[Cite as *Fifth Third Bank v. Gen. Bag Corp.*, 2010-Ohio-2086.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92793

FIFTH THIRD BANK

PLAINTIFF-APPELLEE

vs.

GENERAL BAG CORPORATION, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-547229

BEFORE: Cooney, J., Gallagher, A.J., and Jones, J.

RELEASED: May 13, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendants-appellants, General Bag Corporation ("General Bag"), Robert L. Sprosty, and Allan E. Sprosty, Jr. ("the Sprostys") (collectively referred to as "appellants"), appeal from a jury verdict in favor of plaintiff-appellee, Fifth Third Bank ("Fifth Third"), on their counterclaims. We find no merit to the appeal and affirm.

{¶ 2} On November 9, 2004, Fifth Third filed a complaint and obtained cognovit judgments against General Bag and the Sprostys as personal guarantors. On November 12, 2004, appellants filed a motion for relief from cognovit judgment and emergency motion to stay execution of cognovit judgments. Appellants also filed a verified amended answer, counterclaim, and third-party complaint against Fifth Third and John Does I through IV. The court and the parties initially stayed execution on the cognovit judgments pending negotiations.

{¶ 3} In October 2006, CadleRock Joint Venture L.P. ("CadleRock"), which purchased the cognovit judgments, promissory notes, and personal guarantees from Fifth Third, intervened in the action. The court vacated the cognovit judgments in August 2007. CadleRock and appellants resolved their claims by an agreed judgment entry, which awarded a judgment against appellants in the

sum of $2,137,652.50. The case proceeded to trial on appellants' counterclaims in January 2009, at which the following facts were presented.

{¶ 4} From November 2000 through 2003, General Bag and Fifth Third entered into a number of revolving notes, draw notes, renewals, and related instruments through which General Bag borrowed millions of dollars from Fifth Third to finance its contract to manufacture bags for the U.S. Postal Service ("USPS"). The parties also entered into an Irrevocable Standby Letter of Credit and Security Agreement. As part of the arrangement, General Bag opened a business checking account with Fifth Third into which it deposited payments from the USPS. This account was often referred to as a "DDA account." Payments made under General Bag's other contracts were maintained in separate accounts.

{¶ 5} Robert Sprosty, president of General Bag, testified that after depositing the first few USPS payments into the DDA account, he noticed that amounts written on the checks did not match the deposit amounts on his statement. He notified Fifth Third of this discrepancy and attempted to resolve the matter over a period of three years. Despite appellants' claim that the bank repeatedly took fees and interest payments "off the top" of the USPS payments before depositing the remainder of those deposits into the account, the dispute did not culminate until General Bag defaulted on the notes.

{¶ 6} Fifth Third declared the notes to be in default in October 2003. The letter of credit also became due in 2004. The appellants and Fifth Third attempted to work out the default with General Bag and the Sprostys, as personal guarantors, over a period of several months. Fifth Third proposed entering into a forbearance agreement whereby Fifth Third would agree not to foreclose on the debts in exchange for a release of claims and defenses against the bank. The Sprostys refused to sign the forbearance agreement, and Fifth Third sold their notes at auction to CadleRock.

{¶ 7} Appellants claimed that Fifth Third failed to exercise ordinary care in the handling of General Bag's funds deposited into the DDA account and that this failure proximately caused appellants to lose over $2 million. Appellants also claimed that Fifth Third acted in bad faith under R.C. 1304.03(E) because Fifth Third failed to produce approximately 37 debit and credit memos, which appellants contended would explain what happened to the missing money.

{¶ 8} Both parties presented expert testimony on the propriety of Fifth Third's accounting practices as they related to the General Bag accounts. Appellants' expert, Timothy Finn ("Finn"), testified that Fifth Third's practices failed to meet the appropriate standard of care with respect to the handling of appellants' DDA account because Fifth Third failed to report transactions accurately, made unauthorized sweeps of the account, and failed to maintain its

documentation. Finn did not render an opinion as to whether the claimed breach of the standard of care proximately caused any damage to General Bag.

