STATE OF MICHIGAN

COURT OF APPEALS

OXFORD BANK,

Plaintiff-Appellant,

v

VICKI S. ROHLMAN,

Defendant-Appellee.

UNPUBLISHED
February 22, 2007

No. 267784
Lapeer Circuit Court
LC No. 04-034594-CK

Before: Meter, P.J, and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10) in its action alleging breach of warranty under the bank collection portion of the Uniform Commercial Code (UCC), MCL 440.1101, *et seq*. We vacate and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff bank seeks to recover $48,000, the amount of a check that was deposited by defendant and was subsequently returned to plaintiff by an intermediate bank because it was rejected as counterfeit. Plaintiff claims that defendant breached her warranties under MCL 440.4207 by presenting a counterfeit item. Defendant, who asserts that she was the victim of an e-mail scam, claims that genuine issues of material fact exist as to whether the bank breached its duty to exercise reasonable care and whether the bank failed to give defendant timely notice that the check was counterfeit.

Defendant was contacted via e-mail by a man named "Murphy Brown," who claimed he lived in a hotel in the Netherlands. Brown stated he was interested in moving to the United States and investing in property, so he asked defendant to find suitable property for him to purchase. Brown stated that defendant would receive a ten-percent commission if he could sell a portion of the property. Defendant agreed, and subsequently advised Brown she had found some property in Fenton. Brown's "corporate partner," Tony Grant, sent defendant a check for $48,000 for the property. The check was drawn on the account of "1029081 Alberta Ltd." at the Bank of Nova Scotia and was payable to defendant.

Defendant deposited the check into her account at plaintiff bank on March 12, 2004, and was advised it would take a couple of weeks to clear. Defendant received a "Notice of Delayed Availability" from plaintiff, indicating that the deposited funds would not be available until

March 30, 2004, because the amount of the check was greater than $5,000. When defendant called to inquire about the check after a couple of weeks, it still had not cleared. However, defendant asserts that plaintiff's employee called her two days later and told her that the funds had cleared.

After advising Grant that the check had cleared, defendant received a phone call from Brown, who told her that he needed all of the money back because he needed money for his hotel and airfare. Defendant followed Brown's instructions and sent $45,000 by wire transfer from her account to one "E. Jacob" at a bank in the Netherlands. Defendant additionally wired $2,500 to "Ebo Ben," who was supposedly Brown's lawyer.

On April 19, 2004, plaintiff received a "Customer Notice" from Bank One, indicating that plaintiff's account had been debited for $48,000 as a result of the counterfeit item. Defendant testified she received a phone call from one of plaintiff's employees in "mid April 2004," indicating the check was counterfeit. Defendant also received a letter from plaintiff a few weeks later notifying her the check had been returned. Cynthia Edgett, an employee of plaintiff, stated she contacted defendant by telephone on the day the check was returned to plaintiff, April 19, 2004, to give her notice of the counterfeit item and to demand repayment. Edgett advised defendant that plaintiff would be willing to arrange a loan to assist her in repayment. Edgett also contacted defendant on April 26 and April 28, 2004, to follow up. Defendant never received reimbursement for the amount of the funds she had wired and never reimbursed plaintiff.

Plaintiff brought an action against defendant for reimbursement of the amount of the counterfeit check, alleging breach of warranty under the UCC. Plaintiff then filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10), arguing that defendant breached her warranties under MCL 440.4207 by presenting a counterfeit item to plaintiff and that there was no genuine issue of material fact with respect to whether notice of the claim for breach of warranty was given within 30 days after plaintiff had reason to know of the breach, as required by MCL 440.4207(4).

The trial court denied plaintiff's motion. The court held that, in accordance with MCL 440.4302, a payor bank must provide notice of dishonor before its "midnight deadline," i.e., before midnight on the next banking day following the banking day on which the payor receives the sum. MCL 440.4104(j). The trial court reasoned that plaintiff did not provide notice by the midnight deadline, so it was not entitled to summary disposition. The trial court further held that the UCC obligated plaintiff to send written notice, so plaintiff's telephone call was not sufficient to alert defendant of the check's dishonor.

A motion under MCR 2.116(C)(9) is properly granted if a defendant fails to raise any legally cognizable defense and no amount of factual development could prevent the plaintiff's recovery. *Wheeler v Shelby Twp*, 265 Mich App 657, 663; 697 NW2d 180 (2005). Summary disposition is proper under MCR 2.116(C)(10) if, considering the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Plaintiff seeks to charge back the amount of the counterfeit check on a breach of warranty theory pursuant to MCL 440.4207, which provides:

(1) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank all of the following:

(a) That the warrantor is a person entitled to enforce the item.

