

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 13 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NAVIGATORS SPECIALTY INSURANCE
COMPANY, a New York Corporation,

Plaintiff-Appellant,

v.

CALIFORNIA BANK AND TRUST,

Defendant-Appellee.

No. 21-56161

D.C. No.

8:17-cv-00991-JLS-KES

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Argued and Submitted October 17, 2022
Pasadena, California

Before: WATFORD and HURWITZ, Circuit Judges, and VITALIANO,** District
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eric N. Vitaliano, United States District Judge for the
Eastern District of New York, sitting by designation.

After a remand from this Court vacating a district court judgment based on the statute of limitations, the district court granted summary judgment to appellee California Bank & Trust on the merits, rather than on statute of limitations grounds. That approach was not inconsistent with our mandate. *See Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). And, reviewing the district court's summary judgment de novo, we affirm.

This case arose out of the fraudulent indorsement of a series of checks drawn against the account of Deacon Corporation—a construction general contractor and the subrogor of appellant Navigators Specialty Insurance Company—that were payable to Deacon's subcontractor, Champion Construction, and to certain of Champion's vendors. Upon presentment by Chase, Champion's depository bank, the fraudulently indorsed checks were honored by California Bank, Deacon's bank. Navigators, standing in Deacon's shoes, sued California Bank.

1. Navigators first contends that California Bank cannot avail itself of the protections of California Commercial Code § 3405 as they may be invoked only as an affirmative defense. Dkt. 10 at 42–62. But even assuming, without deciding, that § 3405 is an affirmative defense, a defendant may raise an affirmative defense not raised in its initial pleading, so long as the delay does not prejudice the plaintiff. *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). We find no prejudice here.

Trying to scrape together a claim of prejudice, Navigators asserts that its legal position was harmed by California Bank's late invocation of this provision of § 3405 because the statute would not allow Navigators to sue the depository bank—Chase—until California Bank raised a § 3405 affirmative defense. By the statute's plain text, however, a party's liability under § 3405 for failing to exercise ordinary care in paying a check or other negotiable instrument is not contingent upon a third party raising a § 3405 affirmative defense. Recovery is contingent solely upon a showing that the bank to be charged under the section failed to exercise "ordinary care" in receiving or paying a check bearing a fraudulent indorsement made by an employee whom the employer had entrusted with responsibility and that such failure contributed to the employer's loss. *See Lee Newman, M.D., Inc. v. Wells Fargo Bank*, 87 Cal. App. 4th 73, 82–84 (2001). Thus, as soon as Navigators or its subrogor, Deacon, experienced the claimed loss here, it had an unfettered right to sue Chase. It was not prejudiced in any way by California Bank's failure to invoke the protection of § 3405 as an affirmative defense in its answer.

2. Appellant fares no better on its substantive challenge to the summary judgment. California law is unambiguous: where the fraudulent indorsement of a check is that of a trusted employee of the party incurring the loss—absent the comparative fault of other parties—the employer and, ultimately, its insurer stand

to bear the loss. *See* Cal. Com. Code § 3405(b); Unif. Com. Code § 3-405, cmt. 4. Attempting to wriggle out of this statutory allocation of liability, Navigators argues that Champion was not Deacon’s “employee” under § 3405. But under § 3405, an independent contractor qualifies as an “employee,” and California Labor Code § 3353 applies the term to entities providing services like those provided by Champion to Deacon. 7-ER-877–78; 7-ER-896–905. Navigators’ additional argument that Champion lacked the “responsibility” necessary under § 3405 also is unavailing because Champion supplied key information for the execution of the instruments and handled their distribution.

Navigators might have sought to diminish its loss on a comparative fault basis by plausibly pleading and showing that California Bank failed to exercise ordinary care. But the record is barren of any evidence of such failure by California Bank. Navigators contends only meekly that California Bank “fail[ed] to individually review checks transferred to it for payment.” 8-ER-995; *see* 1-ER-13. A drawee bank, however, has no duty to review the indorsements of checks that are drawn against it. *See HH Comp. Sys., Inc. v. Pac. City Bank*, 231 Cal. App. 4th 221, 229–30 (2014).

AFFIRMED.