{¶ 9} Fifth Third's expert witness, Mari Reidy ("Reidy"), is a forensic accountant. She testified that the missing debit and credit memos were unnecessary to reconcile the accounts. She demonstrated how she was able to use the other available documents to "figure out the missing pieces." She testified that in her opinion and based on her own accounting of the available documents, she was able to reconcile the accounts to the penny and found that there was no money missing from the DDA account.

{¶ 10} At the conclusion of the trial, the jury reached a unanimous verdict in favor of Fifth Third, finding that Fifth Third did not lose any of appellants' funds. Appellants now appeal, raising four assignments of error.

Statute of Limitations

{¶ 11} In the first assignment of error, appellants argue the trial court improperly applied the statute of limitations contained in R.C. 1304.09 because Fifth Third did not plead it as an affirmative defense, and it was therefore waived. Appellants argue that the trial court erred in granting Fifth Third's motion for directed verdict on the statute of limitations defense and that it was prejudicial error for the court to charge the jury on the statute of limitations.

{¶ 12} It is undisputed that appellants pled their counterclaims as common law claims in their verified amended answer, counterclaim, and third-party

complaint. Appellants raised the U.C.C. claims set forth in R.C. Chapter 1304 for the first time in their trial brief, at which time they asserted that their counterclaims against Fifth Third for "missing funds" were based on R.C. 1304.03. In response, Fifth Third asserted the statute of limitations defense provided in R.C. 1304.09. The court allowed appellants to proceed with their counterclaims as U.C.C. claims at trial and found that the statute of limitations provided under R.C. 1304.09 likewise applied.

{¶ 13} Appellants contend that even though their pleadings did not specifically reference R.C. Chapter 1304, Fifth Third should have known the claims were U.C.C. claims simply because their claims were against a bank. As such, they argue that because Fifth Third did not raise the statute of limitations defense in its answer to the counterclaims, that affirmative defense was waived. We disagree.

{¶ 14} In allowing the case to proceed to trial under R.C. Chapter 1304, the trial court allowed the pleadings to be amended. The grant or denial of an amended pleading is within the discretion of the trial court. *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 6, 465 N.E.2d 377. We will not overturn such a decision absent an abuse of discretion. Id. "Abuse of discretion" implies that the court acted in an unreasonable, arbitrary, or unconscionable manner. *State v. Herring*, 94 Ohio St.3d 246, 255, 2002-Ohio-796, 762 N.E.2d 940.

{¶ 15} Further, Civ. R. 8(A) of the Ohio Rules of Civil Procedure establishes the general rule of pleading to which a plaintiff must adhere in his claim for relief:

> "(A) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief."

{¶ 16} Although the adoption of the civil rules was to simplify pleading as permitted by Rule 8(A), the pleader may not ignore the operative grounds underlying his claim for relief. The staff note to Rule 8(A) sets forth the purpose of the simplified pleading procedure:

> "A pleading must give adequate notice of the nature of the action by setting out the operative grounds underlying the claim for relief."

{¶ 17} Since the adoption of the rules, Ohio courts have consistently held that sufficient operative facts be concisely set forth in a claim so as to give fair notice of the nature of the action and may permit as many claims for relief, legal or equitable, to which the party may be entitled under the operative facts in the statement of the claim. *Devore v. Mutual of Omaha Ins. Co.* (1972), 32 Ohio App.2d 36, 38, 288 N.E.2d 202.

{¶ 18} In the instant case, appellants pled their claim as a common law cause of action. A party may choose a common law cause of action instead of the statutory counterpart or vice versa because each cause of action has different implications affecting the party's strategy. Because appellants did not reference R.C. Chapter 1304, Fifth Third was not on notice that appellants intended to bring

their claims under that statute. Without notice that the statute applied, Fifth Third's decision not to plead the statute of limitations defense provided by the statute was not unreasonable. When the court agreed to proceed under R.C. Chapter 1304, Fifth Third immediately raised the statute of limitations defense, thereby preserving it in timely fashion. Therefore, Fifth Third did not waive the statute of limitations defense. Because the court allowed both parties to amend their pleadings, we find that the trial court did not abuse its discretion.

