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

PAMELA JANA, *et al.*	**:**	**JANUARY TERM, 2005**
	:	
Plaintiffs,	**:**	**No. 2800**
v.	**:**	
	:	**(Commerce Program)**
WACHOVIA, N.A., *et al*.	**:**	
	:	**Control No. 091050**
Defendants.	**:**	

O R D E R

AND NOW, this 15TH day of December 2006, upon consideration of defendants' Motion for Summary Judgment, the response in opposition, the respective memoranda, all matters of record, and in accord with the Opinion being filed contemporaneously, it is **ORDERED** that the Motion is **Granted, in part** and **Denied, in part** as follows:

1. Summary judgment is granted in favor of defendants as to the claims of minor plaintiff Jerry A. Jana and Heronwood, Inc. and all claims of these plaintiffs are dismissed.

2. Summary judgment is denied with respect to the claims of Pamela Jana.

BY THE COURT:

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ALBERT W. SHEPPARD, J.

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ……...…… December 15, 2006

Currently before the court is defendants' Motion for Summary Judgment. For the reasons discussed the Motion is **granted, in part** and **denied, in part.**

I. Background

Plaintiffs, Pamela Jana, on behalf of herself and her minor son Jerry A. Jana, Jr., and Heronwood Inc. ("Heronwood") have asserted claims against defendants, Wachovia, N.A. and Wachovia Bank of Delaware, N.A. ("Wachovia") pursuant to 13 Pa.C.S.A § 4402 for the alleged wrongful dishonor of two checks drawn on a Wachovia account in the name of Heronwood.

Since 1991, Pamela and Jerry Janna (husband and wife) were involved in investment opportunities which consisted of acquiring certificates of deposit ("CDs") in savings and loan and/or mutual savings banks to be held until such time that the banks converted to publicly owned banks. When conversion occurred, certificate holders were entitled to purchase shares of the converting bank's stock at a favorable price. The stock could then be resold by the certificate holder in the public market for a profit. For these investments, the Janas purchased certificates

of deposits in their own names, the name of their minor son, Jerry A. Jana (after he was born in 1995), Jerry Jana's 401(k) plan, and various corporate entities formulated by the Janas to effectuate their investments. One such entity was Heronwood, a subchapter S corporation established in 1998. The Janas formed corporations in several states to acquire the CDs because the saving banks preferred to deal with customers within their community.

In August 1998, a demand deposit account was opened in the name of Heronwood with CoreStates Bank (which was later acquired by First Union then merged with Wachovia) (the "Account"). Pamela and Jerry Jana were the authorized signatories on the account. Their minor son was not a signatory or otherwise named on the account. Ultimately, the CD line of credit was expanded from $3,000,000 to $4,000,000 and a new line of credit for conversions in the amount of $6,500,000 was added. Additionally, the Janas established a $1,600,000 line of credit secured by a mortgage on their home. The paperwork for these transactions was presented by the bank to the Janas for signature at their home and at a local office in Easton, Maryland.

In August 2003, the Janas learned that Keystone Savings Bank ("Keystone"), a mutual savings company, planned to convert to a stock savings bank. As holders of accounts at Keystone, Pamela Jana and her minor son Jerry, along with a Heronwood subsidiary named Altoona, were offered the opportunity to purchase shares of Keystone stock. Plaintiffs sought to purchase these shares by three separate checks drawn on the Account on September 12, 2003, each of which were signed by Pamela Jana. The checks issued for the Account left the name of the account holder blank, which the Janas contend was to allow them to write in the name of the particular certificate holder exercising the conversion right to purchase stock. The checks First Union provided to the Janas did not have the account number micro-encoded on the checks but rather was written by hand. The checks at issue were made payable to Keystone and were in the

names of "Pamela Jana", "Jerry A. Jana (a minor)" and "Altoona Inc." All three checks were initially dishonored due to alleged micro-encoding errors. First Union ultimately processed the check written on behalf of Altoona, Inc., but dishonored the two checks written on behalf of Pamela Jana and her minor son. First Union subsequently agreed to honor these checks, but since the deadline had passed, Keysone refused to fill the stock purchase requests of Pamela Jana and her minor son. As a result, plaintiffs claim $306,872 in damages representing lost profits.

II. Discussion

13 Pa.C.S. § 4402(b) sets forth the liability of a bank in the event of a wrongful dishonor:

> A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

"Customer" is defined as "a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank." 13 Pa.C.S. § 4104.

