

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000592-MR

FORCHT BANK, NA

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 10-CI-00484

RENEE GRIBBINS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KRAMER, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Forcht Bank, NA appeals the judgment and order of the Taylor Circuit Court granting Renee Gribbins's motion for summary judgment and awarding her compensatory damages with interest after the Bank cashed eight forged checks on her account. After careful consideration, we affirm.

BACKGROUND

Between July 18, 2010, and August 9, 2010, Forcht Bank wrongfully honored and improperly paid eight checks with forged drawer signatures from the checking account of Renee Gribbins, who was a depositor at the bank. All eight checks were made payable to Andy Akers and presented by him for payment at the Campbellsville, Kentucky, branch of Forcht Bank. Gribbins was the only signator on the account, and it was the only account she had with the bank. Further, Forcht Bank was both the drawee and collecting bank.

On August 12, 2010, a bank employee contacted Gribbins about the forged checks, which had completely depleted the funds in Gribbins's account. Upon learning about the forgeries, Gribbins went to the Campbellsville branch of the bank and completed affidavits of forgery for each check. Initially, she did not know who had forged the checks but learned from the bank that the checks had all been made payable to Akers and cashed by him.

On October 27, 2010, Gribbins filed a complaint against Forcht Bank alleging that the bank had wrongfully honored and improperly paid eight forged checks on her account. In her complaint, she noted that the bank and she were in a contractual relationship, and the bank's payment of the checks was a breach of contract. Gribbins's signature was forged on each of the above instruments as the maker of each instrument. She sought compensatory damages and attorney's fees. Later, she amended the complaint to include punitive damages. However, the complaint did not specifically seek interest.

During the pendency of the action, both Gribbins and Akers were deposed. At her deposition, Gribbins testified that the checks were not signed by her, that she received no benefit from them, and that Akers did not have authority to write the checks. Furthermore, although the memo line on the checks suggested that Akers had performed a variety of services for her, such as a kitchen remodel, Gribbins asserted that Akers never provided any services.

Gribbins further testified that she had a romantic relationship with Akers and that, on occasion, he stayed at her home. But as soon as she learned about the forgeries, she contacted the police. Ultimately, Akers was charged in Taylor Circuit Court with eight counts of criminal possession of a forged instrument. He pled guilty and was ordered to pay restitution.

With regard to the checking account itself, Gribbins provided information that she consistently maintained a balance in excess of \$5,000.00 and did not write checks often. In fact, the August 15, 2010 bank statement listed twelve cancelled checks including the eight forged checks. As such, Gribbins only authorized and signed four checks. Significantly, when the pertinent bank statement was issued, Gribbins had already submitted the affidavits of forgery.

Gribbins expected the bank to only authorize withdrawals from her account when checks were signed by her as the drawer. To effectuate this purpose, Gribbins signed a signature card when she opened the account. Nonetheless, the bank cashed the checks with the forged signature allowing the funds in her checking account to be depleted in a matter of days. Moreover, the signature on

the eight checks was clearly not Gribbins's signature. The total amount paid out of Gribbins's account for the eight forged checks was \$7,650.00.

Akers's deposition took place upon a motion by Forcht Bank. He admitted to stealing the checks and forging Gribbins's signature. Akers testified that Gribbins was a victim and did not "contribute" to the forgery in any way. In fact, he articulated that he purposely concealed the theft of the blank checks from her. Further, Akers testified that Gribbins received no benefit from the forgery and that he fabricated the information on the memo line of the checks.

Forcht Bank relied primarily on Kentucky Revised Statutes (KRS) 355.3-406 and maintained that the comparative fault analysis provided in the statute precludes Gribbins from asserting forgery against Forcht Bank. It asserted that Gribbins was careless in having a relationship with Akers, did not safeguard her checks and, thereby, gave him access to her checks. Gribbins denies that she provided Akers with access to her checks.

On January 31, 2010, the trial court granted Gribbins's motion for summary judgment. This order was appealed, but our Court dismissed the appeal because the order was not final. Thereafter, the trial court then held a hearing on damages. And on November 27, 2012, it entered the final judgment and order, which granted Gribbins summary judgment and awarded damages in the amount of the forged checks with eight percent prejudgment interest and twelve percent postjudgment interest. The trial court, however, did not grant punitive damages or attorney's fees.