{¶ 19} Appellants argue that even if the statute of limitations applied, the court applied the wrong statute of limitations. Specifically, they argue the court should have applied the six-year statute of limitations provided by R.C. 1109.69, which provides that banks must retain deposit and withdrawal tickets for six years, as opposed to the three-year statute of limitations provided by R.C. 1304.09.

{¶ 20} As previously explained, the parties agreed at trial that R.C. Chapter 1304 governed the case. Indeed, appellants asked the trial court to apply R.C. Chapter 1304 to this case.

{¶ 21} R.C. 1304.09 provides:

> "An action to enforce an obligation, duty or right arising under sections 1304 to 1304.40 of the Revised Code shall be brought within three years after the cause of action accrues."

{¶ 22} Thus, because the three-year statute of limitations provided in R.C. 1304.09 is the applicable statute of limitations, the trial court properly applied the three-year statute of limitations.

{¶ 23} Finally, appellants argue the trial court should not have charged the jury on the statute of limitations. However, the court did not give an explicit instruction on the statute of limitations defense, but merely stated prior to closing arguments that they (the jury) "will not consider anything damage wise prior to December 13, 2001." Moreover, since the three-year statute of limitations is applicable, we do not find anything prejudicial about this statement.

{¶ 24} Accordingly, the first assignment of error is overruled.

Burden of Proof

{¶ 25} In the second assignment of error, appellants argue the trial court erroneously instructed the jury that appellants bore the burden of proof in this case when the burden should have been on Fifth Third.

{¶ 26} We review the trial court's choice of jury instructions under an abuse of discretion standard. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. As stated above, "abuse of discretion" implies that the court acted in an unreasonable, arbitrary, or unconscionable manner. *Herring* at 255.

{¶ 27} Numerous Ohio courts have interpreted R.C. 1304.03 as placing the burden of proof on the party asserting the lack of ordinary care. See *RDH Enterprises, Inc. v. Farmers & Merchants Bank*, Montgomery App. No. 19934,

2003-Ohio-6247 (expressly stating that the burden of proof falls on the party claiming negligence); *Haney v. First Fed. Sav. & Loan Assn. of Toledo* (Sept. 16, 1988), Lucas App. No. L-87-397 (holding that customer must prove proximate cause and bad faith under R.C. 1304.03(E) to recover damages against bank); *W. Ohio Colt Racing Assn. v. Fast*, Mercer App. No. 10-08-15, 2009-Ohio-1303 (affirming summary judgment in favor of bank where customer failed to prove the bank failed to use ordinary care under R.C. 1304.03). Therefore, the trial court did not abuse its discretion in placing the burden of proof on appellants to prove their claim that Fifth Third failed to use ordinary care in the handling of their accounts.

{¶ 28} Accordingly, the second assignment of error is overruled.

Bad Faith

{¶ 29} In the third assignment of error, appellants argue the trial court erred in granting Fifth Third's motion for directed verdict on their bad faith claim. Appellants claim there was substantial evidence in the record upon which a jury could have found bad faith.

{¶ 30} The standard of appellate review on a motion for directed verdict is de novo. *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399. This court is to construe the evidence presented most strongly in favor of the nonmoving party and, after so doing, determine whether reasonable minds could only reach a conclusion that is against the nonmoving party. *Titanium Industries*

v. S.E.A. Inc. (1997), 118 Ohio App.3d 39, 691 N.E.2d 1087, citing *Byrley v. Nationwide Ins. Co.* (1994), 94 Ohio App.3d 1, appeal not allowed, 78 Ohio St.3d 1516. An appellate court does not weigh the evidence or test the credibility of the witnesses. Id. In considering the motion, this court "assumes the truth of the evidence supporting the facts essential to the claim of the party against whom the motion is directed, and gives to that party the benefit of all reasonable inferences from that evidence." *Becker v. Lake Cty. Mem. Hosp. W.* (1990), 53 Ohio St.3d 202, 206, 560 N.E.2d 165, quoting *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68, 430 N.E.2d 935.

