IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1103

Filed: 3 May 2016

Lincoln County, No. 13 CVS 383

JOSEPH LEE GAY, Individually and on Behalf of all Persons Similarly Situated, Plaintiff,

v.

PEOPLES BANK, Defendant.

Appeal by Plaintiff from judgment entered 10 June 2015 by Judge Louis A. Bledsoe, III in Lincoln County Superior Court. Cross-appeal by Defendant from judgment entered 17 April 2014 by Judge Calvin E. Murphy in Lincoln County Superior Court. Heard in the Court of Appeals 25 February 2016.

Squitieri & Fearon, LLP, by Stephen J. Fearon, Jr., pro hac vice; Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Amber R. Mueggenburg[1]*; Greg Coleman Law PC, by Greg Coleman, pro hac vice, for Plaintiff-Appellant/Cross-Appellee and the Proposed Class.*

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith and Reid L. Phillips for Defendant-Appellee/Cross-Appellant.

INMAN, Judge.

[1] Stephen L. Palmer was listed as one of Plaintiff-Appellant's attorneys of record in the brief and reply brief. On 9 February 2016, this Court allowed Mr. Palmer's motion to withdraw and substitute Amber R. Mueggenburg as counsel of record.

Plaintiff Joseph Lee Gay ("Plaintiff") appeals from summary judgment in favor of Defendant Peoples Bank and dismissal of claims for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, unjust enrichment, and violation of North Carolina's unfair and deceptive trade practices statute. We affirm the trial court's order granting summary judgment.[2]

Factual and Procedural History

This dispute arises out of overdraft fees incurred by Plaintiff and other customers of Defendant Peoples Bank ("Peoples Bank" or "the Bank") between 6 June 2008 and on or about 1 July 2011.[3] Peoples Bank provides retail banking services to thousands of customers through 22 branches in North Carolina. These retail services include issuing debit cards, allowing customers to transact with third parties using funds paid directly from their checking accounts.

On 3 July 2008, Plaintiff opened a checking account with Peoples Bank. At that time, he agreed to terms provided in the following documents: (1) Terms and Conditions of the Account Agreement ("the Terms and Conditions"); (2) Terms and Conditions Addendum ("the Addendum"); (3) Funds Availability Act disclosure; (4) Electronic Funds Transfers disclosures, Peoples Bank 24 Express & People's Bank 24

[2] Because this Court affirms the trial court's order granting summary judgment, Peoples Bank's cross appeal is dismissed as moot.

[3] The termination date for the class period appears somewhat unclear. 1 July 2011 is the date when Peoples Bank changed its posting transactions in the manner specified by the newly issued FDIC guidance. However, as Judge Bledsoe noted, "a determination of the end date for the class period is not necessary to resolve Defendant's Motion."

Express Check Terms, Conditions, and Agreements ("EFT Agreements"); (5) Truth-in-savings disclosures; (6) No Bounce Advantage (overdraft protection) disclosure; and (7) privacy disclosure (collectively, the "Account Agreement Documents").

On 14 September 2009, Plaintiff was charged eleven overdraft fees of $33 each for the payment of ATM and/or one-time debit card transactions drawing funds from his Peoples Bank Checking Account. Peoples Bank refunded nine of the eleven fees within the same week as they were assessed.

On 25 March 2013, Plaintiff filed a class action complaint against Peoples Bank, alleging the Bank had assessed "improper and multiple overdraft charges." Plaintiff claimed that Peoples Bank "maximized its income from overdraft fees by manipulating the timing and order in which customer debit card charges were processed, charging overdraft fees on accounts that were not actually overdrawn." Plaintiff's complaint asserted claims against Peoples Bank for breach of contract, breach of the covenant of good faith and fair dealing, conversion, unjust enrichment, and unfair and deceptive trade practices under N.C. Gen. Stat. §§ 75–1.1, *et seq*.

Peoples Bank moved for judgment on the pleadings on 6 June 2013. Judge Calvin Murphy denied the Bank's motion in an order entered on 17 April 2014.

