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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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YRB NYC, INC., Index No.: 110970/10

Plaintiff, Motion Seq. No. 002

-against-

SOVEREIGN BANK OF NEW YORK, CITIBANK, N.A., J.P. MORGAN CHASE BANK, and HERBERT J. BATTISE, III,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for conversion of checks, defendant Santander Bank, N.A. f/k/a Sovereign Bank, N.A. and sued herein as Sovereign Bank of New York ("Santander") moves pursuant to CPLR 3212 for summary judgment and dismissal of plaintiff YRB NYC, Inc.'s ("plaintiff") amended complaint. Plaintiff opposes the motion and cross-moves for summary judgment against Santander, also pursuant to CPLR 3212.[1]

Factual Background

Plaintiff operates a pop-culture magazine known as "Yellow Rat Bastard"; and its CEO/President is Henry Ishay ("Ishay"). The company, which maintains one office, earns revenue by selling advertising space in its magazine.

On March 5, 2007, plaintiff hired defendant Herbert J. Battise ("Battise") as a bookkeeper and accountant. Battise worked for plaintiff for approximately three years until he was terminated.

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[1] Defendants Citibank N.A. and JPMorgan Chase Bank, N.A. i/s/h/a J.P. Morgan Chase Bank submit an affirmation indicating that YRB's cross-motion seeks no relief or judgment against them, and that they have reached a settlement in principle with YRB.

Plaintiff did not conduct a background check before hiring Battise, and knew little about him at the time of his hiring. Battise's job functions included, among other things, contacting advertising clients for payment, collecting and handling checks received from clients, maintaining records for incoming checks and outstanding accounts receivable, and depositing checks into plaintiff's corporate bank account.

Incoming checks from clients were delivered directly to Battise. Plaintiff did not have a policy or procedure in place for logging and/or keeping track of incoming mail and checks, other than the requirement that Battise report all collected payments.

According to Ishay, Battise was a poor employee from the beginning of his tenure; Ishay rated his overall job performance as a "6" out of "10" or "like a D in school." And, although a "9 to 5" employee, Battise was allowed to come and go as he pleased, and he was frequently out of the office. Ishay believed Battise's job performance had declined beginning in the second half of 2008 and into the first half of 2009.

At some point in 2008, Ishay began inquiring with Battise about his decline in collections. Battise excused his lack of collections by pointing to the recession. In any event, plaintiff took no further action to investigate the decline in receivables from this time until Battise's eventual termination in late 2009, other than directing Battise to urge customers to pay their purportedly outstanding bills.

In April 2009, Battise opened an account with Santander (the "Account") in the name of "Yellow RB Group United, Inc." (the "Company"). Battise interacted with branch manager Antoine Valentine ("Valentine") to set up the Account.

In order to open up the Account, Santander required compliance with its account opening

procedures and titling requirements for business checking accounts. As such, Battise was required to produce at least two pieces of business identification. In this regard, Battise produced a certificate of incorporation of the Company, and a letter from the Internal Revenue Service issuing an Employer Identification Number for the Company. Also, Valentine verified Battise's identity as the account's authorized signer by examining his New York State driver's license and credit card.

Additionally, as part of Santander's account opening procedures, Valentine ran a Chex Systems search on the Company, which yielded no record of delinquent or negative banking history, as well as a Qualifile report on Battise as the authorized signer on the Account. No negative reporting was returned. As the opening documentation appeared proper, and no negative banking history was uncovered for the Company or Battise after his research, Valentine opened the Account.

Battise executed a signature card document to open the Account, which listed him as the authorized signer of the Account. The "Business Entity Information" portion of the signature card lists the name of the Company as "Yellow FRB Group United Inc" and the "Account Title & Address" section appears to list the Account in the same way, except that the 'F' in 'FRB' appears to have been whited out.

