

**Michelson v Provident Fin. Servs. Inc..**

2011 NY Slip Op 32825(U)

October 6, 2011

Supreme Court, New York County

Docket Number: 104351/10

Judge: Emily Jane Goodman

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SCANNED ON 10/13/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**EMILY JANE GOODMAN**

PRESENT:

PART 17

Index Number : 104351/2010

MICHELSON, HEATHER L

vs

PROVIDENT FINANCIAL SERVICES

Sequence Number : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

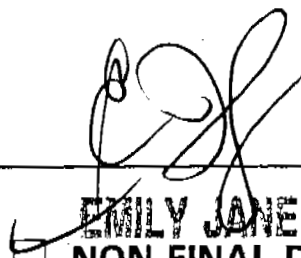
Upon the foregoing papers, It is ordered that this motion *is decided for attached*

**FILED**

OCT 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/6/11

  
\_\_\_\_\_  
**EMILY JANE GOODMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----x  
HEATHER MICHELSON,

Plaintiff,

Index No. 104351/10

-against-

PROVIDENT FINANCIAL SERVICES INC.,  
THE PROVIDENT BANK, REGISTRAR AND  
TRANSFER COMPANY, WACHOVIA BANK,  
COMMERCE BANK, TD BANK and  
JEFFREY E. MICHELSON,

**FILED**

OCT 12 2011

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----x

Emily Jane Goodman, J.S.C.:

Motions bearing sequence numbers 002 and 004 are consolidated for disposition.

This is an action by plaintiff Heather Michelson arising from the alleged conversion of funds from a bank account held in trust for her. In motion sequence 002, defendant TD Bank moves, pursuant to CPLR 3211(a) (1) and (7), for an order dismissing the complaint as against it. In motion sequence 004, defendant Registrar and Transfer Company moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as against it. For the reasons stated below, both motions are granted.

**Background**

According to the complaint, plaintiff was born on October 20,

1983. On December 16, 1983, plaintiff's father, defendant Jeffrey Michelson, opened an account in her name at the First Morris Bank in Morristown, New Jersey, pursuant to the New Jersey Uniform Transfer to Minors Act (UTMA). Jeffrey Michelson was designated as the custodian of the account.

The complaint states that, from December 16, 1983 until April 2007, the account was funded with shares of stock of First Morris Bank, which eventually merged with defendant Provident Financial Services, Inc. and its subsidiary, defendant the Provident Bank. During that period, the number of shares in plaintiff's account increased from 158 shares of First Morris Bank to 2,524 shares of Provident Financial Services, Inc.

Plaintiff alleges that, in April of 2007, Jeffrey Michelson, asked Provident Bank to cash out the shares of Provident Financial Services and to issue a check for the proceeds to him as Custodian. Provident Bank cashed out the shares and, on April 5, defendant Registrar and Transfer Company, as transfer agent for Provident Financial Services Inc., issued a check drawn on its account at Wachovia Bank in the amount of \$93,213.75. The check first lists the name "Heather L. Michelson" and underneath her name it states "Jeffrey E. Michelson Custodian."

The complaint states that Jeffrey Michelson then endorsed the check by signing plaintiff's name directly on top of his own with

the word custodian next to his name. On or about April 9, 2007, he deposited the check into an account in the name of Glikin Brothers Inc., at defendant Commerce Bank (Commerce). Sometime thereafter, Wachovia Bank delivered \$93,213.75 to the Glikin Brothers' account at Commerce.

Plaintiff alleges that she first became aware of the fact that the account had been cashed out in November of 2009. She commenced this action in April of 2010, asserting claims for negligence, breach of fiduciary duty and conversion.

#### **Motion Sequence 002**

Plaintiff's seventh cause of action alleges that Commerce Bank knew or should have known that check was improperly endorsed and that Jeffery Michelson was not entitled to deposit the check. As such, plaintiff alleges that Commerce Bank "acted in a commercially unreasonable manner, negligently and in bad faith in permitting Jeffrey [Michelson] to deposit the check into Glikin Brothers' account at Commerce Bank."

Plaintiff's eighth cause of action asserts that Commerce Bank was acquired by the TD Financial Group on October 2, 2007 and became TD Bank. As such, plaintiff asserts that TD Bank is liable for the Commerce Bank's actions.

Defendants move to dismiss these causes of action for failure

to state a claim. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 (1st Dept 2009), citing *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "The court must accept the facts alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference." *Id.*, citing *Leon v Martinez*, 84 NY2d at 87.

#### **A. Choice of Law**

The parties agree that New Jersey law applies to this motion. This is because "[t]he liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located." NY UCC 4-102(2); see, NJ UCC 4-102(2).