Again, the judgment was appealed, and our Court remanded it since the order was not designated as “final and appealable.” On March 18, 2014, a supplemental agreed order was entered making the order “final and appealable.” Forcht Bank now appeals this order.

STANDARD OF REVIEW

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03. Moreover, summary judgment is appropriately granted “where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

When considering a motion for summary judgment, the trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Id.* However, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial.” *Id.* at 482.

Therefore, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine

issues as to any material fact and that the moving party was entitled to judgment as a matter of law. [Further,] [t]here is no requirement that the appellate court defer to the trial court since factual findings are not at issue” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citations omitted). With this standard in mind, we turn to the case at bar.

ANALYSIS

Issues

On appeal, Forcht Bank maintains that the trial court erred in granting Gribbins’s motion for summary judgment since genuine issues of material fact existed and that the trial court erred in granting interest on the damages since she did not specifically request interest in her complaint. Regarding the grant of summary judgment, relying on KRS 355.3-406(1), the bank claims that both Gribbins and Akers offered inconsistent testimony about the safeguarding of the checks and the manner in which the forgeries were made. This inconsistent testimony, according to Forcht Bank, creates a material issue of fact and, thus, the trial court erred in granting summary judgment. Second, Forcht Bank argues that because Gribbins did not plead in particular for interest on the judgment in her complaint, it was improper for the trial court to award her interest.

Contrary to Forcht Bank’s characterizations, Gribbins argues that Forcht Bank’s defenses to the summary judgment were addressed and resolved through both her and Akers’s uncontroverted testimony. Moreover, concerning the award of prejudgment and postjudgment interest, she notes that she has been and

continues to be denied the use of these funds. In the complaint, Gribbins requested “all proper relief,” and an award of statutory prejudgment interest answers this demand. *See* KRS 360.010. Additionally, she contends that an award of postjudgment interest is statutorily mandated in KRS 360.040.

Efficacy of the Grant of Summary judgment

The relationship between a customer and a bank is inherently contractual and, thus, it has been held that banks have a duty to act in good faith and to exercise ordinary care in dealing with their customers and their accounts.

Ousley v. First Commonwealth Bank of Prestonburg, Kentucky, 8 S.W.3d 45, 47 (Ky. App. 1999). Furthermore, KRS 355.1–203 and KRS 355.4–103 of the Uniform Commercial Code (UCC) also impose a duty of good faith and fair dealing on banks. *Id.*

Additionally, KRS 355.4- 401(1) provides that “[a]n item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.” Here, it is not disputed that Forcht Bank improperly made payment from Gribbins’s account on eight forged checks. She established, under KRS 355.4-401, that she did not sign the eight checks and, thus, did not authorize the payment of the instruments. However, despite the forgery and the lack of proper authorization, Forcht Bank paid the checks without hesitation. In doing so, it failed to use ordinary care in the disbursement of Gribbins’s funds resulting in harm to her by the depletion of the deposited funds in the account over the course of 21 days.

The next step in our analysis is to consider Gribbins's duties as a customer of the bank who had forged checks cashed on her account. The duties are found in KRS 355.4-406. Keep in mind, this statute applies only to claims based on checks with "unauthorized signatures." See KRS 355.4-406(4), (6); *Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 498 (Ky. 2014). These duties are outlined in KRS 355.4-406(3), which elucidates that a customer has a duty to exercise reasonable promptness in examining the bank statement to ascertain whether any payment was unauthorized either because of an alteration or forged signature. If such a discovery is made by a bank customer, the customer must promptly notify the bank of the relevant fact. In the case at bar, Gribbins actually completed the appropriate affidavits of forgery prior to even receiving the bank statement. Thus, she exercised ordinary care as delineated by the statute.