At around the same time, and for approximately eight months until his discharge from plaintiff in approximately November 2009 for failure to collect adequate revenue, Battise allegedly stole and deposited a number of checks sent to plaintiff for advertising fees made payable to "YRB", "YRB Magazine", or "Yellow Rat Bastard" into the Account. The indorsement section on the backs of the checks contain various printed writings, including "For

Deposit Only"; "Yellow For Deposit Only"; "YRB For Deposit Only" "YRB For Deposit"; and "YRB."

At the same time, Battise still received, recorded and deposited other checks into plaintiff's actual account, although Ishay continued to value his performance as sub-par.

In examining the subject checks at his deposition, Valentine found nothing on their faces which would raise any questions as to the payee's validity, or whether they should have been accepted for deposit into the Account. According to Valentine, payee names are frequently abbreviated on checks as common practice. Also, indorsement of checks was not then, and is not now required, by Santander for deposit of funds, and only is required when a check is being cashed. Valentine also believed none of the indorsements on the checks appeared to be improper, and that none of the checks at issue was improperly presented.

Based on the Account's monthly statements, the Account's balance was allegedly drawn down to $0 by Battise in March 2010; since then, the Account has been closed.

In early-to-mid 2010, plaintiff discovered that Battise had been stealing checks, when it called certain customers with outstanding invoices. Those customers advised that they had already made payment on their bills, and sent plaintiff copies of the front and back of their checks that Battise had deposited into the Account. Plaintiff's subsequent investigation confirmed same.

Plaintiff thereafter filed a police report alleging Battise's theft of company checks.[2] To date, Battise, although named as a defendant, has not been served and has not appeared in this

[2] Thereafter, the District Attorney's office conducted an investigation, and a grand jury was convened; however, the outcome of that proceeding is unclear based on information supplied in discovery.

action.

Arguments

In its moving papers, Santander argues that it acted, at all times, in good-faith, in a commercially reasonable manner, and in accordance with the New York State Uniform Commercial Code ("UCC") § 3-419(3).

The UCC provides that although an instrument is converted when it is paid on a forged indorsement, a depositary bank is not liable if it acts in good-faith and in a commercially reasonable manner. The "imposter rule" of the UCC further makes any indorsement in the name of the named payee legally effective (*i.e.* not forged), which shifts the risk of loss from the bank to the drawer of the subject checks.

The loss should fall upon plaintiff as a risk of its business enterprise rather than upon Santander, because plaintiff, as Battise's employer, was in a better position to prevent such forgeries by reasonable care in the selection or supervision of its employees. Alternatively, plaintiff was in a better position to cover the loss by insurance, which is properly an expense of its business rather than of Santander's. Moreover, the imposter rule makes such indorsements effective irrespective of whether the bank acted commercially reasonably; thus, the UCC imposes no duty of care upon Santander in this situation.

Here, Battise indorsed the majority of the checks as "YRB," in the name of the payee, making the indorsement legally effective (and therefore not forged) with respect to Santander.

Plaintiff was in the best position to select and monitor Battise's conduct and failed to do so, despite the fact that he worked for plaintiff for three years in the same office as Ishay. In hiring an employee to specifically handle company funds that plaintiff counted on as its life

support to keep it afloat, plaintiff performed no background check or other due diligence prior to selecting Battise for the position. Moreover, plaintiff left the reporting of accounts receivable and the reporting of incoming checks to satisfy the same accounts receivable to Battise with no oversight. Thus, plaintiff failed to discover that its own employee was stealing checks for about eight months under its nose, despite the facts that Battise was the only employee charged with collections; collections declined from mid-2008 through mid-2009; and for several months, Ishay believed Battise was performing poorly. Despite the alleged desperate need for advertising revenue, Ishay accepted Battise's excuses and explanations as sufficient for the lack of collections and took no further action to investigate the noticeable decline in receivables during this period.

In fact, plaintiff admits that it should have supervised Battise more closely, and that it was its responsibility to ensure that Battise did not steal. Thus, it was plaintiff's supervisory failures that contributed to Battise's theft, and Santander should not be held liable for plaintiff's negligent hiring and supervision of its own employee, and any loss borne therefrom.

