

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

FIRST PENN BANK, INC.	:	September Term 2005
	:	
<i>Plaintiff</i>	:	
	:	
v.	:	
	:	
AT SYSTEMS ATLANTIC, INC.	:	No. 3084
	:	
and	:	
	:	
WACHOVIA BANK, N.A.	:	
	:	Motion Control No. 120390.
<i>Defendants</i>	:	

ORDER

AND NOW, this 29th day of May 2007, upon the motion for summary judgment filed by Plaintiff First Penn Bank, Inc., the response filed by Defendant AT Systems Atlantic, Inc., the memoranda of law in support and opposition, and the response to the answer of Defendant AT Systems Atlantic Inc., it is **ORDERED** that Plaintiff's motion for summary judgment is **GRANTED** in part and **DENIED** in part and Plaintiff may not recover attorney's fees.

It is further **ORDERED** that Plaintiff First Penn Bank, Inc. shall file, no later than 10 days from the date of this Order, a motion to recover accrued interest, with supporting affidavit. Defendants AT Systems Atlantic, Inc. and Wachovia Bank N.A. may file a response to the motion no later than 20 days from the date of this Order.

BY THE COURT,

MARK I. BERNSTEIN, J.

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	:	Motion Control No. 120390.
<i>Defendants</i>	:	

OPINION

Plaintiff First Penn Bank (“First Penn”), moves for summary judgment against Defendants AT Systems Atlantic, Inc. (“Atlantic”), and Wachovia Bank, N.A. (“Wachovia”). Plaintiff argues that Defendant Atlantic is liable for breach of an implied bailment agreement. Plaintiff further claims that Defendant Atlantic was acting as an agent of Wachovia. Plaintiff seeks to recover the funds entrusted to and lost by Defendants, together with accrued interest and attorney’s fees. First Penn’s motion for summary judgment is granted in part.¹ First Penn’s request for attorney’s fees is denied.

Plaintiff First Penn, a Philadelphia bank, contracted with Federal Home Loan Bank (“Federal Loan”), to transport excess cash from First Penn to a secure depot owned by Defendant Wachovia. Federal Loan subcontracted with Defendant Atlantic, a cash logistics company, to

¹ Since the motion is resolved under a breach-of-bailment analysis, the court finds it unnecessary to address First Penn’s claim of negligence.

transport First Penn's money to the depot. Atlantic not only delivers First Penn's money to the secure depot, but also manages the depot as an agent of Wachovia.

On 9 November, 2004, two First Penn employees, Marie Buzniak, manager, and Renee Di Donato, assistant manager, packed First Penn's excess currency into four bags to be shipped by armored truck. They counted the money twice, wrote the amounts on the deposit slips, and sealed the bags for shipment.² One bag, No. 000643592, contained \$200,000. The next day, a courier employed by Atlantic accepted the bags from First Penn, and signed a receipt which said: "I have received the described sealed bag(s) in good condition with seals(s) intact."³ That afternoon, the courier delivered the bags to the Wachovia depot managed by Atlantic.⁴ An employee of Atlantic received the bags and placed them into storage.⁵ The following morning, when Atlantic counted the money, a teller discovered that bag No. 000643592 contained only \$130,000.⁶ A six-inch slit had been cut into the bag.⁷ Atlantic can neither account for the missing \$70,000, nor explain when or where the bag was slit. Atlantic refuses to reimburse First Penn for the missing money.

Under the Pennsylvania Rules of Civil Procedure, "the court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action."⁸ "In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." "[T]he court may

² Exhibit 2 to First Penn's motion for summary judgment.

³ Exhibit D to First Penn's motion for summary judgment.

⁴ Exhibit F to First Penn's motion for summary judgment.

⁵ Exhibit 11 to First Penn's motion for summary judgment.

⁶ Exhibit 14 to First Penn's motion for summary judgment.

⁷ Exhibit 15 to First Penn's motion for summary judgment.

⁸ PA. R.C.P. 1035.2(1).

grant summary judgment only when the right to such a judgment is clear and free from doubt.”⁹

The “[f]ailure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof ... establishes the entitlement of the moving party to judgment as a matter of law.”¹⁰

I. First Penn may recover \$70,000 for breach of an implied bailment agreement.

First Penn seeks to recover the \$70,000 for breach of an implied bailment agreement.

First Penn argues that it entered into a bailment contract with Atlantic when Atlantic received the money bags from First Penn.

The Pennsylvania Supreme Court defines bailment as "a delivery of personalty for the accomplishment of some purpose upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it, otherwise dealt with according to his directions or kept until he reclaims it. [A] cause of action for breach of a bailment agreement arises if the bailor can establish that personalty has been delivered to the bailee, a demand for return of the bailed goods has been made, and the bailee has failed to return the personalty. When the bailor produces evidence to satisfy those elements, the bailee has the duty of going forward with evidence accounting for the loss. [I]f the bailee fails to do so, he is responsible for the loss. It is assumed under those circumstances that the bailee has failed to exercise the duty of care required by the agreement.”¹¹ “The lynchpin of the presumption in favor of the bailor is exclusive possession by the bailee, for it is this exclusive possession that puts the bailee in the superior position regarding the availability of material evidence.”¹²

⁹ Sevast v. Kakouras, 915 A.2d 1147, 1152-1153.

¹⁰ Young v. DOT, 744 A.2d 1276, 1277 (Pa. 2000).

¹¹ Price v. Brown, 545 Pa. 216, 221; 680 A.2d 1149, 1151 (1996).

¹² Buckley v. Exodus Transit & Storage Corp., 744 A.2d 298, 306 (Pa. Super. 1999).

Atlantic accepted the money in a bag that was in good conditions, with seals intact. When Atlantic counted the money, \$70,000 was missing, and the bag had been slit. From the moment Atlantic accepted the bags, to the moment it discovered the missing funds and the slit, Atlantic had exclusive possession of First Penn's money. Since Atlantic came forward with no explanation as to how the bag had been slit, and offered no evidence to account for the loss, the law presumes that Atlantic breached the implied bailment agreement. First Penn is entitled to summary judgment.

II. Attorney's fees.

First Penn seeks further to recover attorney's fees from Atlantic and Wachovia. First Penn argues that the sub-contract between Federal Loan and Atlantic provides for the recovery of attorney's fees, and that as a third-party beneficiary, First Penn is entitled to recover its costs, including attorney's fees.

The law is clear: under the American Rule adopted in Pennsylvania, "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception."¹³ In Pennsylvania, "a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."¹⁴

¹³ Mosaica Acad. Charter Sch. v. Commonwealth, 813 A.2d 813, 822 (Pa. 2002).

¹⁴ Scarpitti v. Weborg, 609 A.2d 147, 150-151 (Pa. 1992).

The contract between Federal Loan and Atlantic states: “In the event of litigation between the parties hereto ... the prevailing party shall be entitled ... to an award of reasonable attorney’s fees and other litigation costs, including such costs on appeal.”¹⁵ The contract between Federal Loan and Atlantic explicitly allows for attorney’s fees “between the parties hereto.” The contract does not state that First Penn or any other party may recover attorney’s fees. First Penn has not offered any evidence of any intention that third parties may recover such fees. Since First Penn is not a party to the contract and is not a third party beneficiary, the request for attorney’s fees is denied.

BY THE COURT,

MARK I. BERNSTEIN, J.

¹⁵ Exhibit 16 to First Penn’s motion for summary judgment (emphasis added).