STATE OF MICHIGAN

COURT OF APPEALS

DWAYNE HARRIS,

Plaintiff-Appellant,

v

BANK ONE, N.A.,

Defendant-Appellee.

UNPUBLISHED
October 18, 2005

No. 262002
Wayne Circuit Court
LC No. 04-410672-CB

Before: Owens, PJ, and Fitzgerald and Schuette, JJ

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). This case arose when plaintiff endorsed and deposited in his personal account at defendant's bank a check issued by the title company who acted as the escrow agent in plaintiff's refinancing transaction and made payable to his creditor Providian. We affirm.

According to plaintiff, his credit score in May 2003 was about 637. Plaintiff testified that he attended the closing on the refinancing of his home on June 20, 2003. He was refinancing to pay off his debt to Providian and to obtain some proceeds. It was his understanding that he would be taking $14,000 away from the transaction aside from the debt. He claimed that when he had refinanced in the past to pay off debts, the brokers had forwarded the proceeds to creditors and had given him the balance. Because the closing took place so late, the funds were not available that day. He picked up an envelope from the title company on June 23, 2003. The envelope contained two checks. The name and address that showed through the envelope window on the top check was his. He did not completely remove the checks, but only opened the end of the envelope to verify that the amounts approximated $14,000.

According to plaintiff, he drove from the title company to defendant bank to deposit the checks. He met with a bank representative, explained that he had forgotten his account number and wanted to deposit the checks, and handed her the envelope containing the checks. After writing the account number down for him, she handed him the checks to endorse. He claimed that he did not notice at the time that the second check was made out to Providian. The deposit slip, which was date stamped June 25, 2003, indicated that plaintiff deposited all but $556.85. Plaintiff acknowledged that he went to Sault Ste Marie the weekend after the deposit was made, he lost between $300 and $500 at the casino, and he did not write a check to Providian between June 23, and July 1. About one week after depositing the checks, plaintiff received a letter dated

July 1, 2003, from defendant indicating that it was closing his account because of a problem with the deposit, it was freezing the portion not authorized to be deposited in plaintiff's account, and it was forwarding the remaining proceeds to plaintiff. Plaintiff stated that he did not make the minimum payment to Providian between July and October because he assumed defendant would forward the proceeds to Providian.

Plaintiff said that he had begun a real estate investment business, he owned one rental home, he made an offer on a second rental home in July 2003, and he planned to invest in seven other houses in 2003. He did not inquire about the location of the Providian proceeds until September 2003. The bank refused to discuss with him anything about the Providian proceeds because the check did not belong to him. He claimed that when the offers to purchase fell through, he discovered that his credit score had fallen to about 550 by October 2003. Plaintiff received a letter from defendant dated November 18, 2003, stating that it had returned the funds to the title company. On November 25, 2003, Greco issued another check to Providian; Plaintiff claimed that the check was given to him, and he promptly forwarded it to Providian.

According to plaintiff, he did not file a 2003 tax return because he was in financial crisis. He claimed that his funds were exhausted from his fiasco with the bank, he was unable to pay his car payments, he was struggling with the mortgage payments, and he could not afford to pay his taxes or personal debts. However, he also acknowledged that he had co-signed a car loan for a friend who then defaulted on the loan, and he had contributed to his nephew's criminal defense fund for double murder. Moreover, he acknowledged that he had not worked since 2001, had not applied for a job anywhere, and was living off his disability check.

Plaintiff filed suit against defendant alleging negligence and defamation. He moved to file an amended complaint to withdraw the defamation count, which was granted. Defendant moved for summary disposition arguing that plaintiff's claims were barred by the wrongful conduct rule, plaintiff was unable to establish that defendant owed him a legal duty, and plaintiff was unable to establish proximate cause. Defendant also sought sanctions pursuant to MCR 2.114 for having to defend a frivolous action. Plaintiff responded that whether he intended to defraud the bank was a question of fact for the jury and, thus, summary disposition was inappropriate under a wrongful conduct theory; defendant owed plaintiff a duty of due care because plaintiff was defendant's customer; and plaintiff was entitled to anticipated lost profits from his failure to complete the purchases of the eight rental homes as a result of his poor credit score and damages for mental distress. The trial court granted defendant summary disposition because it found that defendant had no duty to plaintiff.

A trial court's decision on motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo to determine whether a genuine issue of material fact exists or whether the moving party is entitled to judgment as a matter of law. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether a defendant owes a plaintiff a duty is a question of law that is likewise reviewed de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

Plaintiff first argues that the grant of summary disposition was error because, by virtue of his status as a customer and depositor, he was owed a duty by defendant to exercise due care, to verify the authenticity of plaintiff's inadvertent and mistaken endorsement of the check, and to

conduct a timely and thorough investigation with respect to the ownership of the funds in question. We disagree.

To maintain an action in negligence, a plaintiff must demonstrate that the defendant owed the plaintiff a legal duty, the defendant breached the duty, the plaintiff suffered damages, and the defendant's breach caused the damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). If a defendant does not owe a plaintiff a legal duty, then the defendant cannot be held liable in tort. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). Whether a defendant has any legal obligation to act on a plaintiff's behalf is distinguishable from the standard of care "which, in negligence cases, always requires reasonable conduct." *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 n 4; 679 NW2d 689 (2004) A sufficient relationship must exist between a plaintiff and a defendant before a duty will arise. *Schultz, supra* at 450.