In any event, Santander acted in a commercially reasonable manner based on the documents presented to Valentine to open the Account. The First Department has held that the opening of an account in a plaintiff's name after presentation and review of multiple pieces of business identification. Moreover, a bank acts reasonably when it, in good-faith, deposits checks into an account with a substantially similar title to that of the payee on the check.

In opening the account, Santander acted in accordance with its internal procedures (and otherwise reasonably) by accepting at least two pieces of documentation to verify the existence of the Company, and by verifying Battise's identity. It is undisputed that most of the disputed

checks were made payable to "YRB," a name substantially similar to that of plaintiff and of the titled Account opened by Battise. Moreover, no restrictive indorsements appeared on any of the checks other than "For Deposit Only", "YRB", or "Yellow", which appear to have been placed on the checks by Battise himself. Here, Battise was the sole signatory on the Account as authorized by the Account's signature card; thus, indorsement of any check for deposit into the Account was authorized by the signature card itself. In sum, there was nothing that appeared improper with respect to the deposits, and therefore there was no way for Santander to know about Battise's illicit scheme by examination of the checks or otherwise.

Factually similar case law in the State of New York supports Santander's arguments. And, the UCC provides that plaintiff's own negligence here precludes plaintiff from asserting the alteration or lack of authority against Santander, which paid the checks in good-faith and in a commercially reasonable manner.

In opposition, and in support of its cross-motion, Ishay provides an affidavit and attests that Battise was not the only employee or bookkeeper with collection duties. Also, Ishay claims that there was no way for plaintiff to determine that Battise had stolen and deposited checks into a fraudulent bank account. And, given the harsh economic climate of the late 2000s, it was not unreasonable to believe that some of plaintiff's clients were encountering legitimate difficulty paying their bills.

Contrary to its claims, Santander performed no verification regarding the checks and Account. For example, the signature card was not used in verifying that the checks were being deposited into the same account that appeared on the checks. Moreover, Santander did not verify even one check, as there is no signature on any of the checks that are remotely similar to Battise's

signature as shown on his signature card. Also, there is no account number placed on any of the checks, which were indorsed by a different name than that of the payee. Incidentally, Battise immediately withdrew any money deposited.

At his deposition, Valentine testified that it would not be problematic where a check is made payable to "YRB" and the indorsement says "Yellow." However, he further testified that Santander would "simply take the deposit without any questions whatsoever." Also, Santander does not have a process for reviewing deposits to ensure that they are properly made, and Valentine was unaware of any review of the Account. As to the situation where the payee is one name one day, and another name on another day, Valentine admitted that if that fact was brought to his attention, he would look to see how the account was titled. He further admitted that if the account was titled "Yellow RB Group United" and the check's payee was "YRB Magazine," he might investigate further by reviewing the opening documents for a comparison of relevant names. Valentine would also possibly look for additional documentation, contact the customer or Valentine's regional operations manager, or refer to Santander's policies and procedures.

However, none of the above was done. If Santander had asked Battise to explain or clarify any discrepancy before it, or even merely pulled out Battise's signature card, it would have seen that the checks were being deposited into the wrong account. Thus, while Ishay could not have possibly known that a certain few checks had gone missing, Santander was not only in the best position to detect and prevent the fraud, it was in the only position to do so. Accordingly, it is fully liable for plaintiff's losses.

As to its legal arguments, plaintiff contends that when a bank receives a check for deposit, and the name payable on the check differs from the name on the account in which the

check is to be deposited, the bank has a duty to inquire as to whether it is permissible. Such inquiry must take the form of securing instructions from the plaintiff's duly authorized agent as to whether such check may be deposited into such an account. Here, this duty arose when Battise presented checks made payable to YRB or Yellow Rat Bastard for deposit into an account titled "Yellow FRB United, Inc." And, as noted above, Santander did not take the steps noted by Valentine that would have been proper in this situation. Thus, the fact that Santander did not make the proper inquiry renders it negligent *per se*.

