

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0360
STATE OF WISCONSIN**

Cir. Ct. No. 00 CV 10774

**IN COURT OF APPEALS
DISTRICT I**

GORDON P. RALPH,

PLAINTIFF-APPELLANT,

v.

BANK ONE WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Gordon P. Ralph appeals from a judgment dismissing his amended complaint against Bank One Wisconsin.¹ Ralph alleged

¹ The trial court issued an “Order for Judgment and Judgment Dismissing Amended Complaint.” (Uppercasing omitted.)

that Bank One had a duty to delay transactions Cora Buckowich made on her corporate account because Bank One had “notice” that Buckowich was misappropriating money he wired to the account. The trial court concluded that Bank One did not have a duty to delay the transactions because Ralph did not notify Bank One of his adverse claim to the money. We affirm.

I.

¶2 Gordon P. Ralph alleged that in November of 1997 Cora Buckowich agreed to “accept \$500,000 from [him] for the purpose of making an investment on [his] behalf.” Ralph wired \$500,000 to a corporate checking account at Bank One in the name of Capital Links, Inc. Buckowich had opened the Capital Links account at Bank One several months earlier. According to the amended complaint, Buckowich told her personal banker at Bank One that “the funds were going to be used for a business transaction which she characterized as quite complex.”

¶3 Buckowich withdrew \$500,000 from the Capital Links account and purchased a cashier’s check payable to her. According to the amended complaint, she told her personal banker that the money “was to be used in the business she was doing through Capital Links.” Buckowich then took the check to Europe to make the “investment.” On December 29, 1997, Buckowich reported to Bank One that the cashier’s check had been lost in France. Bank One stopped payment on the check at Buckowich’s request and credited the Capital Links account with the money on December 31, 1997.

¶4 According to the amended complaint, around January 2, 1998, Buckowich began withdrawing money from the Capital Links account in what Ralph alleges were “a series of extraordinary, unusual and irregular transactions.”

Ralph alleged that Buckowich used the money to pay for personal travel expenses, an automobile, a home equity loan, and credit card debit. He further alleged that Buckowich's personal transactions "were done with the assistance of ... a banker ... who was told the purpose of the transactions."

¶5 Ralph claims that the Bank was negligent:

(a) by failing to allow reasonable time for any claim other than Buckowich's to be made to the funds represented by the cashier's check purportedly lost by Buckowich before crediting the account in the name of Capital Links, Inc., and allowing use of those funds by Buckowich[; and,]

(b) by failing to impose and enforce reasonable conditions before allowing the funds represented by the stopped cashier's check to be credited to the account in the name of Capital Links, Inc.[,] and used, including, but not limited to, those conditions permitted by Wis. Stats. § 403.312; and,

(c) by failing to question and delay or stop any or all of the extraordinary, unusual and irregular transactions by which Buckowich withdrew funds from that account for her personal use while at the same time she maintained a personal account appropriate for such transactions; and,

(d) by allowing the transaction of business in the account in the name of Capital Links, Inc.[,] while the formalities necessary to the formation of that entity as a valid corporation and to permit it to do business with defendant were incomplete.

Ralph further claimed that Bank One's alleged negligence "enabled Buckowich to misappropriate funds from the account in the name of Capital Links, Inc.[,] held for the benefit of plaintiff, thereby causing plaintiff injury and damages."

¶6 Bank One filed a motion to dismiss Ralph's amended complaint. It claimed that under *Commercial Discount Corp. v. Milwaukee Western Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974), a bank does not have a duty to a noncustomer, such as Ralph, to stop or delay a customer's transactions unless the

noncustomer makes a claim to the money held by the bank. Bank One thus argued that Ralph failed to state a claim under *Commercial Discount* because Ralph did not allege that he made a claim to the money in the Capital Links account.

¶7 Ralph argued that Bank One had a duty to “limit Buckowich’s use of the funds from the stopped \$500,000 cashier’s check” because it had notice that Buckowich was using funds “intended for a business purpose for her personal benefit.” Ralph claimed that Buckowich began using the money in the Capital Links account “[w]ithin days of the redeposit of the \$500,000” and that this “deprived” him of “any meaningful opportunity” to make a claim to the money.

¶8 The trial court granted Bank One’s motion to dismiss. It concluded that Ralph’s amended complaint did not state a claim against Bank One because Ralph did not allege that Bank One owed a duty to him:

The Court declines to impose the duty that you want to read into your pleadings against the bank. The bank has no duty to question the transactions or to regulate the transactions or to refuse to comply with the transactions requested by the depositor. They can only delay payment if notice of a potential problem is brought to their attention, and the plaintiff did not bring such notice to their attention.

II.

¶9 A motion to dismiss a complaint for the failure to state a claim challenges the legal sufficiency of the complaint. *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 64, 384 N.W.2d 333, 338 (1986). Our review is limited to the face of the pleadings. *Onderdonk v. Lamb*, 79 Wis. 2d 241, 245, 255 N.W.2d 507, 509 (1977). The facts pled and all reasonable inferences from those facts are admitted as true. *Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 303, 306 (1987). We will affirm the dismissal of a complaint for the failure to state a claim

only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of the allegations. *Id.* Whether a complaint states a claim upon which relief can be granted is a question of law that we review *de novo*. *Id.*

¶10 Ralph alleges that the trial court erred when it dismissed his amended complaint because *Commercial Discount* does not apply. He claims that *Commercial Discount* “is not a negligence case” because it analyzed the intentional tort of conversion. Thus, he argues that its discussion of a bank’s duty to noncustomers “cannot be fit into Wisconsin’s negligence paradigm, which recognizes a universal duty” to exercise ordinary care in all activities. *See Gritzner v. Michael R.*, 2000 WI 68, ¶20, 235 Wis. 2d 781, 611 N.W.2d 906.