Peoples Bank filed a motion for summary judgment on 27 October 2014. Judge Bledsoe conducted a hearing on 14 March 2015, and entered an order on 10 June 2015 granting Peoples Bank's motion and dismissing Plaintiff's complaint. Plaintiff timely

appealed the summary judgment order. Peoples Bank filed a cross appeal from the order denying its motion for judgement on the pleadings.

Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and internal quotation marks omitted; italics added). "A movant may meet its burden by showing either that: (1) an essential element of the non-movant's case is nonexistent; or (2) based upon discovery, the non-movant cannot produce evidence to support an essential element of its claim; or (3) the movant cannot surmount an affirmative defense which would bar the claim." *McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 332, 713 S.E.2d 495, 499 (2011) (*quoting Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001).

Analysis

I. Account Agreement Documents

Plaintiff, like all customers of Peoples Bank, was provided with the Account Agreement Documents upon opening his account with the Bank. The EFT Agreements, regarding electronic fund transfers, state in pertinent part:

> You should treat all banking card transactions as immediate withdrawals from your account and reflect them as such in your personal records.
>
> . . . .
>
> 5. . . . Cardholder agrees not to use the card (or allow it to be used) to make any withdrawal, transfer or payment from any Peoples Bank Checking Account, NOW Account, Money Market Account, or Statement Savings Account which results in an overdraft on said account, except when and as authorized by agreement by Bank and Cardholder. Cardholder further agrees to assume responsibility for all authorized transactions arising from the use of the ATM or debit card.
>
> . . . .
>
> 13. When you use the debit card to pay for goods or services at a merchant or POS transaction, you agree:
>
> a. That such use, whether or not you have signed any sales authorization, will constitute a simultaneous withdrawal from and/or demand from your checking account, even though the transaction may not actually be posted to that account.
>
> b. The merchant may be required to obtain an authorization from us for any transaction over a certain dollar amount. The available balance in your checking account will be reduced by the amount of the transaction for which the merchant has received authorization from us, even if the documentation evidencing the transaction has not yet been received and processed by us. When the documentation has cleared through us, the "hold" placed on

> your account for the amount of the transaction will be released and your checking account will be debited for the amount of the transaction. (You agree to release us from liability based upon failure to authorize subsequent transfers and/or failure to pay other items drawn on your checking account because the processing of a previously authorized transaction may not be completed.)

A second pertinent written agreement provided to Plaintiff, the Addendum, states in pertinent part:

> **Payment Order of Items** – The law permits us to pay items (such as checks or drafts) drawn on your account in any order. To assist you in handling your account with us, we are providing you with the following information regarding how we process the items that you write. When processing items drawn on your account, our policy is to pay them according to the dollar amount. We pay the largest items first. The order in which items are paid is important if there is not enough money in your account to pay all of the items that are presented. Our payment policy will cause your largest, and perhaps more important, items to be paid first (such as your rent or mortgage payment), but may increase the overdraft or NSF fees you have to pay if funds are not available to pay all of the items. If an item is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item (NSF). The amounts of overdraft and NSF fees are disclosed elsewhere.

When he opened his account, Plaintiff was also provided with the Bank's No Bounce Advantage Disclosure. This form disclosure was reiterated in 2008 and 2010

marketing brochures provided to Plaintiff. All versions[4] of the No Bounce Advantage Disclosure provided to customers during the relevant period state in pertinent part:

> In the normal course of business, we generally pay electronic transactions first and then checks beginning with the highest dollar amount, per the bank's policy. . . . Also, please be aware that the order of item payment may create multiple overdrafts during a single banking day for which you will be charged our paid item NSF fee of $33 for each overdraft paid.
>
> . . . .
>
> You will be notified by mail of any non-sufficient funds items paid or returned that you may have; however, we have no obligation to notify you before we pay or return any item.
>
> . . . .
>
> No Bounce Advantage should not be viewed as an encouragement to overdraw your account. As always, we encourage you to manage your finances responsibly. If you would like to have this service removed from your account, please call (828) 466-1765 or (877) 802-1212.

II. Breach of Contract

"A party asserting breach of contract must show: (1) existence of a valid contract; and (2) breach of the terms of that contract." *Cater v. Barker*, 172 N.C. App. 441, 445, 617 S.E.2d 113, 116 (2005) (citations omitted) *aff'd per curiam*, 360 N.C. 357, 625 S.E.2d 778 (2006).

