

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JAMES H. PERRY and M. KAY PERRY, :
 : C.A. No. 04C-01-018 WLW
 :
 : Plaintiffs, :
 :
 :
 : v. :
 :
 :
 : DOVER FEDERAL CREDIT UNION, :
 :
 :
 : Defendants. :

Heard: March 19, 2004
Decided: March 23, 2004

ORDER

Upon Defendant's Motion to Dismiss.
Denied.

Suzanne Macpherson-Johnson, Esquire, Dover, Delaware, attorney for the Plaintiffs.

A. Richard Winchester, Esquire of McCarter & English, LLP, Wilmington, Delaware, attorneys for the Defendant.

WITHAM, J.

Introduction

Before this Court is Defendant Dover Federal Credit Union's (DFCU) motion to dismiss all claims asserted in the Complaint by James and M. Kay Perry. Plaintiffs have responded. Based on the following, Defendant's motion should be *denied*.

Background

According to the Complaint, apparently the Perrys deposited a \$45,000.00 cashier's check¹ payable to James Perry and endorsed by James Perry in their checking account at DFCU on January 16, 2003. Mr. Perry was told that the funds from the check would be immediately available to him, even though the check was drawn on an out of state bank. The next day, Mr. Perry, with the assistance of a DFCU employee, wire transferred \$25,460.00 to Peter O. Akande's account at Me Bank (Emirates Bank Group) in the United Arab Emirates. On January 23, 2003, the Perrys received a letter from DFCU informing them that the \$45,000.00 check was counterfeit and thus was not paid. DFCU then seized the \$7,000.00 remaining in the Perrys' account in an attempt to recover the funds transferred to Mr. Akande. This left the Perrys with a negative balance in their account totaling \$16,658.89. From these bare facts, the Plaintiffs' Complaint alleges that DFCU breached its contract with the Perrys by making the funds available immediately for withdrawal allegedly in violation of their agreement and that DFCU was negligent in that its employees improperly deposited the check as cash and informed Mr. Perry that he would have immediate access to the

¹ The drawer and drawee on the check were both National City Bank of Indiana. The remitter was identified as Peter O. Akande.

funds.

Defendant contends that the case should be dismissed pursuant to Superior Court Civil Rule 12(b)(6), because the Plaintiffs have suffered no monetary damages and such damages are an essential element of the case. In addition, Defendant claims that the Plaintiffs failed to join an indispensable party, namely Peter O. Akande, the remitter of the \$45,000 check and the recipient of the wire transfer, and thus the complaint should be dismissed pursuant to Rule 12(b)(7).

Discussion

Superior Court Civil Rule 12(b)(6) permits the Court to dismiss a claim when, taking all of the allegations in the complaint as true, the plaintiff cannot recover under any conceivable set of circumstances. When considering a motion to dismiss based upon the Plaintiff's alleged failure to state a claim pursuant to Rule 12(b)(6), the Court must accept all allegations in the Complaint as true and view the complaint in the light most favorable to the Plaintiff. The Court should dismiss the complaint only if the Plaintiff would not be able to recover under any reasonably conceivable set of circumstances susceptible of proof.²

Under Rule 12(b)(7), the Court may dismiss a plaintiff's claim for failure to join a party under Rule 19, which provides for the joinder of persons needed for just adjudication of the claims. Rule 19 permits the Court to dismiss the claim if the party

² *Battista v. Chrysler Corp.*, 454 A.2d 286 (Del. Super. Ct. 1982).

not joined is indispensable to the case but cannot be made a party. The factors for the Court to consider in making this determination, as stated in Rule 19, include:

First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.³

If the party is subject to service of process and the joinder will not deprive the Court of subject matter jurisdiction, the Court may order that the person be made a party.⁴

The Defendant asserts that the Plaintiffs have not suffered any monetary damages because they deposited the check in their own account and withdrew the funds themselves. In their Complaint, Plaintiffs request judgment for damages, costs, attorney's fee and pre- and post-judgment interest. However, if all of the allegations in the Complaint are accepted as true, then DFCU was negligent in allowing the Perrys to complete the wire transfer and DFCU breached its agreement in allowing access to the funds immediately. If this is the case, then the Plaintiffs would have suffered the loss as a result of DFCU's alleged errors. If, according to the Complaint, DFCU had followed its procedures, the Perrys would not have had access to the funds

³ Super. Ct. Civ. R. 19(b).

⁴ Super. Ct. Civ. R. 19(a).

from the recently deposited check.

The Defendant further claims that Peter O. Akande is an indispensable party under Superior Court Rule 19(b) and must be joined as a party in the action. DFCU contends that because Mr. Akande allegedly issued the apparently counterfeit check and received the wire transfer in Dubai, complete relief cannot be accorded among the parties unless Mr. Akande is joined in this action. Further, DFCU contends that if joinder of Mr. Akande is not possible, the suit should be dismissed.

However, Mr. Akande did not issue the cashier's check, he is merely listed on the check as the remitter. Thus he purchased the cashier's check, but as a remitter is not liable on the instrument. Thus, Mr. Akande, the alleged purchaser of the cashier's check, would not be an indispensable party to this action.⁵ There are gaps in the factual history as represented by the parties that will prevent dismissal at this stage. Clearly, it does not appear to a certainty that the Plaintiffs cannot recover.

Conclusion

Accepting all allegations in the Complaint as true, Defendant's motion to dismiss for failure to state a claim and failure to join an indispensable party is *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

⁵ "[F]illing in of the remitter line on a cashier's check is akin to the filling in of the memo line on a personal check; helpful, but not required, and of no legal effect." *In re Spears Carpet Mills, Inc.*, 86 B.R. 985, 993 (Bankr. W.D. Ark. 1987).

Perry v. Dover Federal Credit Union
C.A. No. 04C-01-018 WLW
March 24, 2004

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File