¶11 In the alternative, Ralph alleges that his amended complaint states a claim upon which relief can be granted under *Commercial Discount* because the amended complaint alleges that Bank One had a duty to delay Buckowich’s transactions. Ralph claims that Bank One had notice that “someone, somewhere was being harmed by Buckowich’s conduct” because her conduct was “suggestive of wrongdoing and a potential claim of a third party.” We disagree. For the reasons set forth below, *Commercial Discount* applies and Ralph failed to establish that Bank One had a duty to him.²

² Ralph also alleges: “The circuit court improperly circumvented the Wisconsin negligence public policy analysis.” *See Gritzner v. Michael R.*, 2000 WI 68, ¶¶26-27, 235 Wis. 2d 781, 611 N.W.2d 906 (six public policy considerations that may preclude liability for negligent conduct). The trial court was not required to make a public policy determination, however, because under *Commercial Discount Corp. v. Milwaukee Western Bank*, 61 Wis. 2d 671, 687–688, 214 N.W.2d 33, 41 (1974), it is clear that Bank One did not owe a duty to Ralph. *See Gritzner*, 2000 WI 68 at ¶24 (“when a duty of care exists and the other elements of negligence have been established, public policy considerations may preclude liability”) (emphasis added).

¶12 The existence and scope of a legal duty are questions of law that we review *de novo*. *Kramschuster v. Shawn E.*, 211 Wis. 2d 699, 703, 565 N.W.2d 581, 583 (Ct. App. 1997). Generally, a bank does not have a duty to a noncustomer to investigate the transactions of its customers. See *Commercial Discount Corp.*, 61 Wis. 2d at 688, 214 N.W.2d at 41; *Guidry v. Bank of LaPlace*, 954 F.2d 278, 286 (5th Cir. 1992). This general rule is subject to a limited exception explained in *Commercial Discount*.

¶13 In *Commercial Discount*, the Simplex Shoe Company had two checking accounts with the Milwaukee Western Bank. *Commercial Discount Corp.*, 61 Wis. 2d at 679, 214 N.W.2d at 37. The Commercial Discount Corporation had a perfected security interest in Simplex's funds. *Id.* Simplex drew checks on the Milwaukee Western accounts to pay other creditors. *Id.*, 61 Wis. 2d at 685–686, 214 N.W.2d at 40. Commercial Discount sued Milwaukee Western for the return of the funds paid to the other creditors, alleging, among other things, that Milwaukee Western was liable for aiding and abetting Simplex “in diverting all of said funds to the payment of other obligations.” *Id.*, 61 Wis. 2d at 686, 214 N.W.2d at 40.

¶14 *Commercial Discount* adopted the rationale of *Gendler v. Sibley State Bank*, 62 F. Supp. 805 (N.D. Iowa 1945), and determined that a bank does not owe a “duty of inquiry” to a third party with an adverse claim to money deposited unless the bank has specific notice of the adverse claim. *Id.*, 61 Wis. 2d at 687–688, 214 N.W.2d at 41. Then it has “a duty to wait a reasonable time *after notice of the claim* to allow the claimant to begin legal action.” *Id.*, 61 Wis. 2d at 688, 214 N.W.2d at 41 (emphasis added). *Commercial Discount* thus concluded that Milwaukee Western's “knowledge” that Commercial Discount had a perfected security interest in Simplex's account was not enough to impose liability

because Milwaukee Western had no duty to inquire whether “the particular funds deposited were covered by the security agreement and whether such deposit was in fact contrary to any agreement of the parties or without the approval of the secured party.” *Id.*, 61 Wis. 2d at 687–688, 214 N.W.2d at 41.

¶15 *Commercial Discount* applies to this case because it analyzed whether the bank had a duty to a noncustomer under a tort theory of liability. *See id.*, 61 Wis. 2d at 687, 214 N.W.2d at 41 (“[T]he liability of a bank to an adverse claimant to a deposit is based on tort and ... to constitute a ‘tort’ there must be a duty owing by one party to another and a breach of that duty.”). Ralph’s allegation that the “amended complaint sets forth facts giving rise to an inference that Bank One had constructive notice of a claim of a third party” is not enough to trigger Bank One’s duty. *See id.*, 61 Wis. 2d at 688, 214 N.W.2d at 41 (“It is irrelevant whether there are disputes as to the knowledge of defendant bank with regard to the plaintiff’s financial relationship to its depositor.”).

¶16 Ralph’s claim fails because he did not allege that he ever gave Bank One notice of his adverse claim to the money in the Capital Links account. Indeed, in his reply brief he admits: “It is true that the amended complaint does not allege that the bank knew of Ralph’s claim to the money.” The first time Ralph gave Bank One actual notice of his adverse claim to the money was when he filed his original complaint, which was almost three years after Buckowich allegedly began to misappropriate the money.³ This falls far short of the notice required to trigger Bank One’s duty to hold the funds for a reasonable time under *Commercial Discount*. *See id.* (notice approximately thirty days after checks

³ Ralph’s original complaint was filed on December 29, 2000.

drawn insufficient). Accordingly, the trial court properly dismissed Ralph's amended complaint for its failure to state a claim upon which relief can be granted.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