[4] The No Bounce Advance disclosure was revised 31 January 2008, 1 September 2008, and 1 September 2010.

Plaintiff contends there is a genuine issue of material fact regarding whether the Bank reordered the sequence of electronic debit transactions over multiple days in breach of the terms of their contract as reflected in the Account Agreement Documents. Specifically, Plaintiff argues the EFT Agreements required the Bank to process debit transactions in chronological order. Additionally, Plaintiff asserts that the trial court made impermissible factual and credibility findings that Peoples Bank did not charge hold fees and did not post debits before credits.

A. Chronological Posting

The EFT Agreements provide in pertinent part:

> 13. When you use the debit card to pay for goods or services at a merchant or POS transaction, you agree:
>
> a. That such use, whether or not you have signed any sales authorization, will constitute a simultaneous withdrawal from and/or demand from your checking account, *even though the transaction may not actually be posted to that account*.

(emphasis added).

We hold that the language "simultaneous withdrawal" in the EFT Agreements does not implicate an instantaneous payment order, considering the additional language in the sentence, "even though the transaction may not actually be posted to that account." In context, the admonition in the EFT Agreements that customers "should treat all banking card transactions as immediate withdrawals from your account and reflect them as such in your personal records" relates to the available

balance in a person's account and how to manage it. The EFT Agreements also advise customers "to assume responsibility for all authorized transactions arising from the use of the ATM or debit card." Because the EFT Agreements did not represent that transactions were posted instantaneously, the Bank was not obligated to post transactions in real-time chronological order.

B. High-to-Low Posting

Plaintiff also argues that the trial court mistakenly conflated negotiable instruments with electronic debits in concluding that the Bank was authorized to post all debits to Plaintiff's account in order of amount from high to low. Specifically, Plaintiff argues that the term "items" in the Addendum, which refers to paying "the largest items first," does not include debit transactions. We disagree.

When read together, the Addendum and the No Bounce Advantage disclosures establish Peoples Bank's high-to-low payment order. The Addendum states: "When processing items drawn on your account, our policy is to pay them according to the dollar amount. We pay the largest items first." Likewise, the No Bounce Advantage Brochure explains: "In the normal course of business, we generally pay electronic transactions first and then checks beginning with the highest dollar amount, per the bank's policy." We hold that there is no ambiguity in the language of the Account Agreement Documents regarding Peoples Bank's payment priority, so that the Bank was authorized to post all transactions—including checks, ATM withdrawals and debit card payments to third parties—in high-to-low order.

The EFT disclosures are non-exhaustive and are presented to customers along with the other Account Agreement Documents. Therefore, all of these documents must be read together. A contract must be considered in its entirety, as "[t]he problem is not what the separate parts mean, but what the contract means when considered as a whole." *Sutton v. Messer*, 173 N.C. App. 521, 525, 620 S.E.2d 19, 22 (2005) (quoting *Atlantic & N.C. R.R. Co. v. Atlantic & N.C. Co.*, 147 N.C. 368, 382, 61 S.E. 185, 190 (1908)). The first sentence of the Addendum states: "The law permits us to pay items (such as checks or drafts) drawn on your account in any order." Despite Plaintiff's contention, we hold that the Addendum contemplates a variety of debit transactions, and the parenthetical "(such as checks or draft(s))" following the word "items" is merely illustrative and not exhaustive.

Language in the other Account Agreement Documents supports our interpretation of "items" to include debit card transactions. Each of the EFT Agreements provides: "You agree to release us from liability based upon failure to authorize subsequent transfers and/or failure to pay other *items* drawn on your checking account because the processing of a previously authorized transaction may not be completed." (emphasis added). It defies reason that in this context, the Bank would only release itself from liability for its failure to pay checks or drafts drawn upon a customer's account. Additionally, the No Bounce Disclosure states: "you will be mailed notice whenever *items* are paid using the No Bounce Advantage overdraft privilege showing the amount, the check number (if applicable) and the insufficient

fund fee so you will know the amount to subtract when balancing your checkbook." (emphasis added) It would be nonsensical for a customer to receive notice only when checks and drafts, but not debits, were paid using overdraft protection. Thus, although the Addendum does not expressly define "item" to include electronic debit transactions, the plain meaning of the term is easily discerned by other Account Agreement Documents and is unambiguous.

