SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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THOMAS J. BROWN,

Plaintiff(s),

-against-

PUBLIC INSURANCE ADJUSTERS OF N.Y., LTD,, PUBLIC INSURANCE ADJUSTERS, LIMITED, DON WILKE, JOHN A. CARINO, MARIANNE SERONE, F.T.K. CONTRACTING CORP., FRANK LEWERY, DOUBLE EDGE CONSTRUCTION, INC., ANTHONY PIGNATANO, CHUBB INDEMNITY INSURANCE COMPANY, HSBC MORTGAGE CORPORATION (USA), AND J.P. MORGAN CHASE BANK a/k/a J.P. MORGAN CHASE & CO.,

Defendant(s).

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Part DCM 5
Present:
Hon. Judith P. McMahon

DECISION AND ORDER
Index # 101764/2011
Motion # 007

F.T.K CONTRACTING CORP. AND FRANK LEWERY

Third-Party Plaintiff(s),

-against-

THOMAS BROWN, ELIZABETH A. BROWN a/k/a BETSY BROWN AND TERESA B. SMITH,

Third-Party Defendant(s).

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Index # A101764/2011

The following papers numbered 1 to 3 were marked fully submitted on the 24th day of September, 2013:

Motion For Summary Judgment and Dismissal of Complaint by Defendants Public Insurance Adjusters of N.Y. Ltd., Public Insurance Adjusters Limited, Don Wilke, John A. Carino and Marianne Serone, with Supporting Papers and Exhibits (dated May 9, 2013)..... 1

Affirmation In Opposition by Plaintiff Thomas J. Brown and Third-Party Defendants Thomas Brown, Elizabeth A. Brown a/k/a Betsy Brown and Teresa B. Smith, with Supporting Papers and Exhibits (dated July 16, 2013)..... 2

Reply Affirmation by Defendants Public Insurance Adjusters of N.Y. Ltd., Public Insurance Adjusters Limited, Don Wilke, John A. Carino and Marianne Serone, with Supporting Papers and Exhibit (dated September 16, 2013)..... 3

On January 30, 2009, the house owned by plaintiff Thomas Brown ("plaintiff"), which he shared with his wife, was severely damaged in a fire in which his wife perished. At the time of the fire, there was a mortgage on the premises held by HSBC Mortgage Corporation ("HSBC"). The premises was insured against property damage by Chubb Indemnity Insurance Company ("Chubb").

In February of 2009, plaintiff entered into an agreement with defendant Public Insurance Adjusters, Limited ("Public Adjusters") to assist in the preparation, filing, and negotiation of his insurance claims with Chubb. Defendants Don Wilke, John A. Carino and Marianne Serone were employees of Public Adjusters. Plaintiff's sister, third-party defendant Elizabeth ("Betsy") Brown, handled much of the communication with Public Adjusters on behalf of her brother. Also in February of 2009, plaintiff retained defendant Frank Lewery and his company, FTK Contracting Corp. ("FTK"), to handle the renovation and restoration of his house.

Thereafter, various checks were issued by Chubb to compensate plaintiff for the property damage to his house and its contents. It is undisputed that all of the checks were sent by Chubb to Public Adjusters, including the subject check tendered by Chubb to Public Adjusters on April 8, 2009, in the amount of $320,341.90, made payable jointly to both plaintiff and HSBC. Public Adjusters apparently delivered the check to Lewery for re-delivery to plaintiff's sister, but insofar as it appears, the check was fraudulently endorsed in the name of both plaintiff and HSBC, deposited into FTK's bank account, and paid by the drawee bank JP Morgan Chase.

In their motion for summary judgment, defendants Public Insurance Adjusters of N.Y., Ltd., Public Insurance Adjusters, Limited, Don Wilke, John A. Carino and Marianne Serone (hereinafter "defendants") seek dismissal of the complaint against them, which alleges causes of action for fraud (leading to plaintiff's hiring of defendant Lewery and FTK); misrepresentation (to the effect that the insurance company would settle plaintiff's claim more quickly if he were to hire Lewery); conversion (based upon their purportedly improper tender of the check from Chubb to defendant Lewery and the unlawful retention of a portion of its proceeds); breach of contract; unjust enrichment; negligence; and notary misconduct.

The motion is granted in part, and denied in part, as herein provided.

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v. Airborne Freight Corp., 301 AD2d 500, 500–501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard "the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference" (Cortale v. Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion to produce "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial" (Alvarez v. Prospect Hosp., 68 NY2d at 324; Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]).

Here, defendants have met their burden of producing prima facie proof of their entitlement to summary judgment and dismissal of all of the causes of action against them. In this regard, defendants have submitted evidence in the form of deposition testimony that plaintiff hired defendant Lewery and his corporation freely and of his own accord, without any recommendation from any of them; that they made no representation to plaintiff regarding the hiring of either one; that they were only hired by plaintiff to adjust his claim, which they did successfully and therefore did not breach their contract with him; that plaintiff's sister was acting as his agent and had instructed them to turn over all of the insurance company checks to Lewery for delivery to her; that they were therefore acting with express or implied authority in the manner in which they handled the subject check ; that they kept no portion of the proceeds of that check; that Lewery admitted in a letter notarized on May 12, 2011 that he took, endorsed and deposited the check without the plaintiff's permission or knowledge; that such admitted action constitutes a superseding cause of any injury sustained by plaintiff; that defendants were not aware nor could they reasonably have anticipated such misconduct on the part of Lewery; that even if they were negligent in the handling of the check, the actions of defendant JP Morgan Chase in honoring the fraudulently endorsed check absolves them of any fault since the UCC imposes strict liability on a bank which makes payment on a fraudulent instrument; and that the claim of improper notarization is irrelevant to the manner in which the check was handled because it related to an entirely separate document, i.e., a "proof of loss" form. Finally, the movants, in their individual capacities argue that since all of the actions at issue here were taken by them in the course of their employment for the corporate movant, Public Adjusters, they may not be held personally liable.