Moreover, when Santander accepted checks for deposit from Battise into the Account, it relied on the directions of one who was without either actual or apparent authority to represent the drawer. Santander was not justified in simply relying on the information on a deposit slip, and was required to inquire further.

Plaintiff additionally maintains that UCC § 3-406(b) requires that a bank confronted with a check with one name being deposited into an account with a different name would show a lack of ordinary care and thus liable to the proper payee. UCC § 4-401 also provides that missing indorsements show a lack of ordinary care on the bank's part. Here, it is relevant that all checks at issue had no indorsements, or had indorsements "written" but not "signed" with the letters "YRB."

Therefore, Battise's lack of indorsements and/or the presence of improper indorsements, does not preclude plaintiff from claiming that Santander failed to act in a commercially reasonable manner. There is no claim that Battise had any actual authority to give instructions as to the ultimate disposition of the monies that were payable to plaintiff. No course of business was shown from which it could be inferred that plaintiff was in the habit of depositing or

transferring funds to the Account. Thus, the usual doctrines of holding another out as one's agent having apparent authority, have no application to this case because Santander asked no questions and merely assumed that the deposit slip presented with the checks represented plaintiff's *bona fide* instructions as to the disposition of the proceeds. As such, Santander could not rely on Battise's directions, as he was without either actual or apparent authority to represent plaintiff.

In reply, Santander contends that although plaintiff filed opposition papers labeled as a "cross-motion" for summary judgment, plaintiff did not set forth any legal standard to be met on such a motion or explain how it met its burden to fulfill that legal standard. Thus, plaintiff's request for relief pursuant to CPLR 3212 is facially deficient and should be denied. Plaintiff's purported cross-motion is nothing more than opposition to Santander's motion, which, in any event, fails to raise a triable issue of material fact sufficient to deny Santander's motion.

As to the merits of plaintiff's opposition, the affidavits submitted in support thereof are inconsistent with Ishay's deposition testimony. In his affidavit, Ishay states that Battise was hired as a "bookkeeper and accountant," whereas in his deposition, he testified that Battise was the first and only employee hired as a "collector." In fact, Ishay testified that Battise was "not really an accountant," and that his job was "mostly collection."

Although Ishay's affidavit states that one of Battise's duties was to collect and deposit payments made by check, it provides that Battise was not the only employee or bookkeeper with this duty. However, Ishay testified that Battise "definitely [performed] one hundred percent of the collection." In sum, according to Ishay's testimony, only Battise was charged with collecting and recording incoming checks.

The affidavit further states that Ishay and plaintiff's accountant checked and reviewed Battise's work, the records kept by him, and outstanding payments and deposits. While it is argued that there was much review of all employees' work, especially Battise's and others' (those responsible for collecting fees and making deposits), the affidavit does not make this representation, and Ishay fails to attest to how or how often Battise's work was reviewed. Ishay's deposition testimony tells a different story, that David Ishay (Ishay's nephew) was in charge of supervising Battise, and until a few months before he was terminated, Ishay had little contact with Battise.

Plaintiff ignores the fact that Ishay admits throughout his testimony that Battise was not properly supervised. Moreover, it is undisputed that no action was taken by plaintiff until several months after Battise began stealing checks, even though Ishay admitted that the missing payments were from clients who should not be delinquent and who paid on time. Further, Ishay admitted in his deposition that plaintiff was responsible for preventing Battise from stealing the subject checks. Thus, plaintiff knew it was in the best position to prevent the theft, and counsel's unsupported statement that the bank was in the only position to detect and prevent the fraud is a red herring.

The allegations that Battise opened up an account titled "Yellow FRB Group United, Inc." are specious and unsupported by the record. Rather, the account opening statement/signature card, supporting corporate and tax documents, and account statements annexed to the moving papers indicate that the Account was titled "Yellow RB United, Inc."