We hold that Peoples Bank's policies disclosed in the Account Agreement Documents, which constitute the contract between Peoples Bank and Plaintiff, allowed the Bank to post transactions—including electronic debits—in a high-to-low order. Accordingly, there is no issue of material fact regarding Peoples Bank's posting order.

C. Overdraft Charge When Not Overdrawn/Processing Debits Before Credits

Plaintiff contends that the trial court made impermissible factual and credibility findings that Peoples Bank did not charge hold fees and did not post debits before credits. We disagree.

The Bank mailed its customers a monthly account statement. The Bank presented deposition testimony that the monthly statement did not present a customer's "true running balance," but was instead a non-sequential list of transactions and NSF fees that occurred in a particular business day. The purpose of the monthly account statement was "merely for [the customer] to reconcile his account." However, for each and every overdraft, the Bank sent a Notice of

Insufficient Funds to its customers to show the specific transactions that caused the overdraft fee that had been incurred.

Plaintiff contends that the Bank charged an overdraft fee on a positive account on 21 August 2008, because according to his monthly statement, "he had a balance of $17.60, spent $9.23, and nevertheless incurred a $32.00 overdraft fee." In support of this contention, Plaintiff presented to the trial court his monthly statement. However, the Bank presented evidence that the Notice of Insufficient Funds, and not the monthly statement, is the document that reflects a customer's account balance at the time an overdraft fee is incurred. Plaintiff presented no evidence to refute this distinction between these two documents. *See McKinnon*, 213 N.C. App. at 332, 713 S.E.2d at 499 (The movant can meet the initial burden of proving no genuine issue of material fact exists by showing that "based upon discovery, the non-movant cannot produce evidence to support an essential element of its claim. . . . ."). The burden then shifted to Plaintiff to "produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial." *Id.* (internal quotation marks, citations, and italicization omitted). Plaintiff did not present in evidence a Notice of Insufficient Funds from 21 August, the document correlating to the specific overdraft at issue. Because Plaintiff failed to present evidence showing the exact date the hold fee was charged, there is no evidence that the Bank charged an improper hold fee at a time when Plaintiff's

account had a positive balance. Plaintiff, therefore, failed to present evidence sufficient to raise a genuine issue of fact with regard to this issue.

Plaintiff also points to his account statement for 9 January 2012 as additional evidence that the Bank posted credits before debits or charged an overdraft fee on a positive account. However, the Notice of Insufficient Funds for that date, provided in the record, shows that Plaintiff incurred a fee for a $248.79 transaction that the Bank attempted to clear on a balance of $107.69 on Friday, 6 January 2012. Plaintiff's overdraft transaction was processed the next banking day, Monday, 9 January 2012. Therefore, the evidence Plaintiff presented on this issue shows that the Bank processed the overdraft fee on the business day after Plaintiff's transaction which overdrew his account balance, *i.e.* the Bank did not assess an improper fee on a positive account.

III. Covenant of Good Faith & Fair Dealing

Plaintiff contends the trial court erred in granting summary judgment on his claim for breach of the covenant of good faith and fair dealing. Plaintiff argues the Bank breached its duty of good faith and fair dealing when it abused its discretion in two ways to generate profits: (1) failing to decline transactions in which customers presented a debit card with insufficient funds and (2) failing to decline transactions that would result in a negative balance greater than $300. We disagree.

"In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the

benefits of the agreement." *Sunset Beach Dev., LLC v. AMEC, Inc.*, 196 N.C. App. 202, 217, 675 S.E.2d 46, 57 (2009) (citation and quotation marks omitted).