(b) That all signatures on the item are authentic and authorized.

(c) That the item has not been altered.

(d) That the item is not subject to a defense or claim in recoupment (section 3305(1)) of any party that can be asserted against the warrantor.

(e) That 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.

(2) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (i) according to the terms of the item at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in sections 3115 and 3407. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor cannot disclaim its obligation under this subsection by an endorsement stating that it is made "without recourse" or otherwise disclaiming liability.

(3) A person to whom the warranties under subsection (1) are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(4) The warranties stated in subsection (1) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(5) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

The trial court erred in ignoring the plain language of MCL 440.4207 and in applying instead MCL 440.4302 and its corresponding "midnight deadline." Section 4302 provides, in relevant part:

(1) If an item is presented on and received by a payor bank the bank is accountable for the amount of the following:

(a) A demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline.

Section 4302, on its face, applies only to a "payor bank." According to MCL 440.4105(c), a "payor bank" is "a bank that is the drawee of a draft." The UCC further defines "drawee" as "a person ordered in a draft to make payment." MCL 440.3103(b). Plaintiff was not the drawee of the counterfeit check. Accordingly, the trial court erred in holding that plaintiff had failed to meet its "midnight deadline." Instead, plaintiff in this case is a "collecting bank," which the UCC defines as "a bank handling the item for collection except the payor bank." MCL 440.4105(e).

Applying these provisions, it is clear there is no genuine issue of material fact concerning whether plaintiff gave appropriate "notice" of its claim for breach of warranty. Plaintiff did not receive notice from Bank One that the counterfeit check was being dishonored until April 19, 2004. Plaintiff's employee testified that she contacted defendant by telephone the same day to give her notice of the counterfeit item and to demand repayment. Consistent with this testimony is defendant's testimony that plaintiff's employee notified her by telephone of the dishonor in "mid April 2004." Furthermore, defendant testified she received written notification of the returned check "a few weeks later." Defendant failed to present any evidence that she did not receive notice of dishonor within 30 days after plaintiff had "reason to know of the breach and the identity of the warrantor," MCL 440.4207(4), and plaintiff's right to a refund is not conditioned on defendant's receipt of written notice by the midnight deadline. MCL 440.4214.

Nevertheless, defendant claims on appeal that genuine issues of fact remain regarding whether plaintiff exercised ordinary care in notifying her of the dishonored check. The statute outlining the collecting banks duty, MCL 440.4202, states, in relevant part:

(1) A collecting bank must exercise ordinary care in all of the following:

(a) Presenting an item or sending it for presentment.

(b) Sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted, as the case may be.

* * *

(d) Notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(2) A collecting bank exercises ordinary care under subsection (1) by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness.

> (3) Subject to subsection (1)(a), a bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in the possession of others or in transit.

Plaintiff's prompt notice satisfied its duty to notify defendant. Pursuant to MCL 440.4202(1)(b), plaintiff was required to provide notice to defendant of the check's nonpayment "after learning that the item has not been paid or accepted." The uncontroverted evidence establishes that plaintiff provided notice of nonpayment to defendant on the same day Bank One notified plaintiff that the check had been rejected as counterfeit. Therefore, defendant has failed to provide any evidence to substantiate her allegations of insufficient notice.[1] See MCL 440.4214.

Nevertheless, defendant also raises issues on appeal regarding plaintiff's exercise of due care in presenting the instrument, arguing that the circumstances should have prompted plaintiff to present the instrument directly to the payor bank. She also argues that plaintiff may only charge back or revoke a provisional settlement if it never received a final settlement in accord with the relevant rules, facts, and time constraints. See MCL 440.4214; see also MCL 440.4215. However, neither party points to evidence suggesting that these issues were indisputably resolved in the trial court. Under the circumstances, we vacate the trial court's order denying plaintiff's motion for summary disposition, and we remand for further proceedings. On remand, defendant may move the trial court to add any new parties as allowed by law.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

I concur in result only.

/s/ Patrick M. Meter

[1] We note that defendant has failed to provide any evidence of prejudice regarding plaintiff's alleged delays. Defendant has failed to demonstrate that her transfer of money to her defrauders could have been prevented if plaintiff had acted faster. Defendant's diligence in complying with her defrauders' demands left hardly any time between the moment plaintiff credited her account and the moment defendant maximized her account's credit and wired the money to the wrongdoers.