Plaintiff's assertion that Santander must verify and inquire as to each deposit in the form of securing instructions from plaintiff's duly authorized agent as to whether a check may be

deposited into such an account is unsupported by any authority. Contrary to plaintiff's contentions, no indorsement was then or is now required to deposit checks. Valentine attested to a review of the subject checks during his deposition and that all checks were properly deposited. Moreover, his statements that he might take different action regarding discoveries such as different names on checks and accounts, and if a teller had raised concerns to him were hypothetical at best. As set forth in his affidavit, Valentine found nothing on the face of the checks while would raise any question as to the payee's validity or whether same should be accepted for deposit into the Account. And, plaintiff's claim that the teller "never checked" the signature card or the opening documents of the Account is unsupported by the record.

Lastly, plaintiff's cited cases are factually distinguishable from the present matter. Those cases concern instances of an employee diverting funds from that company's existing account where the bank was the named payee, or where the checks at issue contained one indorsement where two were required. Because Battise had actual authority to transact business with respect to the Account as appears on the signature card, no further instruction from a third-party was required by Santander in accepting funds for deposit.

Discussion

It is well established that the "proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). However, the moving party must

demonstrate entitlement to judgment as a matter of law (*see Zuckerman, supra*), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v. CAC Business Ventures, Inc.*, 52 A.D.3d 327, 859 N.Y.S.2d 646 [1st Dept 2008]; *Murray v. City of New York*, 74 A.D.3d 550, 903 N.Y.S.2d 34 [1st Dept 2010]).

CPLR §3212(b) provides, in relevant part, that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion" (*see also Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 978 N.Y.S.2d 13 [1st Dept 2013]). Moreover, the court may search the record to grant summary judgment to a non-moving party entitled to summary judgment, but the issue must be related to the issues raised in the summary judgment motion (*see* CPLR §3212(b); *New Hampshire Ins. Co. v MF Global, Inc.*, 108 A.D.3d 463, 970 N.Y.S.2d 16 [1st Dept 2013]; *Siegel Consultants, Ltd. v Nokia, Inc.*, 85 A.D.3d 654, 926 N.Y.S.2d 82 [1st Dept 2011]). Searching the record to grant summary judgment to a non-moving party affords an expedient resolution of a claim in that party's favor once the court has determined the party is entitled to relief (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 N.Y.2d 106, 112 [1984]).

As such, despite Santander's contentions, it is of no moment whether plaintiff's submission is labeled as a cross-motion for summary judgment in addition to constituting opposition to Santander's motion, as the issue at stake in both submissions is whether Santander is liable to plaintiff for conversion of the subject checks.

UCC § 3-419(1) provides that an instrument is converted when it is paid on a forged indorsement. Section 3-419(3) provides that a "depositary bank, which has in good-faith and in accordance with the reasonable commercial standards applicable to its business, which dealt with

an instrument on behalf of an individual who was not its true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in its possession." "Good-faith" is defined by UCC § 1-201(19) as "honest in fact in the conduct or transaction concerned."

UCC § 3-406 provides that "any person who by his negligence substantially contributes ... to the making of an unauthorized signature is precluded from asserting . . . the 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."

In general, banks that accept instruments for deposit with unauthorized indorsements are liable to the instrument's true owner; however this presumption is limited by UCC § 3-419(3), as noted above (*see National Union Fire Ins. Co. of Pittsburgh, PA v. Castellano*, 102 A.D.3d 662, 957 N.Y.S.2d 726 [2d Dept 2013]).

UCC § 3-405(1)(c) (also known as the "imposter rule," or the "fictitious payee" or "padded payroll" rule) provides that "an indorsement by any person in the name of a named payee is effective if . . .an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest."

The court finds that based on the signature card, IRS taxpayer identification number letter, the certificate of incorporation, and W-9 form submitted with the moving papers, the Account was entitled "Yellow RB Group United Inc." Thus, the "imposter rule" of 3-405(1)(c) is inapplicable because none of the subject checks contains an indorsement "in the name of [the] named payee" (*see Millens v. Kingston Trust Co.*, 118 Misc.2d 512, 461 N.Y.S.2d 938 [Sup Ct

Ulster Cty 1983]).