The express language of the Account Agreement Documents establishes that Peoples Bank had the discretion to pay transactions or return them for insufficient funds. "All parties to a contract must act upon principles of good faith and fair dealing to accomplish the purpose of an agreement, and therefore each has a duty to adhere to the presuppositions of the contract for meeting this purpose." *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005). Here, there is no evidence that the Bank intended at all times to pay NSF items, nor is any such intention presupposed in the Account Agreement Documents. *See Lane v. Scarborough*, 284 N.C. 407, 411, 200 S.E.2d 622, 625 (1973) ("No meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions.") (internal alterations omitted). Plaintiff offers only speculation and no evidence that the Bank abused its discretion for the purpose of generating profits. Therefore, there is no issue of material fact regarding whether Peoples Bank breached the implied covenant of good faith and fair dealing.

IV. Conversion

Plaintiff contends there is an issue of material fact regarding whether Peoples Bank wrongfully converted Plaintiff's funds by charging unauthorized overdraft fees. Specifically, Plaintiff alleges that People's Bank "was not authorized by the contract, or by law, to extract funds from [Plaintiff] for overdrafts that resulted from the Bank's

undisclosed practice of reordering debit transactions." (emphasis added). We disagree.

"[C]onversion is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Myers v. Catoe Constr. Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986).

Here, People's Bank disclosed in the Terms and Conditions Agreement that it would charge customers a fee for overdraft charges:

> Each of you also agrees to be jointly and severally (individually) liable for any account shortage (resulting from charges *or overdrafts*, whether caused by you or another with access to this account. This liability is due immediately, and can be deducted directly from the account balance whenever sufficient funds are available. You have no right to defer payment of this liability, and you are liable regardless of whether you signed the item or benefited from the charge or overdraft.

(emphasis added).

Plaintiff does not deny that on 14 September, he should have accrued some overdraft fees, but contends that, as a result of reordering transactions, Peoples Bank charged him more fees than it was authorized. However, as discussed above, Peoples Bank adequately disclosed its high to low policy to Plaintiff and other customers in its Account Agreement Documents. Additionally, Peoples Bank disclosed its overdraft protection policy in the No Bounce Advantage disclosures and marketing brochures it provided Plaintiff and other customers. Therefore, as there was no

evidence tending to show that the overdraft fees assessed by the Bank were unauthorized, there was no genuine issue of material fact regarding Plaintiff's conversion claim.

V. Unjust Enrichment

Plaintiff contends that there is a genuine issue of material fact regarding whether the Account Agreement Documents allowed People's Bank's overdraft fee policy, and thus whether Plaintiff was entitled to restitution. Additionally, Plaintiff contends the trial court erred in dismissing Plaintiff's unjust enrichment claim because the express agreement the court relied upon did not cover "the subject matter at issue." Again, we disagree.

"In order to properly set out a claim for unjust enrichment, a plaintiff must allege that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000).

Plaintiff contends that in dismissing his unjust enrichment claims, the trial court relied predominately on the Addendum, which Plaintiff argues does not concern the ordering of electronic debits. However, as discussed above, the Account Agreement Documents, read together, expressly disclose Peoples Bank's high-to-low order, permit the Bank to assess the overdraft fees it charged, and apply to all transactions, including debits. Our Supreme Court has held that "[i]f there is a

contract between the parties the contract governs the claim and the law will not imply a contract." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). *See also Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (holding that "[i]t is a well[-]established principle that an express contract precludes an implied contract with reference to the same matter"). Here, because we hold that the Account Agreement Documents apply to all transactions, it follows that the terms of the Addendum relate to the same "subject matter at issue" as the other documents. Therefore, the unjust enrichment claim was properly dismissed by the trial court.

VI. UDTP

Plaintiff also argues there are genuine issues of material fact regarding his unfair and deceptive trade practices claim.

"To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *McKinnon*, 213 N.C. App. at 340, 713 S.E.2d at 504 (2011) (citations and internal quotation marks omitted).

Plaintiff argues that the controlling documents prohibited the Bank's overdraft practices, and that even if Peoples Bank technically disclosed its "reordering and hold fee scheme," its practices were nevertheless unfair and deceptive.

First, as discussed above, the Account Agreement Documents unambiguously stated the Bank's high-to-low dollar amount priority for posting transactions.

