

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

HAWA G. DOWANA, DELIA G. NAH,	:	OCTOBER TERM, 2006
Individually and on behalf of Shareholders of	:	
Helping Hand Staffing, Inc., and	:	NO. 01409
HELPING HAND STAFFING, INC.,	:	
	:	COMMERCE PROGRAM
Plaintiffs,	:	
	:	Control No. 032224
v.	:	
	:	
JONAH J. BOYKAI, Individually and t/a H. H.	:	
PROFESSIONAL HOME CARE, and CITIZENS	:	
BANK, N. A.,	:	
	:	
Defendants.	:	

ORDER

AND NOW this 18th day of July, 2007, in accordance with the Opinion issued contemporaneously, it is hereby **ORDERED** that the Preliminary Objections of defendant Citizens Bank of Pennsylvania, N.A. to plaintiffs' Amended Complaint are **SUSTAINED in part**. Plaintiffs' claims against Citizens Bank for breach of warranties, breach of contract, bad faith, and punitive damages are **DISMISSED**. The remainder of the Preliminary Objections are **OVERRULED**. Within twenty (20) days from the date of entry of this Order, Citizens Bank shall file an Answer to the remaining claims asserted against it under 13 Pa. C. S. § 3404, § 3405 and § 3420.

BY THE COURT,

MARK I. BERNSTEIN, J.

improperly if it otherwise sets forth a valid cause of action against Citizens.¹ In their claim against Citizens, plaintiffs allege that Citizens is liable for conversion, negligence, breach of contract, breach of warranty, bad faith, and punitive damages. Several of these are valid causes of action that plaintiffs may assert against Citizens.

Plaintiffs allege that Citizens made or obtained payment for Boykai on certain checks that Boykai was not entitled to enforce or receive payment on. Under the Pennsylvania Uniform Commercial Code (“UCC”):

The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.²

Thus, plaintiffs asserted a valid claim for conversion against Citizens.

The UCC limits the types of persons or entities who may bring conversion claims against a bank.

An action for conversion of an instrument may not be brought by the issuer or acceptor of the instrument or a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a copayee.³

HHS was neither the “issuer”, “acceptor” or “indorsee” of the checks that Citizens allegedly converted, but HHS was allegedly the “payee.”⁴ HHS may assert a conversion claim only if HHS alleges that the checks were delivered to it or its agent or co-payee. Plaintiffs claim that the

¹ Pa. R. Civ. P. 126 (“The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.”)

² 13 Pa. C. S. § 3420.

³ *Id.*

⁴ “Issuer” “means a maker or drawer of an instrument.” 13 Pa. C. S. § 3105. An “acceptor” is a “drawee who has accepted a draft.” A “drawee” is a “person ordered in a draft to make payment.” *Id.* at § 3103. A “payee” is the person to whom the instrument is payable. *Id.* at § 3110(a). An “indorsee” is the person to whom an indorsement makes an instrument payable. *Id.* at § 3206(b).

checks were delivered to Boykai, who was acting as agent for HHS' at the time, but who improperly deposited the checks in his own company's account at Citizens. Therefore, plaintiffs may assert a claim for conversion against Citizens.

Plaintiffs have also asserted a valid claim for negligence against Citizens. Common law negligence claims are displaced by the provisions of the UCC concerning the wrongful payment of negotiable instruments.⁵ No cause of action exists for common law negligence that causes only economic loss.⁶ However, the UCC contains its own "comparative negligence" provisions with respect to imposters:

If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

* * *

[A]n indorsement is made in the name of a payee if:

- (1) it is made in a name substantially similar to that of the payee; or
- (2) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to that of the payee.

* * *

[I]f a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.⁷

⁵ 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).

⁶ Duquesne Light Co. v. Pa. Am. Water Co., 850 A.2d 701, 703 (Pa. Super. 2004). 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.

⁷ 13 Pa. C. S. § 3404(a), (d).

In this case, plaintiffs allege that Citizens failed to exercise ordinary care in permitting Boykai to deposit checks that were made out to HHS into H. H. Professional Home Care's account.

Therefore, plaintiffs have asserted a Section 3404 negligence claim against Citizens.

The UCC also contains comparative negligence provisions with respect to fraudulent indorsements by employees:

For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

* * *

[A]n indorsement is made in the name of the person to whom an instrument is payable if:

- (1) it is made in a name substantially similar to the name of that person; or
- (2) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to the name of that person.⁸

Plaintiffs allege that Citizens failed to exercise ordinary care in permitting Boykai to deposit checks that were made payable to his employer HHS into H. H. Professional Home Care's account. Therefore, plaintiffs have properly asserted a Section 3405 negligence claim against Citizens.

Plaintiffs do not have a valid claim for breach of warranty against Citizens. The UCC recognizes two warranties that a bank may be found to have breached: transfer and presentment warranties. With respect to transfer warranties:

⁸ 13 Pa. C. S. § 3405.

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.⁹

Citizens did not transfer the checks to plaintiffs,¹⁰ so it cannot be liable to plaintiffs for breach of transfer warranties. With respect to presentment warranties:

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.¹¹

Plaintiffs are not the “drawees” of the checks,¹² so plaintiffs may not assert a claim for breach of presentment warranties against Citizens.

⁹ 13 Pa. C. S. § 3416. Section 4207 of the UCC 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.” *Id.* at § 4207. A “collecting bank” is “a bank handling an item for collection except the payor bank.” *Id.* at § 4105. HHS is not a collecting bank nor, as discussed, is it a transferee. Thus, it does not have standing to enforce such warranties.

¹⁰ “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 instrument.” 13 Pa. C. S. § 3203(a).

¹¹ 13 Pa. C. S. § 3417(a); *id.* at § 4208(a) (same provisions).

¹² A “drawee” is “a person ordered in a draft to make payment.” 13 Pa. C. S. § 3103(a). Normally, the drawee is a bank at which the drawer has an account. *Id.* at § 4105 (defining “payor bank” as “a bank that is the drawee of a draft.”)

Plaintiffs' remaining claims against Citizens may be dealt with quickly. There is no "implied at law" contract between HHS and Citizens under which plaintiffs could bring a claim for breach of contract against Citizens. There is no UCC or common law cause of action for bad faith that may be asserted by plaintiffs against Citizens. Plaintiffs may not recover punitive damages on either their conversion¹³ or negligence¹⁴ claims against Citizens.

BY THE COURT,

MARK I. BERNSTEIN, J.

¹³ "In an action [for conversion under the UCC], the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument." 13 Pa. C. S. § 3420.

¹⁴ The UCC's comparative negligence provisions do not provide for recovery of punitive damages; instead they allow recovery only for the loss caused. 13 Pa. C. S. §§ 3404, 3405.