{¶ 31} In *Johnson v. Third Fed. S. & L. Assn. of Cleveland* (June 27, 1985), Cuyahoga App. No. 49236, this court stated that:

> "'Bad faith' is a legal term of art, which is not defined in the Ohio Uniform Commercial Code. Logically, it is the inverse of 'good faith,' which is defined as 'honesty in fact in the conduct or transaction concerned.' R.C. 1301.01(S). Thus, while not specifically defined, 'bad faith' suggests dishonesty, fraud, or misrepresentation, which are intentional in nature and beyond the perimeters of mere negligence."

{¶ 32} In the instant case, there is no evidence that Fifth Third acted in bad faith. Although appellants' expert opined that Fifth Third acted in bad faith, the acts he lists as constituting bad faith include failing to record transactions accurately, making unauthorized sweeps of the account, and failing to maintain its documentation. While unauthorized sweeps could be intentional, there was evidence that the Sprostys authorized the sweeps when they completed the

paperwork to open the account. The inaccurate record-keeping referred to Fifth Third's inconsistent use of terms in appellants' statements. Although it is undisputed that Fifth Third failed to maintain 37 debit and credit memos, there is nothing in the record demonstrating that this failure was intentional.

{¶ 33} Moreover, even if Fifth Third acted in bad faith, the trial court's grant of directed verdict was harmless because there is no evidence that Fifth Third actually lost any of General Bag's money. Without causing any harm, Fifth Third could not be liable for any damages as a result of bad faith.

{¶ 34} Therefore, the third assignment of error is overruled.

Spoliation of Evidence

{¶ 35} In the fourth assignment of error, appellants argue the trial court abused its discretion when it denied their motion to amend their counterclaim to add a new claim of spoliation of evidence and denied their request for jury instructions on negative inference and punitive damages.

{¶ 36} As previously stated, the standard of review of the trial court's jury instructions is abuse of discretion. See, *Wolons* at 68. A trial court's decision on a party's motion to amend its pleadings is also reviewed under an abuse of discretion standard. *Freeman v. Cleveland Clinic Found.* (1998), 127 Ohio App.3d 378, 386, 713 N.E.2d 33.

{¶ 37} Civil Rule 15(A), which governs amendments to pleadings, provides:

> "A party may amend his pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calender, he may so amend it at any time within 28 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires."

{¶ 38} Although Civil Rule 15(A) dictates that amendment should be granted "freely," courts are not required to grant a leave to amend if the request is untimely or would cause unfair prejudice to the other party. *Tulloh v. Goodyear Atomic Corp.* (1994), 93 Ohio App.3d 740, 759, 639 N.E.2d 1203 (citing *Wilmington Steel Prods., Inc.*, 60 Ohio St.3d 120, 122-123, 573 N.E.2d 622). This court has held:

> "[W]here a party is not seeking to remedy an apparent oversight or omission in the original complaint, but instead sets forth a new cause of action resulting in prejudice to the defendant, the trial court does not abuse its discretion in overruling a motion for leave to amend.
>
> "In this case, [the plaintiff] did not attempt to remedy an oversight or omission in its earlier pleadings, but instead attempted to set forth a new cause of action on the eve of trial, after the action had been pending for two years. Accordingly, we cannot hold that the trial court abused its discretion in denying [the plaintiff] leave to amend."

Karat Gold Imports v. United Parcel Serv. (1989), 62 Ohio App.3d 604, 613-614, 573 N.E.2d 622.

{¶ 39} Here, appellants sought to amend their counterclaim seven days before trial to add an entirely new claim for spoliation of evidence based on Fifth Third's inability to locate and produce 37 debit and credit memos, when the case

had been pending for over four years. Appellants had known for years that Fifth Third failed to produce the 37 debit and credit memos, and yet they waited to seek amendment of their counterclaim until just one week before trial. They failed to demonstrate why they were prevented from amending the counterclaim sooner.

{¶ 40} Further, Fifth Third would have been prejudiced if appellants had been allowed to add a new spoliation of evidence counterclaim one week before trial. Fifth Third would not have had an opportunity to conduct discovery, prepare a defense, a responsive pleading, or dispositive motion in response to the new counterclaim.

