11-18-98

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

NANCY CAO,

Plaintiff,

v

BANK OF GUAM,

Defendant.

Civil Action No. 94-856

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL BACKGROUND

This matter came before the Court on October 22, 1997, in Courtroom A on Defendant's motion for summary judgment. David A. Wiseman, Esq. appeared on behalf of Plaintiff. Joaquin C. Arriola, Esq. appeared on behalf of Defendant Bank of Guam. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

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FOR PUBLICATION

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II. FACTS

In December 1993, Plaintiff Nancy Cao (hereinafter referred to as "Plaintiff') opened a savings account with Defendant Bank of Guam (hereinafter refer-red to as "Defendant") with an initial deposit of $300,000.

In February 1994, while incarcerated at the CNMI Department of Corrections, Plaintiff signed a blank savings withdr-awal slip and a blank sheet of paper and gave them to an alleged business associate named Joy [1] Subsequently, Mr. Daniel Besougloff, who was Joy's boyfriend, allegedly prepared a fraudulent withdrawal authorization above Plaintiffs signature on the blank piece of paper. Mr. Besougloff then presented the withdrawal slip and the authorization to Defendant. whereby Defendant withdrew $32,000 in cash for Mr. Besougloff and wire transferred another $240.000 to a bank account in Hong Kong

In March 1994, Plaintiff notified Defendant that the u ansactions which occur-r-cd between Defendant and Mr. Besougloff were unauthorized and requested that the amounts be credited to her account Plaintiff made a second request to Defendant to have her account credited, but Defendant refused.

On August 26, 1994, Plaintifffiled suit against Defendant alleging two tort-based causes of action and one cause of action for breach of contract[2]. After answering the Complaint, Defendant filed a third party complaint against Daniel Besougloff.[3]

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[1]It is unclear who requested Plaintiff to sign the blank documents. At deposition, Plaintiff testified that the blank documents were presented to her in jail by a friend/business associate named "Joy"for the purpose of drafting a partnership agreement. See Deposition of Nancy Cao, dated October 1994, at 49:7-14, attached as Exhibit A to Defendant's Reply to Plaintiffs Supplemental Brief However, in her complaint, Plaintiff alleges that she signed the blank documents in jail for Joy's boyfriend, Daniel Besougloff, to assist Plaintiff in recovering her lost savings account passbook. *See Complaint, page 2, ¶ 7,8.*

[2]The two tort-based causes of action include failure to exercise ordinary care in transferring the money and failure to exercise ordinary care in retrieving the transferred money.

[3]Mr. Besougloff was never served with the summons and the third party complaint as Defendant was unable to locate him. In March 1998, the Court dismissed Daniel Besougloff as a third-party defendant. See Order Dismissing Third Party Defendant, dated March 17, 1998.

On September 2, 1997, Defendant filed the instant motion for summary judgment. After the October 22, 1997 hearing on the motion, the Court requested that Plaintiff file a supplemental brief as to the issue of whether the defense of contributory negligence would bar Plaintiffs recovery.?'

111. ISSUES

1. Whether Defendant is entitled to summary judgment as to the first and second causes of action for failure to exercise ordinary care in transferring the funds and retrieving the funds?

2. Whether Defendant is entitled to summary judgment as to tile third cause of action for bi each of contract?

3. Whether contributory negligence acts as a complete bar to Plaintiffs recovery in the CNMI?

IV. ANALYSIS

A Summary Judgment Standard

The standard for summary judgment is set forth in Rule 56 of the Commonwealth Rules of Civil Procedure Rule 56(a) provides:

> A par-ty seeking to recover upon a claim may move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Corn. R. Civ P 56(a). Rule 56(c) continues

> Th judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Corn. R. Civ. P. 56(c). Once a movant for summary judgment has shown that no genuine issue of material fact exists; the burden shifts to the opponent to show that such an issue does exist. Riley v. Public School Sys., 4 N.M.I. 85, 89 (1994).

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[4/] Defendant raised the issue of contributory negligence for the first time in its reply brief Therefore, in all fairness, the Court ordered the parties to submit supplemental briefs on this issue. However, it should be noted that the Court looks with disfavor upon a party who raises legal issues in this manner. See Bank of Saipan v. MA. Mercedes Godino Ayanzado, et al., Civil Action No. 94-619 (N.M.I. Super. Ct. May 24, 1995)(Opinion and Order on Defendant Milne's Motion for Summary Judgment, at 5, n.3).

