IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Leslie Johnson,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 13 L 13315
MB Financial Bank, N.A., Jordan Margolis, and The Margolis Law Firm, P.C.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A cause of action for conversion of a negotiable instrument requires the existence of a duty owed by a defendant-bank to a plaintiff-depositor. If, however, a plaintiff is not a depositor, the bank owes that third party no duty of care. Since the plaintiff here was not a bank customer when his attorney deposited a settlement check in the firm's general-operating account rather than the client-fund account, the defendant's summary judgment motion must be granted and the plaintiff's cross motion denied.

FACTS

While at work for the William Wrigley Junior Company in 2004, Johnson tripped and twisted his knee as he fell. Wrigley placed Johnson on light duty, and his attorney filed a claim for benefits under the Workers' Compensation Act. Johnson later retained Jordan Margolis at his eponymous law firm at which Johnson's day-to-day contact was Charles Candido.

Beginning in 2006, Johnson underwent the first of 11 knee surgeries. Wrigley paid Johnson temporary total disability, but in 2011, Johnson and Candido discussed settling the workers' compensation claim. In May 2012, Candido told Johnson that the case could be

settled for $375,000, of which Johnson would receive $318,000, less other fees and expenses. Candido also indicated that he would need Johnson's power of attorney so that Candido could deposit the settlement check in the Margolis law firm's client-fund account.

On or about May 19, 2012, Johnson's claim settled for $375,000. On May 29, 2012, Candido mailed Johnson a blank power of attorney. The power of attorney gave the law firm Johnson's unconditional authority to: (1) settle the case; (2) sign any documents necessary to settle the case; (3) release all parties; and (4) sign the settlement check, settlement contract, and pay all fees, costs, liens, and outstanding bills. Two days later, Johnson signed the power of attorney without having it witnessed or notarized, and mailed it back to Candido. Johnson later called Candido to find out if he had received the executed power of attorney. After he did not hear back from Candido, Johnson left Candido voicemail messages, left messages with his secretary, and sent him e-mails. Johnson never heard back from Candido.

In June 2012, the Margolis law firm received the settlement check made payable to it and Johnson. Marisela Marrufo, the law firm's office manager, endorsed the back of the check for the law firm and on Johnson's behalf and deposited the check at MB in an account that the law firm had designated as a client-fund account. That account was not, however, a client-fund account, but the law firm's general-operating account.

In June 2012, Johnson received a telephone call from Jim Eusau of the Attorney Registration and Disciplinary Committee. Eusau told Johnson that his workers' compensation claim had been settled – the first time Johnson had learned of the settlement. The Margolis law firm did not inform Johnson that his case had settled until a January 2013 meeting at which Margolis told Johnson that he would have the funds by March 2013. By August 2013, Johnson had received approximately $97,600 from the Margolis law firm, but he was and is still owed approximately $277,000.

Johnson filed a four-count, first-amended complaint against the defendants.[1] As to MB, count one presents a statutory claim for conversion under the Uniform Commercial Code. *See* 810 ILCS 5/3-420(a). Johnson alleges that, without his authority, Margolis and his law firm endorsed the check, deposited it into the law firm's operating account from which Margolis used the settlement funds for business or personal expenses. The count also alleges that Margolis and his law firm were not entitled to endorse the check or receive payment because they did not have Johnson's authority to endorse his name or deposit the check into the law firm's general-operating account.

Count four presents a claim for common-law negligence. Johnson alleges that MB had at the time a policy governing the endorsement of checks and, therefore, had a duty pursuant to that policy to ensure that: (1) the check contained all necessary endorsements; (2) the persons purporting to endorse the check had, in fact, done so; (3) any endorsement made by someone other than a payee had been previously authorized by the payee; and (4) the bank paid the funds to a person entitled to receive them. Johnson claims that MB breached those duties by failing to: (1) follow its policies to identify who had endorsed the settlement check; (2) determine if Johnson had, in fact, endorsed it; (3) determine if Johnson had authorized the Margolis law firm to endorse the check on his behalf; (4) determine whether Johnson's co-payee status permitted the Margolis law firm to receive the full amount of the check; and (5) know or discover that the account into which MB deposited the check was the law firm's business-operating account.

Johnson and MB each filed summary judgment motions. Johnson argues that MB is negligent for endorsing his settlement check without authority and depositing it in the Margolis law firm's general-operating fund and then misappropriating the funds owed to Johnson. In contrast, MB presents various arguments that it owed Johnson no duty of care and that the remedy Johnson seeks from MB is unavailable as a matter of law.