#### **B. Standing**

As a threshold matter, defendants argue that plaintiff does not have standing to maintain this action because she never had possession of the check. Defendants rely on NJ UCC § 3-420(a), which provides that an action for conversion of an instrument may

not be maintained by a payee who did not receive delivery of the instrument. However, plaintiff's causes of action against TD Bank and Commerce Bank are for negligence, not conversion. Therefore, NJ UCC § 3-420(a) does not bar plaintiff from maintaining this action.

### C. Negligence

Plaintiff alleges that Commerce Bank was negligent in permitting Jeffrey Michelson to deposit the check because it was not properly endorsed. Defendants argue that the check was properly endorsed because only one endorsement was required and Michelson endorsed the check in his capacity as custodian. Thus, even if plaintiff's signature was forged, defendants argue that Michelson's endorsement alone was sufficient to permit the bank to negotiate the check.

The check is made out to both plaintiff and her father. Specifically, the check first lists the name "Heather L. Michelson" and underneath her name it states "Jeffrey E. Michelson Custodian." NJ UCC § 3-110(d) provides, in relevant part, that

If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

"Thus, unless the maker makes it clear that indorsement by a single

payee is unacceptable, persons dealing with the instrument should be able to rely on the single indorsement without suffering the risk of incurring liability." *Danco, Inc. v Commerce Bank/Shore, N.A.*, 290 NJ Super 211, 216, 675 A2d 663, 666 (NJ Super AD 1996); see *Matson Intermodal System, Inc. v Kubis Enterprises, Ltd.*, 385 NJ Super 105, 895 A2d 1242 NJ Super (2005).

Here, the check does not specify that the endorsement of both payees was required. Therefore, the check was payable alternatively to plaintiff or to Jeffrey Michelson, in his capacity as custodian. As such, Commerce Bank was entitled to negotiate the check based on his endorsement, since it is undisputed that he endorsed the check in his capacity as the custodian of the account.

Plaintiff contends, in any event, that Commerce Bank knew or should have known that she was over 21 years of age and that, therefore, Michelson was no longer the valid custodian of the account. However, the complaint does not allege any facts to support this contention.

Plaintiff also contends that Commerce Bank was negligent in accepting the check for deposit into a business account. However, plaintiff does not put forth any New Jersey law to demonstrate that Commerce Bank, as the depositary bank had a duty to investigate whether Jeffrey Michelson was a legitimate fiduciary simply because the check was deposited into a business account.



Under New York law, "there is no requirement that a check payable to a fiduciary be deposited to a fiduciary account, and the fact that the instrument was not so deposited may not, without more, be relied upon as establishing a wrongful payment on the part of the depository bank.'" *Matter of Knox (Columbia Banking Fed. Sav. & Loan Assn.)*, 64 NY2d 434, 437 (1985), quoting *Bradford Trust Co. v Citibank*, 60 NY2d 868, 870 (1983). "In general, a bank may assume that a person acting as a fiduciary will apply entrusted funds to the proper purposes and will adhere to the conditions of the appointment." *Id.* at 438. "A bank is not in the normal course required to conduct an investigation to protect funds from possible misappropriation by a fiduciary, unless there are facts...indicating misappropriation." *Id.*; see *Zaz-Huff Inc. v Chase Manhattan Bank, N.A.*, 277 AD2d 59 (1st Dept 2000).

Here, plaintiff has failed to allege any facts to suggest that Commerce Bank had sufficient knowledge such that it should have undertaken an investigation into whether Jeffrey Michelson was attempting to misappropriate funds from plaintiff's account.

Plaintiff further contends that the bank had a fiduciary duty to her because she became a customer of the bank in 2005 when she opened a checking account. However, even assuming the truth of this assertion, it is undisputed that such account is not related to the transaction at issue here. Thus, it does not give rise to

any duty on the bank's part in connection with the negotiation of the check.

Citing NJ UCC 4-208 (a), Plaintiff also asserts that TD Bank breached its warranty to Provident Bank that the endorsements on the check were valid and that plaintiff was a third-party beneficiary of that warranty.

Plaintiff's assertions are unpersuasive. First, the complaint does not plead a cause of action for breach of warranty. Second, plaintiff cites NJ UCC 4-208 (a) in opposition to the motion, but does not explain how this provision is applicable. Under NJ UCC 4-208 (a), the collecting bank warrants (known as the presentment warranty) to the payor bank (who is instructed to pay) that it is entitled to obtain payment on the check on behalf of the payee and that the check has no unauthorized or missing endorsements. *First Atlantic Federal Credit Union v Perez*, 391 NJ Super 419, 918 A2d 666 (NJ Super 2007). Plaintiff sets forth no facts or law to demonstrate that she was a third-party beneficiary of any warranties which run in favor of the drawee bank (here, Wachovia Bank). Further, as previously discussed, one of the signatures was in fact a valid signature, and, therefore TD Bank committed no wrong.