B. Contract

Defendant contends that the Deposit Account Agreement comprises the entire contract between it and Plaintiff. Thus, since it followed the instructions exactly as laid out in the Deposit Account Agreement when it transferred funds to Mr. Besougloff. Defendant asserts that it cannot be found liable for breach of contract and is entitled to summary judgment on this cause of action.?'

The relationship between a bank and its depositor is contractual. Allied Fidelity Insurance Co. v. Bank of Oklahoma, National Association, 894 P.2d 1101, 1103 (Okl. 1995). The deposit agreement, signature card, and checks drawn against the account are contract documents between a bank and its customer. Federal Deposit Insurance Corporation v. West, 260 S.E.2d 89. 91 (Ga. 1979) Moreover. the rules and regulations adopted by the bank are. or become part of. the contract between a bank and its depositors. Chickerneo v. Society National Bank, 390 N.E 2d 1183, 1185 (Ohio 1979) *also,* Your Style Publications. Inc. v. Mid Town Bank & Trust Co., 501 N.E. 2d 805, *app. den* 508 N.E 2d 738 (fee schedule included in documents comprising bank-depositor contract).

In the instant case, Defendant relies on the case of Bank of Marin v. England, 385 ii S 99, 87 S. Ct. 274. 17 L.Ed. 197 (1966). for the proposition that the relationship between a bank and a depositor is founded on contract. With this, the Court agrees. However, within the same paragraph of Defendant's motion, Defendant makes the unsupported argument that the Deposit Account Agreement is, in and of itself, the "contract" which governs the relationship between the Plaintiff and the Bank of Guam [5] As noted above, the Deposit Account Agreement is not the only document which comprises the contract between Plaintiff and Defendant. Moreover, Defendant's own Deposit Account Agreement and Disclosure defines the "Agreement" as comprising a signature card, a Rate and Fee Schedule, Truth in Savings Disclosures, Funds Availability Policy Disclosure, and an Electronic Funds Transfer Agreement

[5] The Deposit Agreement and Signature Card signed by Plaintiff indicates that the Bank of Guam may "pay out funds *with my signature alone* if an individual account."(emphasis added). See Exhibit A to Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

[6] *See* Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p.3, ¶ 2.

and Disclosure.[7] Without having all the documents comprising the contract, the Court cannot rule in summary fashion as to the cause of action for breach of contract. As such, Defendant's motion for summary judgment is denied as to this cause of action.

C. Tort

In opposition to the instant motion, Plaintiff contends that her two tort-based causes of action involve disputed issues of material fact which cannot be determined via summary judgment Therefore, Defendant's motion as to these causes of action must be denied. The Court agrees.

A bank is obligated to use not only due care and diligence, but active vigilance in paying out depositor's moneys in order that the depositor- might be protected from fraud, larceny, and forgery Commisso v. National City Bank of New York. 21 N.Y.S.2d 187, 191 (S.Ct.1939), *aff'd* 20 N Y S.2d 1007 (S.Ct.App.Div 1940), *app. den.* 2 I N Y.S 2d 390 (S.Ct.App.Div. 1940) As such, the ultimate test of a bank's liability for negligence in paying on the presentation of a withdrawal slip is reasonable care, on the part of a given teller Clyman v. Marks, 240 N Y.S.2d 532. 538 (S.Ct. 1,963). *see also* Noah v Bowery Savings Bank, 122 N.E 2.35. 236 (NY Ct.App. 1919)(a bank must exercise ordinary care and diligence to ascertain that the person receiving the money is entitled to it).

In the instant case, the Court finds that several material facts exist as to Defendant's exercise of requisite care to prevent summary adjudication of the tort-based causes of action. For example, Plaintiff offers the deposition testimony of Ruth DLG Quitugua, one of Defendant's employees involved in the transactions with Mr. Besougloff. Ms. Quitugua admitted at deposition that it was unusual for someone to appear at the bank to withdraw funds from another person's account.[8] Moreover, Ms. Quitugua testified that in her experience, withdrawal slips were normally written by hand instead of being typed

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[7] The Court also notes that a material issue of fact exists as to whether Defendant followed its own rules for savings account withdrawals. For example, Plaintiffs Complaint alleges that her savings passbook had been stolen in February 1994. *Complaint, page* 2, ¶ 7. Despite its own rule that a passbook be presented for cash savings withdrawals, Defendant offers no evidence that the passbook was in fact presented at the bank by Mr. Besougloff. See Cashing Checks and Withdrawals: Procedures, § 6(c)("Cash savings withdrawal only when passbook is presented."), attached as Exhibit E to Plaintiffs Supplemental Briefing per Court's October 22, 1997 Order. As noted in Chickerneo, supra, the bank's rules become part of the depositor-bank contract.