The Addendum informed customers, including Plaintiff, that the law permits the Bank to pay items in any order, yet also explained that "[t]o assist you in handling your account with us, we are providing you with the following information regarding how we process the items that you write." The paragraph further explained that "[w]hen processing items drawn on your account, our policy is to pay them according to the dollar amount," and explained the policy behind the high-to-low payment order.

Plaintiff cites in support of his argument *Gutierrez v. Wells Fargo & Co*., in which the defendant bank's account agreement stated the following:

> The Bank may post items presented against the Account in any order the Bank chooses, unless the laws governing your Account either requires or prohibits a particular order. For example, the Bank may, if it chooses, post items in the order of the highest dollar amount to the lowest dollar amount. The Bank may change the order of posting items to the Account at any time without notice. If more than one item is presented to the Bank for payment . . . the overdraft and returned item fees assessed may be affected by the order that the bank chooses to pay those items. . . . For example, if the Bank pays items in the order of highest to lowest dollar amount the total number of overdraft and returned item fees you are charged may be larger than if the bank were to pay the items in the order of lowest to highest dollar amount.

622 F. Supp. 2d 946, 949 (N.D. Cal. 2009). Unlike the bank in *Gutierrez*, however, which told its customers that it may post items "in any order the Bank chooses," Peoples Bank expressly informed its customers that "[w]e pay the largest items first."

Additionally, Peoples Bank disclosed its overdraft protection policy in the No Bounce Advantage disclosures and marketing brochures it provided Plaintiff and

other customers. Plaintiff, like all customers, had the option to optout of the overdraft protection service, which he eventually did. However, prior to opting out of the overdraft protection service, Plaintiff was solely responsible for any overdraft fees he incurred, as they were based upon polices previously disclosed by the Bank. This is because Plaintiff authorized the Bank to charge his account "for all authorized transactions arising from the use of the ATM or debit card" and agreed to not use the card in a manner "which results in an overdraft on said account, except when and as authorized by agreement by Bank and Cardholder." Furthermore, Plaintiff agreed to "assume responsibility for all authorized transactions arising from the use of the ATM or debit card."

Plaintiff contends that even if the reordering and hold fee practices were disclosed, they were sufficiently unfair and deceptive to support his UDTP claim. In support of this proposition, Plaintiff argues that "almost every other court throughout the country considering analogous state consumer protection claims" has found similar overdraft practices to be unfair or deceptive. However, in each of the cases cited by Plaintiff, the bank customer had successfully stated claims alleging that the challenged overdraft practice violated contract or tort law. *See, e.g.*, *In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litigation*, 1 F. Supp. 3d 34, 51 (E.D.N.Y. 2014) (finding that the plaintiffs had stated a claim that "HSBC breached the covenant of good faith and fair dealing implicitly contained in the Rules [for Deposit Accounts] by implementing its overdraft policy in an abusive manner."); *In re*

Checking Account Overdraft Litig., 2013 WL 5774287, at *14 (S.D. Fla. 2013) ("genuine issues of material fact exist as to the unconscionability claim, [and] those same factual issues warrant the denial of summary judgment as to the [Arkansas Deceptive Trade Practices Act] claim."); *Hughes v. TD Bank, N.A.*, 856 F. Supp. 2d 673, 680–83 (D.N.J. 2012) (denying defendant banks' motion for summary judgment as to claims for unconscionability, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and conversion.); *In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1326 (S.D. Fla. 2010) ("the Court has already held that Defendants' alleged conduct was not expressly authorized by the contract. At this stage, the Court must take as true Plaintiff's allegations that the Defendants' application of the contract was unfair."); *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1363–65, 1371 (N.D. Ga. 2008) (holding that plaintiffs had sufficiently stated a claim for breach of the implied covenant of good faith and conversion).

Here, as discussed above, each of Plaintiff's allegations regarding breach of contract, breach of the implied duty of good faith and fair dealing, conversion, and unjust enrichment are meritless. As a result, Plaintiffs' UDTP claim must fail, as there is no underlying unfair or deceptive act or practice upon which it can rest.

Conclusion

For the aforementioned reasons, we affirm the trial court's order denying the Bank's motion for summary judgment.

AFFIRMED.

Judges GEER and TYSON concur.

Report per Rule 30(e).