In sum, Forcht Bank failed in its duty to exercise ordinary care to Gribbins when it honored eight forged checks drawn on her account. See KRS 355.4-401. Under KRS 355.4-406(4), the bank bears the burden of presenting evidence that Gribbins's conduct, under KRS 355.4-406(3), substantially contributed to its payment or injury from the payment of the forged checks. It cannot do so – Gribbins notified the bank about the forged checks even before the bank statement was issued.

Thus, the trial court properly granted summary judgment to Gribbins because there were no issues of material fact that would preclude it. Forcht Bank

provided no evidence that it paid the instruments in “good faith” compliance with reasonable commercial standards as contemplated under KRS 355.4-401.

Forcht Bank attempts to persuade this Court that KRS 355.3-406(1) is applicable to the case at hand. This statute is found in Article 3 of the Uniform Commercial Code (UCC) and refers to a person whose own negligence substantially contributes to the making of an unauthorized signature. If a person’s actions substantially contributed to such an action, under the statute he or she cannot assert the lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith. *See* KRS 355.3-406. We are not persuaded.

Gribbins brought this action against the bank for its failure contractually to honor the precepts of her relationship with the bank and only pay items with her signature. It did not do so. The signature on the check is clearly not Gribbins, and Forcht Bank does not establish that it made any efforts to ascertain whether the signature was authorized. Hence, Forcht Bank’s reliance on KRS 355.3-406 to establish comparative negligence on Gribbins’s part is inapposite since it breached its contract with Gribbins, and she exercised ordinary care as discussed in KRS 355.4-406.

But even if KRS 355.3-406 was applicable, we believe that the trial court correctly determined that Gribbins’s actions did not create an issue of material fact regarding a lack of ordinary care on her part that would have permitted the unlawful authorization by Akers. First, Forcht Bank did not prove

that it paid the instrument (the checks) in “good faith” as required under KRS 355.3-401. Second, it is undisputed that Gribbins used ordinary care, as provided in KRS 355.4-406 and reported the forgery immediately.

Forcht Bank’s other assertions that she did not exercise ordinary care were not supported by evidence. The depositions of Gribbins and Akers were uncontradicted. Gribbins established that she was unaware of the forgeries, took no part in them, did not benefit from them, and was unaware that checks had been stolen. Akers’ deposition supported her rendition completely and implicated him solely in the forgeries. Consequently, the trial court’s grant of summary judgment was proper.

Prejudgment and postjudgment interest

Forcht Bank argues that because Gribbins did not make a demand for prejudgment and postjudgment interest in her complaint, she is not entitled to it. We disagree.

To begin, Gribbins, through no fault of her own, did not have access to these funds and continues without access. Therefore, there is an issue of equity and fair play. Furthermore, “[t]he longstanding rule in this state is that prejudgment interest is awarded as a matter of right on a liquidated demand, and is a matter within the discretion of the trial court or jury on unliquidated demands.”

3D Enterprises Contracting Corp. v. Louisville & Jefferson County Metro. Sewer Dist., 174 S.W.3d 440, 450 (Ky. 2005)(citation omitted). Clearly, the funds taken from Gribbins’s checking account represent a liquidated claim. Since Gribbins’s

damages are liquidated, prejudgment interest was a matter of right and a specific demand in the complaint is not necessary. Furthermore, when no agreement exists as to the appropriate rate of interest, KRS 360.010 provides that the legal rate of interest is eight percent, which was the rate of interest in the trial court's order. Regarding postjudgment interest, KRS 360.040 specifies that a judgment shall bear twelve percent interest. Thus, under this statutory language, postjudgment interest is mandatory.

Finally, we believe that although the request for interest was not specifically pled by Gribbins, the catch-all phrase at the end of her complaint seeking "all proper relief," encompasses an award of both prejudgment and postjudgment interest. Indeed, in *Reliable Mechanical, Inc. v. Naylor Industrial Services, Inc.*, 125 S.W.3d 856, 858 (Ky. App. 2003), which was cited by Forcht Bank, our Court expressed that an award of interest is a matter entrusted to the sound discretion of the trial court. Given these circumstances, an award of interest is both fair and equitable. Accordingly, the trial court's award of interest on the judgment is proper.

CONCLUSION

The final judgment and order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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