Therefore, the motion by defendant TD Bank to dismiss is granted and the seventh and eighth causes of action are dismissed.

**Motion sequence 004**

In motion sequence 004, defendant Registrar and Transfer Company (RTC) moves for an order granting summary judgment dismissing the complaint.

RTC is a stock transfer agent. It states that on January 15, 2003, it was appointed by Provident to act as transfer agent and registrar for Provident's common stock. On February 24, 2006, it was appointed by First Morris to act as transfer agent and registrar for that company's common stock. On March 22, 2007, RTC was appointed by Provident to act as the exchange agent for the merger of First Morris into Provident.

RTC states that, on March 29, 2007, it received an Election Form and Letter of Transmittal for the exchange of certain First Morris stock into cash and/or Provident common stock. The Letter was signed "Heather L. Michelson and Jeffrey E. Michelson Custodian."

According to the complaint, on April 5, 2007, RTC issued a check drawn on its account at Wachovia Bank in the amount of \$93,213.75, made payable to the order of Heather L. Michelson, Jeffrey Michelson Custodian. As set forth above, the complaint asserts that Jeffrey Michelson then endorsed the check by signing plaintiff's name directly on top of his own with the word custodian next to his name. On April 9, 2007, he deposited the check into

the Glikin Brothers account at Commerce Bank and Wachovia Bank then delivered \$93,213.75 to the Glikin Brothers' account at Commerce.

Plaintiff's fifth cause of action alleges that, as of October 20, 2003, RTC knew or should have known that Plaintiff had become 21 years of age and that Jeffrey Michelson was no longer the proper custodian of plaintiff's account. Plaintiff alleges that RTC "acted in a commercially unreasonable manner, negligently, and in bad faith in permitting Jeffrey [Michelson] to direct the disposition of [Heather Michelson's] account when he was no longer custodian." Complaint, ¶ 55. It further alleges that these actions caused all of plaintiff's 2,524 shares in Provident Financial Services, Inc. to be cashed out.

The complaint also asserts that RTC acted "in a commercially unreasonable manner, negligently and in bad faith when it issued a check made payable to [Jeffrey Michelson's] order as Custodian when he was not Custodian of the account from whence the funds came." Complaint, ¶ 56.

RTC moves for summary judgment dismissing this cause of action. A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Grob v Kings Realty Assoc.*, 4 AD3d 394 (2d Dept

2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

RTC argues that it is exempted from liability to plaintiff under the New Jersey Uniform Transfer to Minors Act (UTMA), NJSA 46:38A-38, which provides that:

A third person in good faith and without court order may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining:

- a. The validity of the purported custodian's designation;
- b. The propriety of, or the authority under this chapter for, any act of the purported custodian;
- c. The validity or propriety under this chapter of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; or
- d. The propriety of the application of any property of the minor delivered to the purported custodian.

RTC provides an affidavit from its President and CEO, Thomas Montrone, which states that RTC had no knowledge of any of the items set forth in the statute. He states that none of the documents involved in the transaction at issue imparted any knowledge or notice that plaintiff was a minor or even that the

account was an UTMA account. As such, RTC argues that it had no obligation to determine the validity of Jeffrey Michelson's actions.

Based on the Montrone affidavit, RTC has made a prima facie demonstration that plaintiff's claim should be dismissed. In opposition, plaintiff has not demonstrated the existence of any factual issues.

Plaintiff asserts that, at a minimum, RTC had an obligation to investigate whether Jeffrey Michelson's actions were authorized because it was "obvious" that plaintiff's signature on the Letter of Transmittal was a forgery. However, such a conclusory assertion is insufficient to demonstrate that a factual issue exists.

Finally, plaintiff asserts that RTC's motion should be denied pursuant to CPLR 3212(f), in order to allow plaintiff to conduct discovery. However, mere speculation that discovery may uncover something which will aid plaintiff's case is not sufficient to warrant denial of defendant's motion. See *Hariri v Amper*, 51 AD3d 146 (1st Dept 2008). Accordingly, it is

ORDERED that defendant TD Banks's motion to dismiss is granted and the seventh and eighth causes of action in the complaint are dismissed; and it is further

ORDERED that the motion for summary judgment is granted and the complaint is severed and dismissed as against defendant

Registrar and Transfer Company, and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements as taxed by the Clerk; and it is further

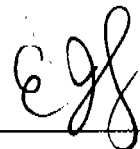
ORDERED that the remainder of the action shall continue.

DATED: October 6, 2011

ENTER:

**FILED**

OCT 12 2011

  
NEW YORK  
COUNTY CLERK'S OFFICE

J.S.C.

**EMILY JANE GOODMAN**