The only binding authority plaintiff cites to support his claim that defendant owed him a duty because he was a customer and depositor is *Benge v Michigan Nat'l Bank*, 341 Mich 441, 445; 67 NW2d 721 (1954).[1] In *Benge*, our Supreme Court stated with respect to the duty owed by a bank to its depositor when forged checks were written on the depositor's account:

> It is not open to question that the relation existing between the parties was that of debtor and creditor, *and that the bank owed to plaintiff the duty to make no payments out of her account except on her order*. Under the common law rule the violation of such duty gives rise to a cause of action. [*Id.* at 445.]

The portion of *Benge* cited by plaintiff does not stand for the proposition that a bank owes its depositor a duty with respect to the funds it receives but, rather, owes its depositor a duty with respect to the funds it disburses from the depositor's account. Moreover, the issue in *Benge* was whether the plaintiff was precluded from recovery by statute where the defendant mailed the canceled forged checks to plaintiff but the plaintiff did not receive the checks and, thus, did not notify the defendant within the three-month statutory period that the checks were forged. *Id.* at 445-446. Therefore, we find *Benge* inapposite.[2]

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[1] In *Siecinski v First State Bank*, 209 Mich App 459, 462-463; 531 NW2d 768 (1995), this Court questioned the continued validity of *Benge* because *Benge* was decided on the basis of a former statute requiring a bank to mail statements and items to the customer. This Court noted that the statute had since been repealed by the Uniform Commercial Code.

[2] Plaintiff also cites *Michigan State Employees Retirement Sys v Traverse City State Bank*, 9 Mich App 639; 158 NW2d 65 (1968), and *R. Mars, The Contract Co v Massunutten Bank of Strasburg*, 285 F2d 158 (CA 4, 1960) to support his claim that the bank owed him a duty (Plaintiff's brief on appeal, 3). In addition to the fact that neither of these cases are binding, MCR 7.215(J)(1); *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004), they do not support plaintiff's claim. In *Michigan State Employees Retirement Sys, supra* at 646, this Court concluded that the plaintiff payor could maintain a suit against the defendant bank for failing to exercise due care in verifying the authenticity of any endorsements despite any negligence on the plaintiff payor's part in issuing the payroll warrants. In *R. Mars, The Contract*

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Because plaintiff failed to cite in his complaint, his brief in support of his answer to defendant's motion for summary disposition, or his brief on appeal any statute, ordinance, or common law that would establish that defendant owed him a duty, plaintiff failed to establish a legal duty. *Gardner v Warren Bank*, 14 Mich App 548, 549; 165 NW2d 869 (1968), citing *Butrick v Snyder*, 236 Mich 300; 210 NW2d 311 (1926).[3]

Moreover, Michigan cases interpreting various UCC provisions belie plaintiff's claim that he was a depositor and, therefore, owed a duty. In *Michigan Ins Repair Co, Inc v Mfrs Nat'l Bank of Detroit*, 194 Mich App 668, 673-674; 487 NW2d 517 (1992), this Court noted that the plaintiff failed to "allege or explain by what right it [could] direct how the proceeds of a check to which it [was] not a payee [could] be disbursed." It found that the plaintiff was neither a payee nor a holder of the check and, thus, did not have the right to negotiate the check. *Id.* at 674. In *Pamar Enterprises, Inc v Huntington Banks of Michigan*, 228 Mich App 727, 734; 580 NW2d 11 (1998), this Court noted that a check was the personal property of the payee, and a bank would be liable if it made payment on a forged check or a check missing an endorsement. Because plaintiff here was not a proper payee or holder of the check, he did not own the check or have the right to deposit it. Therefore, plaintiff was not a proper depositor, the bank did not owe him a duty, and the court properly granted summary disposition on this ground. Because of our disposition on this issue, plaintiff's remaining issues are moot.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette

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Co, supra at 160-161, the Fourth Circuit Court found that the bank was liable to the plaintiff corporation for accepting checks payable to the corporation but forged by the corporation's employee and deposited in the employee's personal account. If these cases are analogized to the instant case, they would establish that defendant owed a duty – to verify the authenticity of plaintiff's signature – to the title company that issued the check and who was also defendant's customer, and to the payee Providian, not to plaintiff.

[3] Plaintiff cited Mitchie on Banks and Banking, Chapter 9, Deposits, pp 30-31, in his brief in support of his answer to defendant's motion for summary disposition, to support his claim that the bank owed him a duty to act with reasonable care because he was a depositor of the bank. The cited pages indicate (a) special circumstances, such as when a bank acts as an advisor for a depositor, may impose a duty to disclose on a bank, (b) a bank must exercise reasonable care when handling a customer's funds, (c) a bank may submit to the court the question of ownership of a deposit, (d) a bank has a duty to its depositors to recover improperly loaned funds, and (e) the Uniform Commercial Code (UCC) governs bank deposits absent an express agreement to the contrary. In *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991), this Court found that no fiduciary duty existed between a bank and its customers absent special circumstances. Plaintiff has failed to allege any special circumstances that would create a fiduciary duty in the instant case.