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 CORPORATION, and FIRST PREMIER BANK,	:	Control Nos. 011012, 011023
Defendants.	:	

ORDER

AND NOW, this 11th day of May, 2006, upon consideration of defendants' Preliminary Objections, the responses in opposition, the briefs in support and opposition, all other matters of record, and after oral argument on April 7, 2006, and in accord with the Opinion being issued contemporaneously, it is **ORDERED** that said Preliminary Objections are **SUSTAINED** and plaintiff's Complaint is **DISMISSED**.

Plaintiff may file an Amended Complaint consistent with the court's opinion against Wachovia Bank, N.A. only, within twenty (20) days of the date of entry of this Order.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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OPINION

In its Complaint, Nestlé alleges that its employee, Mr. Machinski, executed[1] 386 Nestlé "Rapidrafts"[2] totaling more than $6 million, which were made payable to an entity called "AP." Mr. Machinski and/or his cohort Mr. Marchese[3] apparently opened an account[4] at Wachovia Bank, N.A. ("Wachovia") into which one or both of them deposited all 386 of the Rapidrafts. 260 of those Rapidrafts stated that they were "payable through" defendant First Premier. Nestlé alleges that First Premier paid those Rapidrafts and deducted the amounts paid from its depositor's account.[5] *See* Complaint, ¶ 20.

As a result of the negotiation of the Rapidrafts, Nestlé has asserted claims against Wachovia and First Premier for negligence, conversion, and breach of certain Uniform

[1] Mr. Machinski "had authorization to write drafts drawn against Nestlé bank accounts to store customers." Complaint, ¶ 2.

[2] "Rapidrafts" are basically checks and will be viewed as such for purposes of this opinion.

[3] Mr. Marchese was allegedly the operator of a store called Allentown Food 4 Less. Complaint, ¶ 10.

[4] At the time Nestlé drafted its Complaint, it did not know the exact name of the Wachovia accountholder. At oral argument, the parties agreed that the Wachovia account is held in the name of "A P Foods."

[5] The parties agreed at oral argument that Gelco Information Network ("Gelco") held the account at First Premier from which the Rapidraft amounts were paid. Gelco and Nestlé have a separate agreement pursuant to which Nestlé apparently reimbursed Gelco the amount of the Rapidrafts. Gelco is not a party to this action.

Commercial Code ("UCC") warranties. Nestlé claims that both banks knew or should have known that something was wrong with the Rapidrafts because: 1) the payee, AP, did not endorse 313 of them; 2) the payee endorsement on the remaining 73 was in handwriting identical to the drawer's agent, Mr. Machinski's, signature and therefore obviously forged;[6] and 3) the payee's name and address was different from that of the entity into whose account the Rapidrafts were deposited.

Both defendants have filed Preliminary Objections to all claims asserted against them.

Count V for Breach of Transfer Warranties Against Wachovia Must Be Dismissed.

The section of the UCC under which Nestlé brings its claim against Wachovia for breach of transfer warranties provides as follows:

> A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:
>
> (1) the warrantor is a person entitled to enforce the instrument;
>
> (2) all signatures on the instrument are authentic and authorized;
>
> (3) the instrument has not been altered;
>
> (4) the instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor; and
>
> (5) the warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

13 Pa. C. S. § 3416.[7] "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the

[6] At oral argument, Nestlé withdrew its claims against defendants based on the supposed forgery of the endorsement.

[7] 13 Pa. C.S § 4207 contains similar language permitting a "transferee" and "any subsequent collecting bank" to bring warranty claims against "a customer or collecting bank that transfers an item and receives a settlement or other consideration." A "collecting bank" is "a bank handling an item for collection except the payor bank." *Id*. at § 4105. Nestlé is not a collecting bank nor, as discussed, is it a transferee. Thus, it does not have standing to enforce such warranties.

instrument." *Id*. at § 3203(a). "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course." *Id*. at § 3203(b). The Rapidrafts were never transferred to Nestlé, and it has no interest in trying to enforce them, so it is neither a transferee nor a subsequent transferee. Therefore, Nestlé does not have standing to bring claims against Wachovia for breach of transfer warranties.

Count VI for Breach of Presentment Warranties Against Wachovia and First Premier Must Be Dismissed.