It is undisputed that the Account's balance is $0 and was closed, and plaintiff's complaint against Santander is based on allegations that it did not act commercially reasonably "in cashing checks of defendant, Battise, and [in failing] to prevent the misappropriation of funds . . . all in violation of New York Laws dealing with false bank accounts and cashing of false checks." Moreover, the existence of the UCC bars any common law causes of action based on such allegations (*see Prudential-Bache Securities, Inc. v. Citibank, N.A.*, 73 N.Y.2d 263 [1989]). Accordingly, the court will evaluate the instant motions under UCC § 3-419(3), which would preclude a finding of liability against Santander if the court can determine as a matter of law that it acted in good-faith and commercially reasonably.

Whether a bank has acted in a commercially reasonable manner with respect to accepting for deposit an instrument from someone who was not the true owner is generally a question of fact (*see Shivers v. Citibank, N.A.*, 12 A.D.3d 248, 783 N.Y.S.2d 818 [1st Dept 2004]). Two exceptions have been carved out of this basic rule: one, if the variance between the payee and the indorsement is small, acceptance by the bank is deemed to be commercially reasonable as a matter of law; and two, where the bank has provided expert testimony as to the commercial reasonableness of its actions (*see Hochsel, Inc. v. HSBC Bank USA*, 2009 WL 6395099 [Sup Ct New York Cty 2009], *citing Calray Gas Service Inc v Berry*, 1009 NY App. Div. Lexis 16862, 12 UCC Rep Serv (Callaghan) 130 [1st Dept 1990]; *B.D.G.S. Inc. v Balio*, 8 N.Y.3d 106 [2006]; *29th Street Corp. v New York Community Bank*, 2 A.D.3d 838, 769 N.Y.S.2d 734 [2d Dept 2003]; *Penny Technologies, Inc. v Citibank, N.A.*, 248 AD2d 217, 669 N.Y.S.2d 816 [1st Dept 1998]).

Santander did not supply any expert testimony supporting its claim that its actions were commercially reasonable. As to the checks themselves, on four of them, they contain only the writing "For Deposit Only"; or the variance between them ("YRB" vs. "Yellow For Deposit Only") is not sufficiently small that the court can make a determination as a matter of law (*compare 29th St. Corp.*, *supra*, (bank acted commercially reasonable when it accepted checks payable to "29th Street Corp." and indorsed "29th Street" for deposit into the "29th Street Company" account); *Penny Technologies, supra*, (same result when checks were payable to "Penny Technologies, Inc.", and indorsed as "Penny Technologies").

Thus, as to these four checks, Santander's motion and plaintiff's cross-motion is denied, as a question of fact exists as to whether Santander's conduct as to these checks was commercially reasonable (*see Shivers*, *supra*). As to the checks which only listed "For Deposit Only" on their backs, Santander's policy of not requiring indorsement for deposit is not dispositive of this issue, given the controlling case law.

As to the remaining checks, seven of them list both the payee and indorsement as "YRB"; thus, the same reasoning applies to the check with the payee "YRB Magazine" and indorsement "YRB".

The next questions therefore are whether, based on the opening documents supplied by Battise and the remaining checks themselves, it was proper for Santander to: (a) open the Account (titled "Yellow RB Group United Inc."); and (b) accept those checks for deposit into the Account.

Santander establishes *prima facie* that it acted in a commercially reasonable manner in opening the Account by, *inter alia*, acting in accordance with its procedures which required

review of at least two pieces of business identification (here the certificate of incorporation, IRS letter, and W-9 form) , as well as on Valentine's review of Battise's identity as authorized signer, based on his driver's license and credit card (*see Manhattan Med. Diagnostic & Rehabilitation, P.C. v Wachovia Natl. Bank, N.A.*, 49 A.D.3d 461, 857 N.Y.S.2d 55 [1st Dept 2008]); *Sybedon Corp. v Bank Leumi Trust Co. of N.Y.*, 224 A.D.2d 320, 638 N.Y.S.2d 50 [1st Dept 1996]).