Plaintiff Heronwood was and is a "customer" of Wachovia. The account was opened in its name. However, plaintiffs admit that Heronwood did not request stock from Keystone and did not lose the opportunity to purchase stock as a result of the conduct of Wachovia. *See* Def. Exh. C at 169-70, Exh. D at 78-9. Neither the amended complaint nor plaintiffs' expert report identifies any damages sustained by Heronwood. Plaintiffs admit that Heronwood was not a depositor at Keystone and, therefore, not entitled to purchase stock in the conversion. Id. Although Heronwood was the "customer" on the account, it can not recover under § 4402 because it did not suffer damages as a result of the dishonor. Accordingly, summary judgment is granted in favor of defendants as to Heronwood's claim. That claim is dismissed.

The next issue presented is whether Pamela Jana and her minor son may properly be considered "customers" for purposes of 13 Pa.C.S. § 4402 (b). As noted, the account at issue was in the name of Heronwood. Pamela and Jerry Jana were the authorized signatories on the account. Their minor son was not a signatory or otherwise named on the account.

This court is unaware of any Federal, Pennsylvania or other state decisions similar to the facts before this court. However, courts in various other jurisdictions have considered factual scenarios which are instructive. For example, in Murdaugh Volkswagen, Inc. v. First Nat. Bank, 801 F.2d 719 (4th Cir. 1986), an individual who was the president and sole stockholder of a corporation sought to bring an action for wrongful dishonor of a corporate check under UCC § 4-402. The bank argued that the plaintiff had no standing to assert such a claim because she did not have an account with the bank (the account was in the corporation's name). The Fourth Circuit found the bank's construction of §4-402 to be unjustifiably narrow based on the facts presented because the evidence demonstrated a close link between the president and her corporation - - the bank treated the president and the corporate depositor as one entity. The bank consistently and repeatedly looked to the president to assume the corporation's obligations by requiring her to mortgage her own home and personally borrow funds for the company's benefit. The court said that, under these facts, the president was a customer of the bank for purposes of § 4-402.

In Parrett v. Platte Valley State Bank & Trust Co. 459 N.W.2d 371 (Neb. 1990), the Nebraska Supreme Court held that liability under UCC § 4-402 for wrongful dishonor could extend to a corporate officer who signed the check on behalf of the corporation, even though the check was written on the corporate account. The officer was the principal shareholder, president, and chief operating officer of the corporation, as well as a signatory to the corporate account. The evidence demonstrated that the officer personally participated in the business relationship between the corporation and the bank, including giving his personal guarantee to the bank for all obligations owed by the corporation to the bank. The court found that the officer was a "customer" of the bank within the meaning of § 4-402, observing that the parties' business relationship was such that it was foreseeable that dishonoring the corporation's check would reflect directly on the officer, against whom criminal charges had been brought in connection with the dishonored check.

The California Court of Appeals has reached similar conclusions. In Karsh v. American City Bank, 169 Cal. Rptr. 851 (Cal. App. 1980), the court held that the president and sole owner of a corporation was a proper party to bring an action under UCC § 4-402. The court noted that it was alleged that the depositor corporation had not issued any stock and was an undercapitalized, transparent shell having no liability as a separate and distinct legal entity. Furthermore, the president alone controlled the corporation's financial affairs and personally vouched for its fiscal responsibility, both to the bank through its employees and to the public at large. It was also alleged that, at all times, the bank dealt directly with the president and required him to personally guarantee and satisfy all obligations of the corporation to the bank as they arose.

Similarly, in Kendall Yacht Corp. v. United California Bank 123 Cal. Rptr. 848 (Cal. App. 1975), the court held that the corporate owners were "customers" entitled to sue under the wrongful dishonor provision where the bank looked directly to the owners to satisfy the obligations of the corporation and to execute several personal guarantees in connection with the loan. The court also observed that the corporation had never issued shares, was undercapitalized, and was, in effect, nothing but a transparent shell having no viability as a separate and distinct legal entity. In this regard, the court found that the owners alone were controlling the corporation's financial affairs, and were personally vouching for its fiscal responsibility, not only to the knowledge of the bank, but also to the knowledge of suppliers and employees of the corporation. Thus, the court found that it was entirely foreseeable that the dishonor of the corporation's checks would reflect directly on the personal credit and reputation of the owners and that they would suffer the adverse personal consequences which resulted when the bank reneged on its commitments.

Other courts, however, have adopted a more narrow approach. In Loucks v. Albuquerque National Bank, 418 P.2d 191 (N.M. 1966), Loucks and Martinez, as partners, had a partnership checking account at Albuquerque National. The bank dishonored the partnership's check after it had improperly charged the partnership account with a payment on a debt owed by Martinez. Loucks and Martinez individually sued the bank for wrongful dishonor of the partnership check. In determining that Loucks and Martinez, as individuals, had no cause of action against the bank for the alleged wrongful dishonor, the court stated:

> The relationship, in connection with which the wrongful conduct of the bank arose, was the relationship between the bank and the partnership. The partnership was the customer, and any damages arising from the dishonor belonged to the partnership and not to the partners individually.