Nevertheless, in all but three particulars, which will be discussed *infra*, plaintiff has presented sufficient proof in admissible form to demonstrate that material questions of fact exist which warrant a trial. In the first instance, in her affidavit submitted in opposition to the motion, plaintiff's sister denies that she ever instructed any of the moving defendants to deliver any checks from Chubb to defendant Lewery. Thus, a question of fact exists as to whether or not defendants

did so with the express or implied authority which they have claimed. In this regard, the deposition testimony of individual defendants Wilke and Carino is also inconclusive, as it fails to establish a consistent course of conduct in the manner of delivery. To the contrary, it was conceded that defendants delivered some checks to Lewery while others were sent directly to plaintiff's sister through the mail. As a consequence, it is for a jury to determine whether or not defendants were negligent in the handling of the check in question, and/or whether this or other alleged conduct constituted a breach of their contract with plaintiff.

Moreover, notwithstanding the purported 2011 notarized letter attributed to defendant Lewery, the question of whether or not the latter fraudulently endorsed the subject check has been drawn into issue by the repudiation of this alleged admission at his subsequent deposition. As a result, that letter does not conclusively establish a "superseding cause" as a matter of law, especially since plaintiff, his sister, and the individual movants have also denied any role in effectuating the fraudulent endorsement.

In addition, the mere fact that the drawee bank failed to detect the forgeries before honoring the check does not make out a *per se* violation of UCC 3-406 entitled "Negligence Contributing to Alteration or Unauthorized Signature". That section pertinently provides:

> Any person who by his negligence *substantially contributes* to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business (emphasis added).

Here, the question of whether defendants properly handled the check in question and, if so, whether that negligence "substantially contributed" to the apparently fraudulent endorsements, cannot be decided as a matter of law (see Ernst & Co. v. Chemical Bank, 209 AD2d 241, 245[1st Dept 1994]). Thus, it will fall to the trier of fact to determine the question of negligence and whether defendants' negligence, if any, substantially contributed to the affixing of unauthorized endorsements upon which the bank relied in apparent good faith.

On the other hand, plaintiff has failed to raise a material issue of fact with reference to plaintiff's causes of action for (1) conversion, (2) improper notarization, and (3) so much of the remaining causes of action as are against the defendants individually.

With reference to the claim of conversion as alleged in plaintiff's third cause of action, it has been conclusively established that the proceeds of the fraudulently endorsed check were

deposited exclusively into the bank account maintained by defendant Lewery's corporation. No proof to the contrary has been adduced, nor is there any evidence that the moving defendants retained any part of those funds. In fact, plaintiff makes no such claim in his opposing papers. Accordingly, so much of the third cause of action as alleges conversion on the part of the moving defendants must be severed and dismissed.

Additionally, plaintiff has failed to adduce any evidence sufficient to rebut the deposition testimony of the individual defendants that all of the acts underlying the surviving causes of action were performed within the scope of their corporate employment.

It is well settled that the doctrine of respondeat superior renders an employer vicariously liable for the torts of its employees to the extent that those acts are performed within the scope of their employment (Holmes v. Gary Goldberg & Co., 40 AD3d 1033, 1034 [2d Dept 2007]). While the question of whether an employee was acting within the scope of employment is ordinarily one of fact (see e.g. Corson v. City of New York, 290 AD2d 408, 409-410 [2d Dept 2002]), the question may be decided as one of law when there is no conflicting evidence as to the character of the actions allegedly taken by the employee (see Fernandez v. Rustic Inn Inc., 60 AD3d 893, 896-897 [2d Dept 2009]). Here, plaintiff has adduced no evidence suggesting that the acts of the individual movants, even if tortious or in breach of contract, were performed outside the scope of their employment, whether in the manner in which they fulfilled their company's responsibility to plaintiff or their delivery of the subject check to Lewery. As such, they are entitled to summary judgment and dismissal of so much of the complaint as may be brought against them personally.

Finally, in his 12th cause of action plaintiff alleges that his signature was improperly notarized by individual defendant Marianne Serone on a "proof of loss" form on or about April 7, 2009. Assuming *arguendo* that plaintiff is correct, he has failed to produce evidence in admissible form sufficient to demonstrate that this allegedly improper notarization caused him any damage (see Executive Law, Section 135). Consequently, defendants are entitled to summary judgment and dismissal of this cause of action as well.

Accordingly, it is

ORDERED that the motion for summary judgment of defendants Public Insurance Adjusters of N.Y. Ltd, Public Insurance Adjusters Limited, Don Wilke, John A. Carino and Marianne Serone is granted to the extent of dismissing plaintiff's third and twelfth causes of action against them and it is further

ORDERED that the above causes of action against these defendants is hereby severed and dismissed; and it is further

ORDERED that so much of the same motion as is for summary judgment dismissing the complaint in its entirety against the individual defendants Don Wilke, John A. Carino and Marianne Serone is granted; and it is further

ORDERED that the complaint as against these individual defendants is severed and dismissed; and it is further

ORDERED that the balance of the motion for summary judgment is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

E N T E R,

Dated: Oct 21, 2013

Hon. Judith N. McMahon
Justice of the Supreme Court