Fiduciaries Act.

Plaintiff also urges that this court abused its discretion by allowing Citizens to file its Motion for Summary Judgment beyond the motion deadline. But, plaintiff has failed to show that it was prejudiced by Citizens' untimely filing. Thus, this court did not abuse its discretion by accepting Citizens' Motion as timely filed.

I. Legg Mason Appeal

Plaintiff argues that this court's grant of summary judgment in favor of Legg Mason was improper, in that this court erred in finding that: (1) plaintiff did not produce evidence to support his claim against Legg Mason, and (2) Legg Mason was not the drawee bank.

In granting summary judgment, this court found that plaintiff failed to offer any evidence to demonstrate that Legg Mason acted in bad faith in handling plaintiff's brokerage account. Plaintiff did not serve any discovery requests upon Legg Mason, and failed to respond to Legg Mason's interrogatories and requests for production. Moreover, in plaintiff's deposition taken September 16, 2005, plaintiff testified that he could not recall what facts he believed supported his bad faith claim. Plaintiff further testified that he did not remember Legg Mason acting dishonestly. Examining this case in the light most favorable to plaintiff, this court cannot find any genuine issue of material fact respecting plaintiff's claim against Legg Mason.

This court further found that Legg Mason was not the drawee bank, and was not involved in honoring, paying, or processing plaintiff's check. Plaintiff argues that Legg Mason was the drawee bank because it drew money from plaintiff's account. As previously discussed, when plaintiff and his wife opened a brokerage account with Legg Mason, they signed an Account Agreement, which controlled the manner in which checks written from plaintiff's account were processed. The relevant provision states: "Bank One (the Bank) is authorized to honor³ checks presented against this checking account and is directed to forward said checks to Legg Mason to reimburse the Bank...."

Importantly, Bank One's routing number is listed at the bottom of plaintiff's check.

The transaction at issue here proceeded according to the terms of the Account Agreement. Plaintiff wrote a check for \$100,000.00 payable to Fiserv on this brokerage account. The check was honored by Bank One. Bank One then sought reimbursement from Legg Mason. Although plaintiff protests to the contrary, there is no other way to

³ 13 Pa.C.S.A. § 1201 (defining "honor" as "[t]o pay or accept and pay...").

interpret Legg Mason's role in this transaction. Under the UCC, a "drawee" is defined as "[a] person ordered in a draft to make payment."⁴ A "payor bank" is "[a] bank that is the drawee of a draft."⁵ Legg Mason's role was strictly limited to reimbursement, and accordingly, Legg Mason is not liable as a matter of law.

II. Citizens Bank Appeal

Plaintiff argues that this court erred in granting summary judgment in favor of Citizens Bank when it found that Citizens was not liable because Citizens had no banking relationship with plaintiff. Citizens was the depository bank⁶; thus, plaintiff's claim for conversion is barred under 13 Pa.C.S.A. § 3420 (UCC Section 3-420).

The UCC incorporates the common law of conversion with respect to negotiable instruments, but restricts who may bring such claims. Plaintiff's claim against Citizens is governed by the UCC as it is a negotiable instrument claim. Section 3-420 states in relevant part, "[a]n action for conversion of an instrument **may not** be brought by the **issuer** [drawer]....of the instrument."⁷ The only parties that can assert a claim for conversion under Section 3-420 are a drawee or payee. Clearly, plaintiff, as the drawer, is precluded from bringing such a claim. Further,

Under former Article 3, the cases were divided on the issue of whether the drawer of a check with a forged [e]ndorsement can assert rights against a depository bank that took the check. The last sentence of Section 3-420(a) [cited above] resolves the conflict... **There is no reason why a drawer should have an action in conversion.** The check represents an **obligation** of the drawer rather than **property** of the drawer. The drawer has an

⁴ 13 Pa.C.S.A. § 3103(a).

⁵ 13 Pa.C.S.A. § 4105.

⁶ See 13 Pa.C.S.A. § 4105 (defining "depository bank" as "[t]he first bank to take an item...").

⁷ 13 Pa.C.S.A. § 3420(a) (emphasis added).

adequate remedy against the payor bank for recredit of the drawer's account for unauthorized payment of the check.⁸
(emphasis added)

Plaintiff has no cause of action against Citizens, the depository bank, for conversion.⁹ Moreover, there is no dispute over the material facts of this transaction. As Kogan instructed, plaintiff issued a check for \$100,000.00, payable to Fiserv, and sent it to Kogan to be invested. Kogan deposited plaintiff's check into his personal account at Citizens. Plaintiff had no contractual banking relationship with Citizens. This court properly found as a matter of law that plaintiff's claim is barred under Section 3-420, accordingly, granting summary judgment in favor of Citizens was proper.

CONCLUSION

For these reasons, this court respectfully submits that its Orders of March 27, 2007 should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

⁸ 1B JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 15-4 (3d ed. 1993) (emphasis added).

⁹ Courts have uniformly applied this rule in similar cases. See, e.g., Guardian Life Ins. Co. of America v. Weisman, 223 F.3d 229, 238 (3rd Cir. 2000) ("Unlike a payee who had possession of a check, a drawer has no doctrinal basis for claiming conversion: one's own check is an obligation, not a right. It is a liability that cannot be stolen, not an asset that can be stolen." (internal citation omitted)); Citizens Bank of Pennsylvania v. Chevy Chase Bank, 2004 U.S. Dist. LEXIS 6354 (E.D. Pa. March 22, 2004); Nestle USA Inc. v. Wachovia Corp., 2006 Phila. Ct. Com. Pl. LEXIS 215 (May 11, 2006).