However, Santander fails to meet its burden on the issue of whether it was commercially reasonable for Santander to accept the remaining checks for deposit, given the lack of expert evidence establishing the reasonableness of Santander's actions, combined with the fact that the payee name on those checks was significantly different from the name on the Account (*compare 29th St. Corp., supra; Penny Technologies, supra*; *Andre Romanelli, Inc. v. Citibank, N.A.*, 2008 WL 1840173, 2008 N.Y. Slip. Op. 31105(U) [Sup Ct New York Cty 2008] *aff'd* 60 A.D.3d 428, 875 N.Y.S.2d 14 [1st Dept 2009]) (same result where checks were made payable to "Andre Romanelli International, Inc." when account was in the name of "Andre Romanelli, Inc.");

As is evident in those cases where the courts found that the difference in payee and account name was insignificant, the difference between payee and account name existed merely with respect to the corporate designation following the entity's proper name ("29th Street Corp." vs. "29th Street Company"; "Penny Technologies, Inc." vs. "Penny Technologies"; and "Andre Romanelli International, Inc." vs. "Andre Romanelli, Inc.").

In contrast, the payee name on the remaining checks at issue herein was either "YRB" or "YRB Magazine"; but the Account is entitled "Yellow RB Group United Inc." And, although Valentine stated in his affidavit that the names of payees are frequently abbreviated on checks as common practice, this contention is unsupported by expert testimony or any other authority,

except for the aforementioned, distinguishable cases.

Thus, because Santander has failed to meet its *prima facie* burden, and an issue of fact exists as to the remaining checks, the court's inquiry ends here. Santander's contentions based on UCC 3-406, which pertain to plaintiff's alleged contributory negligence, are irrelevant, as Santander failed to first establish its reasonable conduct (*see Scolnick v. Bank One, N.A.*, 2014 WL 957005, * 8, 2014 N.Y. Slip Op. 30612(U) [Sup Ct New York Cty 2014]) ("To prevail, Chase must prove first that it acted in good faith and in accordance with reasonable commercial standards in accepting the forged checks. If it does, Chase must then show that the plaintiffs were negligent, and that negligence substantially contributed to the forgery. Chase bears the burden of proof as to all these elements.")

Likewise, as to its contentions not already disposed of by the court, plaintiff fails to establish its burden on summary judgment, as such claims are either speculative or unsupported by case law (*see Lawyers' Fund for Client Protection of State v. Gateway State Bank*, 273 A.D.2d 565, 709 N.Y.S.2d 243 [3d Dept 2000] (speculative and conclusory assertion insufficient to establish argument regarding commercially reasonable standards). For example, plaintiff fails to provide any authority for its contention that: (a) the bank is required to inquire as to whether a deposit is permissible in the situation where the name payable on a check differs from the name on the account in which the check is to be deposited; and (b) the inquiry must take the form of securing instructions from the plaintiff's duly-authorized agent as to whether such instrument may be deposited into such an account.[3]

Lastly, plaintiff's cases cited in support of its cross-motion are inapposite, as they pertain

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[3] On this note, the court's research did not locate any authority supporting this claim.

to scenarios where the defendant bank was the payee (*see Arrow Bldrs. Supply Corp. v Royal Natl. Bank of N.Y.*, 21 N.Y.2d 428, 288 N.Y.S.2d 609 [1st Dept 1968]; *Matteawan Mfg. Co. v Chemical Bank & Trust Co.*, 244 A.D. 404, 279 N.Y.S. 495 [1st Dept 1935]), or the issue of indorsements concerned a failure to produce the required number of indorsements in those particular cases (*see Putnam Rolling Ladder Co., Inc. v. Manufacturers Hanover Trust Co.*, 74 N.Y.2d 340 [1989]; *Murray Walter, Inc. v. Marine Midland Bank*, 103 A.D.2d 466, 480 N.Y.S.2d 631 [3d Dept 1984]). Plaintiff's other cases do not interpret New York's UCC, and are not binding on this court.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Santander's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry within 20 days.

This constitutes the decision and order of the Court.

Dated: June 16, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD