IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

NESTLÉ USA, INC.,	:	AUGUST TERM, 2005
Plaintiff,	:	NO. 01026
v.	:	COMMERCE PROGRAM
WACHOVIA BANK, N.A.,	:	Control No. 041562
Defendant.	:	

<u>O R D E R</u>

AND NOW, this 5th day of November 2007, upon consideration of defendant's Motion for Partial Summary Judgment, the response in opposition, the briefs in support and opposition, all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** that said Motion is **GRANTED**.

All of plaintiff's claims against defendant asserted under 13 Pa. C. S. §§ 3404 and 3405 based on checks or "Rapidrafts" deposited before August 5, 2002, are hereby **DISMISSED** as untimely filed.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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<u>O P I N I O N</u>

Albert W. Sheppard, Jr., J. .... October 5, 2007

Plaintiff, Nestlé USA, Inc. ("Nestlé"), has asserted claims against defendant, Wachovia Bank, N.A. ("Wachovia"), for negligence under Sections 3404 and 3405 of the Pennsylvania Uniform Commercial Code ("UCC"). Nestlé alleges that Wachovia was negligent because it accepted for deposit into an account held in the name of "A P Foods" 386 checks or "Rapidrafts" made payable to "A P." Nestlé further claims that Wachovia failed to obtain proper documentation regarding "A P Foods" when it opened the account into which the Rapidrafts were deposited.

The Rapidrafts were deposited in the "A P Foods" account between September 24, 2001, and June 1, 2005. Nestlé commenced this action on August 5, 2005. Wachovia has moved for summary judgment on a portion of Nestlé's claims for negligence based on the three year statute of limitations governing actions brought under Section 3 of the UCC.[1] In opposition to the Motion for Summary Judgment, Nestlé argues that Wachovia fraudulently concealed its wrongful acceptance of the Rapidrafts from Nestlé, so the statute of limitations should be tolled.

The three year limitation period began to run with respect to each Rapidraft on the date that the Rapidraft was accepted for deposit by Wachovia.[2] Therefore, if the statute of limitations is not tolled in this action, the portions of Nestlé's claims that are based upon Rapidrafts deposited before August 5, 2002, are time barred.

Pennsylvania courts and those of

> sister states have recognized that the need for expedition in commercial transactions is best achieved by safeguarding negotiability and finality of negotiable instruments and assuring uniformity of applicable law across state boundary lines. . . . [T]he discovery rule does not apply to toll the statute of limitations for claims of conversion of negotiable instruments. In the absence of fraudulent concealment, such claims accrue and the statute begins to run when the instrument is negotiated. [The UCC policy in favor of negotiability] mandates mechanical application of the statute of limitations notwithstanding the customer's failure to discover a forged instrument within the relevant limitations period.[3]

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[1] CONVERSION, BREACH OF WARRANTY AND OTHER DIVISION 3 ACTIONS.-- Unless governed by other law regarding claims for indemnity or contribution, an action:
(1) for conversion of an instrument, for money had and received or like action based on conversion;
(2) for breach of warranty; or
(3) to enforce an obligation, duty or right arising under this division and not governed by this section; must be commenced within three years after the cause of action accrues.
13 Pa C. S. § 3118(g)(3).

[2] Estate of Hollywood v. First Nat'l Bank of Palmerton, 859 A.2d 472, 482 (Pa. Super. 2004) ("claims of conversion under UCC section 3-420 accrue upon negotiation of the forged instrument and the applicable limitations period under section 3-118 commences to run" at that time.)

The court believes the same reasoning applies to Nestlé's claims of negligence under §§ 3404 and 3405. *See also* Fine v. Checcio, 582 Pa. 253, 266, 870 A.2d 850, 857 (2005) ("The Judicial Code provides in pertinent part that limitations periods are computed from the time the cause of action accrued. In Pennsylvania, a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion. Thus, we have stated that the statute of limitations begins to run as soon as the right to institute and maintain a suit arises.")

[3] Estate of Hollywood, 859 A.2d at 482-3.

The same desire for uniformity of law, negotiability, and finality with respect to negotiable instruments applies when the cause of action is one for negligent acceptance of an instrument for deposit under the UCC, so the discovery rule does not apply to Nestlé's claims in this action.

Since the discovery rule does not apply, the court need not consider when Nestlé reasonably could have or should have discovered that the Rapidrafts were improperly deposited.[4] Instead, the statute is tolled only if Nestlé can point to facts which clearly show that Wachovia in some manner concealed the allegedly improper deposit of the Rapidrafts from Nestlé.

> The doctrine of fraudulent concealment serves to toll the running of the statute of limitations. The doctrine is based on a theory of estoppel, and provides that the defendant may not invoke the statute of limitations if, through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine does not require fraud in the strictest sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception. The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence. While it is for the court to determine whether an estoppel results from established facts, it is for the jury to say whether the remarks that are alleged to constitute the fraud or concealment were made. . . . [A] statute of limitations that is tolled by virtue of fraudulent concealment begins to run when the injured party knows or reasonably should know of his injury and its cause.[5]

In order to find fraudulent concealment, the plaintiff must show that, in addition to committing the acts that constitute the wrong for which plaintiff is suing, defendant did or said something that amounts to concealment of the wrongdoing.[6] For instance, if a doctor commits surgical malpractice and subsequently tells the patient that the resulting pain is normal and not of

[4] "When the discovery rule applies, the statute of limitations does not commence to run at the instant that the right to institute suit arises, *i.e.*, when the injury occurs. Rather, the statute is tolled and does not begin to run until the injured party discovers or reasonably should discover that he has been injured and that his injury has been caused by another party's conduct." Fine, 582 Pa. at 268, 870 A.2d at 859.

[5] *Id.*, 582 Pa. at 270-1, 870 A.2d at 860-1.

[6] *See* Baselice v. Franciscan Friars Assumption BVM Province, 879 A.2d 270, 278 (Pa. Super. 2005) ("in order for fraudulent concealment to toll the statute of limitations, the defendant must have committed some affirmative independent act of concealment upon which the plaintiff justifiably relied.")

concern, the doctor may be found to have fraudulently concealed his/her wrongful act so as to toll the limitations period.[7]

In this case, Nestlé claims that the statute should be tolled because Wachovia accepted the Rapidrafts for deposit into an account that allegedly had been set up improperly. By doing so, Wachovia enabled the Rapidrafts to move through normal banking channels, so that, ultimately, the amounts they represented were deducted from Nestlé's account. These facts serve as the basis for Nestlé's negligence claims against Wachovia; they do not constitute separate or additional acts of concealment that could toll the limitations period.

Nestlé further claims that the three year limitations period does not apply because Wachovia omitted to tell Nestlé that the Rapidrafts were improperly deposited. In other words, the statute should be tolled because Wachovia failed to discover its own wrongdoing and inform on itself to Nestlé. The court will not require a party who may have committed negligence to go to such lengths to ensure that the limitations period continues to run.

CONCLUSION

For these reasons, Wachovia's Motion for Partial Summary Judgment is **granted**, and the portions of Nestlé's claims based on Rapidrafts deposited before August 5, 2002, are dismissed as time barred.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

[7] This hypothetical is similar to the facts set forth in Fine v. Checcio, which facts the court found could constitute fraudulent concealment. In that case, defendant dentist extracted plaintiff's wisdom teeth. When the plaintiff patient subsequently complained of numbness, the dentist allegedly told him it was normal and would subside.