76 N.M. at 742, 744, 418 P.2d at 196-97. *See also* Plummer v. Prairie State Bank, 1989 U.S. Dist. LEXIS 14311 (D.C. Kan. 1989)(refused to allow husband and wife, who were president and secretary of the corporation, joint owners of the common stock of a company and personal guarantors of the loan, to bring a wrongful discharge action where the owners maintained that the corporation was a separate entity from themselves and that the corporate account was not properly chargeable with their individual personal debts).

However, many of the courts which adopted this strict approach seemed to leave the door open for situations where the evidence demonstrates that the corporation and the individual were one and the same or that the bank regarded the officer as its customer. *See e.g.*, Thrash v. Georgia State Bank, 375 S.E.2d 112 (Ga. App. 1988)(found that the president of a corporation was not a "customer" for purposes UCC § 4-402 where president was only a minority shareholder of the corporation who had merely joined with the other shareholders in guaranteeing the corporation's debt to the bank, and where the evidence failed to demonstrate that the president and the corporation were one and the same); Koger v. East First Nat. Bank, 443 So.2d 141 (Fla. App. 1983)(found that the trial court acted properly in dismissing an individual corporate stockholder's action under UCC § 4-402, since the individual was not the named customer on the account, noting that there was no allegation that the corporation was "undercapitalized" or a mere "transparent shell"); Kesner v. Liberty Bank & Trust Co., 390 N.E.2d 259 (Mass. App. 1979)(held that the treasurer of a corporation could not bring an action under UCC § 4-402 since there was no ambiguity as to who had the account with the bank and where there was no suggestion that the corporation was a mere transparent shell rather than a separate and distinct legal entity with independent liability); Farmers Bank v. Sinwellan Corp. 367 A.2d 180 (Del. Sup. 1976) (corporation's president was not a "customer" of the bank under

plain language of statute where there was no evidence in the record supporting a finding that the bank regarded the president as its customer).

This case law suggests that where a dishonored check was drawn on the account of a small business entity, such as a closely held corporation, the wrongful dishonor can result in some actionable damage to the persons who control the corporation. In such instances, evidence may be presented to show that the person injured bore such a close relationship to the corporation that he or she should be permitted to bring an action for wrongful dishonor under the Commercial Code. Such evidence can include the failure to issue stock, undercapitalization of the business or corporation, the person's guarantee of the business' obligations, or the fact that the bank, in some way, treated the person and the business as a single entity. *See* 88 A.L.R.4th 613 (2006). Such a finding would be precluded where there is evidence that the account on which the item was written carried only the corporate name and not the person's name, that the bank did not regard the person and the business as a single entity, or that the business entity was not undercapitalized. Id.

Here, Jerry A. Jana, the minor plaintiff, has failed to satisfy this criteria. He was not a signatory or otherwise formally connected to the Account. It is admitted that he was never an officer or employee of Heronwood and never held any role in the company or had any direct dealings with the bank. As such, Jerry A. Jana, the minor plaintiff, can not be considered a "customer" for purposes of § 4402, as a matter of law. Accordingly, summary judgment is granted in favor of defendants on this issue. Jerry A. Jana's claim is dismissed.

However, the court finds that a factual issue exists as to whether Pamela Jana can be considered a "customer". In order to survive summary judgment on this issue, Ms. Jana must produce evidence to show that she bore such a close relationship to the corporation that she should be permitted to bring an action for wrongful dishonor under § 4402 (b). This court finds that Ms. Jana has presented sufficient evidence to submit the issue to a jury, in that there is documentation to support her claim that the bank viewed she and her husband as their customers, rather than Heronwood. Moreover, the Janas established a $1,600,000 line of credit with the bank which was secured by a mortgage on their home. It is a question of fact whether it was foreseeable to defendants that the dishonor of the checks at issue would harm Ms. Jana, individually. Clearly, factual issues exist which preclude the entry of summary judgment.

"Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035.2; Horne v. Haladay, 1999 Pa. Super. 64, 728 A.2d 954 (1999). This burden rests with the moving party. First Wisconsin Trust Co. v. Strausser, 439 Pa. Super. 192, 198, 653 A.2d 688, 691 (1995).

Here, this court finds that defendants have failed to sustain their burden. Genuine issues of material fact exist which preclude the entry of summary judgment in defendants' favor against Pamela Jana. Accordingly, defendants' Motion for Summary Judgment as to Pamela Jana is denied.

III. Conclusion

Based on the foregoing, summary judgment is granted in favor of defendants as to the claims of minor plaintiff Jerry A. Janna and of Heronwood, Inc. Defendants' Motion for Summary Judgment is denied with respect to the claims of Pamela Jana, individually. This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.