{¶ 41} Moreover, to prevail on a claim for spoliation of evidence, appellants would be required to prove: (1) pending or probable litigation involving Fifth Third; (2) knowledge on the part of Fifth Third that litigation exists or is probable; (3) Fifth Third's willful destruction of evidence designed to disrupt the appellants' case; (4) disruption of the appellants' case; and (5) damages proximately caused by Fifth Third's acts. *O'Brien v. Olmsted Falls*, Cuyahoga App. Nos. 89966 and 90336, 2008-Ohio-2658, at ¶ 17, citing *Smith v. Howard Johnson Co.* (1993), 67 Ohio St.3d 28, 29, 615 N.E.2d 1037.

{¶ 42} Here, appellants' case was not disrupted by the loss of the 37 missing debit and credit memos. The information contained in those memos was available from other sources. There is also no evidence that Fifth Third

willfully destroyed the memos. "Ohio does not recognize a cause of action for negligent spoliation of evidence." *White v. Ford Motor Co.* (2001), 142 Ohio App.3d 384, 388, 755 N.E.2d 954. Because the information was available from other sources and there is no evidence that Fifth Third willfully destroyed the memos, appellant failed to establish a prima facie case for spoliation of evidence. Therefore, we find the trial court did not abuse its discretion when it denied appellants' motion to amend the counterclaim.

{¶ 43} Appellants also claim the trial court abused its discretion by failing to give jury instructions on a negative inference and punitive damages. However, General Bag never requested such instructions.

{¶ 44} Pursuant to Civ.R. 51(A), "[o]n appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Accordingly, a party may not challenge a jury instruction on appeal unless a specific objection is raised prior to deliberations. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210-211, 436 N.E.2d 1001, paragraph one of the syllabus.

{¶ 45} Because appellants never requested a negative inference or punitive damages charge and never objected to the trial court's omission of such instructions, this argument is waived on appeal.

{¶ 46} Accordingly, the fourth assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover of appellants costs herein taxed.

{¶ 47} The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

COLLEEN CONWAY COONEY, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION ATTACHED;

LARRY A. JONES, J., CONCURS WITH SEPARATE OPINION

SEAN C. GALLAGHER, A.J., CONCURRING IN JUDGMENT ONLY:

{¶ 48} I respectfully concur in judgment only with the majority opinion.

{¶ 49} I respectfully disagree with the majority analysis on the issue of whether Fifth Third waived the statute of limitations defense. In my view, Fifth Third should have known the counterclaim involved a U.C.C. claim as asserted by General Bag. As a notice pleading state, Ohio does not mandate that statutes be expressly referenced in pleadings. In any event, no prejudice resulted to General Bag as the trial court permitted the jury to hear evidence regarding the time period where the mishandling of funds allegedly occurred. The final jury charge and the jury interrogatories did not limit the jury's consideration of damages, and the record as a whole reflects that the court would apply the statute of limitations to damages only if damages were to be awarded. For this reason, I agree with the outcome of the majority.

{¶ 50} In the final analysis, General Bag had the burden of proving a loss. Its only expert opined on the applicable standard of care, but did not opine on whether the claimed failure to exercise reasonable care proximately caused damage to General Bag. The testimony of General Bag's president concerning missing funds was refuted by Fifth Third's expert witness, who opined that no funds were missing and testified that the missing debit and credit memos were unnecessary to reconcile the accounts. The record further reflects that General Bag waited an inordinate amount of time to compel production of the missing

documents. Ultimately, the jury found that General Bag failed to prove Fifth Third's failure to exercise ordinary care in handling the account was the direct and proximate cause of a loss.

{¶ 51} This writer is very disturbed by the fact that a major national bank would fail to preserve 37 debit and credit memos concerning transactions involving an account where over $50 million was processed over a six-year period. While these missing records do not, by themselves, amount to bad faith, the jury was apparently concerned enough about these missing records to find the bank failed to exercise due care.

{¶ 52} For these reasons, despite my reservations, I concur in judgment only with the majority opinion.