The section of the UCC under which Nestlé brings its claim against Wachovia and First Premier for breach of presentment warranties provides as follows:

> If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance, at the time of presentment, and a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:
>
> (1) the warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;
>
> (2) the draft has not been altered; and
>
> (3) the warrantor has no knowledge that the signature of the drawer of the draft is unauthorized.

13 Pa. C. S. § 3417(a); *id.* at § 4208(a) (same provisions). A "drawee" is "a person ordered in a draft to make payment." *Id*. at § 3103(a). Normally, the drawee is a bank at which the drawer has an account. *See id*. at § 4105 (defining "payor bank" as "a bank that is the drawee of a draft.") However, in this case, the drawer, Nestlé, did not have an account at First Premier. In

addition, First Premier was named as a "payable through" bank,[8] not a payor bank, so it is not a drawee. The only entity that could be the drawee in this case is First Premier's depositor, Gelco. Since Nestlé is not the drawee, Nestlé does not have standing to bring claims against First Premier and Wachovia for breach of presentment warranties.[9]

Counts III &IV for Conversion Against Wachovia and First Premier Must Be Dismissed.

The UCC incorporates the common law of conversion with respect to negotiable instruments, but limits the types of persons who may bring such claims. 13 Pa. C. S. § 3420. "An action for conversion of an instrument may not be brought by the issuer or acceptor of the instrument . . ." *Id*. "'Issuer' means a maker or drawer of an instrument." *Id*. at § 3105. A "drawer" is "a person who signs or is identified in a draft as a person ordering payment." *Id.* at § 3103(a). In this case, Nestlé is the drawer and, therefore the issuer, so it cannot bring claims for conversion against Wachovia and First Premier

Counts I & II for Negligence Against Wachovia and First Premier Must Be Dismissed.

Nestlé asserts claims against both defendants for "common law negligence." Common law negligence claims are displaced by the provisions of the UCC respecting wrongful payment of negotiable instruments. *See* U.S. Steel Corp. v. Express Enterprises of Pa., Inc., 2006 Phila. Ct. Com. Pl. LEXIS 149 (March 22, 2006); Metro Waste, Inc. v. Wilson Check Cashing, Inc., 2003 Phila. Ct. Com. Pl. LEXIS 56 (Sept. 23, 2003); Gress v. PNC Bank, N.A., 100 F.Supp.2d 289 (E.D. Pa. 2000). Furthermore, "no cause of action exists for [common law] negligence that causes only economic loss." Duquesne Light Co. v. Pa. Am. Water Co., 850 A.2d 701, 703 (Pa.

[8] "If an item states that it is 'payable through' a bank identified in the item, the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and the item may be presented for payment only by or through the bank." 13 Pa. C.S. § 4106.

[9] At oral argument, Nestlé withdrew its claim for breach of presentment warranties.

Super. 2004).[10] In this case, Nestlé's claimed damages are the amounts that it paid (to Gelco) on the Rapidrafts, which is clearly economic loss. Therefore, it may not assert claims for common law negligence against Wachovia or First Premier based on such loss.

The UCC contains its own "comparative negligence" provisions with respect to imposters and fraudulent endorsements. *See* 13 Pa. C. S. § 3404(a), (c); *id.* at § 3405(b). In this case, Nestlé may be able to assert a claim against Wachovia under one of these sections of the UCC. However, Nestlé cannot bring such a claim against First Premier. The only thing Nestlé claims First Premier did wrong was to process the Rapidrafts without a payee endorsement, and the UCC expressly permits deposit without endorsement. *See* 13 Pa. C. S. § 3404(c) ("An indorsement is made in the name of a payee if . . .the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to that of the payee."); *id.* at § 3405(c) ("An indorsement is made in the name of the person to whom an instrument is payable if . . . the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person.") As a transferee, First Premier had no way of knowing if the Rapidrafts were deposited into an account with a name substantially similar to AP; instead, it could assume that they were properly deposited. *See* 13 Pa. C. S. § 4207.

[10] The only exception to the economic loss doctrine is for claims brought against "a design professional" or someone else who is "in the business of providing information to others." Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 480-2, 866 A.2d 270, 286-7 (2005). In this case, the claim for negligence is not predicated upon poor professional advice.

CONCLUSION

For these reasons, defendants' Preliminary Objections to plaintiff's Complaint are sustained and plaintiff's Complaint is dismissed. However, plaintiff may amend its Complaint to assert any UCC claim(s) it may have against Wachovia only.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.