[8] *See* Deposition of Ruth DLG. Quitugua, dated August 27, 1997, at pg. 33 : 15-2 1.

out.[9] Finally, Plaintiff offers the Bank of Guam withdrawal slip used by Mr. Besougloff which states clearly on its face that it is to be used at the bank counter *by depositor personally*.[10]

Based on the foregoing, the Court finds that material facts exist as to whether Defendant acted with the requisite standard of care in regard to the withdrawal, transfer and retrieval of Plaintiffs funds. 4s such, Defendant's motion for summary judgment as to the tort-based causes of action is denied."

D. Contributory negligence

In her supplemental brief, Plaintiff contends that despite her alleged negligence in signing the biank deposit slip and sheet of paper, the rule of contributory negligence would not bar her recovery against Defendant as Defendant had the last clear chance to avoid her loss

There is no doubt that the affirmative defense of contributory negligence is recognized in the CNMI. *See* Ito v. Macro Energy Inc et al, 4 N.M.I. 46 (1993). As noted by the Ito Court, contributory negligence is defined in Restatement (Second) of Torts § 463 (1965) as follows

> "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."

Ito, at 59

The Restatement (Second) of Torts § 467 (1965) goes on to note:

> "Except where the defendant has the last clear chance, the plaintiffs contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him."

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[9] *See* Deposition of Ruth DLG. Quitugua, at page 28:23-29: 1.

[10] *See* Savings Withdrawal Slip attached as Exhibit I to Affidavit in Support of Motion for Summary Judgment.

[11] The Court also notes that questions of negligence are ordinarily not susceptible to summary adjudication. De Los Santos v. State, 655 P.2d 869, 871 (Hawaii 1982). It is for the jury to decide whether the applicable standard of care has been breached. Goodman v. Wenco Foods. Inc., 423 S.E.2d 444,452 (N.C. 1992).

To find that a party was contributorily negligent under § 463, the Ito Court set out a two-step test:

> "First, we must find that Ito did not observe the proper standard of conduct for his own safety. According to Restatement (Second) of Torts Section 464(1), the standard of conduct 'to which [Ito] must conform for his own protection is that of a reasonable man under like circumstances. Only if we find that Ito's conduct did not meet this 'reasonable man' standard may we move on to the second part of the test which is whether Ito's conduct legally contributed to his [injuries]."

Ito, at 59.[12/]

However, as noted in Restatement § 467 above, even if it is established that Plaintiff was negligent, she would not be barred from recovery against Defendant if Defendant had the last clear chance to avoid Plaintiff's injuries.[13] Under the doctrine of last clear chance, the plaintiff's negligence does not preclude a recovery for the negligence of the defendant where it appears that the defendant, by exercising reasonable care and prudence, might have avoided injurious consequences to the plaintiff notwithstanding the plaintiff's negligence.[14]

Contributory negligence and the last clear chance doctrine both involve the issue of whether the parties acted with reasonable care."[15] Whether the parties acted reasonably in the context of contributory negligence must be answered by the trier of fact after hearing the evidence, and not decided as a matter of law. Dahl v. BMW, 748 P.2d 77, 81 (Or. 1987). This corresponds with the prevailing view that the applicability of contributory negligence is a question of fact for the jury. Thompson v. Michael, 433 S.E.2d 853, 854 (S.C. 1993); Geschwind v. Flanagan, 854 P.2d 1061 (Wash. 1993)

Based on the foregoing, the Court finds that the law of contributory negligence is recognized in the CNMI as provided in the Restatement (Second) of Torts. Thus, absent a showing that Defendant had the last clear chance to prevent the harm, Plaintiffs contributory negligence will bar her from recovery

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[12/] The Court also notes that the burden of establishing plaintiffs contributory negligence rests upon the defendant. See Restatement (Second) of Torts, § 477 (1965).

[13/] *See* Restatement (Second) of Torts, $467 (1965).

[14/] *See* Restatement (Second) of Torts, § 479 (1965).

[15/] *See* Restatement (Second) of Torts, §§ 464, 475, 479 (1965).

against Defendant. Finally, the Court finds that the applicability of contributory negligence and the doctrine of last clear chance as to the instant case is a question best left for the trier of fact

V. CONCLUSION

For all the reasons stated above, Defendant's motion for summary judgment is **DENIED**.

So ORDERED this 18 day of November, 1998.

TIMOTHY H. BELLAS, Associate Judge