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[1] Counts two and three are brought against Margolis and his law firm and, therefore, not at issue here. Margolis has been disbarred based, in part, on his misconduct at issue in this lawsuit.

ANALYSIS

The parties bring their motions pursuant to the Code of Civil Procedure. That statute authorizes summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of a summary judgment proceeding is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed.*, 202 Ill. 2d 414, 421, 432 (2002). The nonmoving party is not expected to prove its case in response to a summary judgment motion, but is required to present a factual basis as to each element that would arguably entitle the nonmoving party to judgment. *See id.* at 432. If the party seeking summary judgment presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on its pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001).

It is necessary first to define the scope of the claims this court must address. Johnson pleads count one as a statutory conversion claim and count four as a common-law conversion claim. MB argues that only count one is valid since UCC section 3-420 displaces any common-law cause of action arising from the alleged conversion of negotiable instruments.

Illinois law holds otherwise. The UCC, itself, provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." 810 ILCS 5/1-103. Further, it is plain that the UCC has not displaced the common-law duty of care supporting a breach of contract claim. *See Continental Cas. Co. v. American Nat'l Bk.*, 329 Ill. App. 3d 686, 698-99 (1st Dist. 2002). It must then also be true that the UCC has not displaced common-law duties supporting a negligent conversion claim, particularly since UCC

section 1-103 provides a non-exclusive list of contract, equitable, and negligence causes of action.

The independent legal validity of counts one and four is ultimately of limited importance to this court's analysis because the legal elements necessary to establish statutory or common-law conversion are identical. As to a claim of common-law conversion of a negotiable instrument, the elements are: "plaintiffs' ownership of, interest in or right to possession of the check; plaintiff's forged or unauthorized endorsement on the check; and defendant bank's unauthorized cashing of the check." *Burks Drywall, Inc. v. Washington Bk. & Trust Co.*, 110 Ill. App. 3d 569, 573 (2d Dist. 1982). The UCC provides, in turn, that:

> *The law applicable to conversion of personal property applies to instruments*. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.

810 ILCS 5/3-420 (emphasis added). In short, the elements of a cause of action for conversion are the same under the UCC and the common law. This conclusion makes sense because the legislature intended UCC section 3-420 to codify then-existing Illinois common law. *See Burks*, 110 Ill. App. 3d at 573 (addressing § 3-419, the predecessor to § 3-420), and *Continental,* 329 Ill. App. 3d at 697.

Just as the elements of a conversion cause of action are identical regardless of the legal theory, it is also true that neither cause of action provides Johnson with any greater remedy. Despite the similarities between these causes of action they are supported by distinct factual allegations. Count one alleges that MB violated the UCC's statutory prohibitions against converting negotiable instruments. In contrast, count four alleges that MB breached its internal policies of how it must accept and deposit negotiable instruments. Based on those unique factual allegations, counts one and four each present valid, independent claims.

The facts unique to each count do not, however, alter this court's legal analysis. Regardless of the legal theory and factual allegations, the tort of converting a negotiable instrument requires the same elements: a duty owed to the defendant, breach of that duty, and the breach proximately causing the plaintiff's injury. In this case, MB's duty argument is a simple one – it owed Johnson no duty of care because there existed no relationship between them. This argument is the starting point for analyzing both summary judgment motions since it is outcome determinative.

Central to this court's duty analysis is a determination of whether Johnson and MB had a relationship for which the law would impose a duty on MB for Johnson's benefit. *See Doe-3 v. McLean Cty. Unit Dist. No. 5*, 2012 IL 112479, ¶ 22. Such a relationship need not be direct, but must reflect four factors: "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant." *Id.*, *citing Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 22, and *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436-37 (2006). The duty element focuses on policy considerations underlying the four factors, the weight of each depending on the particular facts of this case. *See Simpkins*, 2012 IL 110662, ¶ 18.

Illinois law has long held that a bank owes no duty to a person who has no contractual relationship with the bank. *See Popp v. Dyslin*, 149 Ill. App. 3d 956, 963 (2d Dist. 1986) (bank owed third-party creditors no duty for negligently investigating borrower's financial condition and could not be held liable "simply because a borrower does not pay one of those creditors"). *See also Abell v. First Nat'l Bk.*, 153 Ill. App. 3d 946, 954-55 (5th Dist. 1987) (banks owed plaintiff-grain sellers no duty to provide information concerning bank customer's insolvency, check kiting, and intent to defraud), *citing* Restatement (Second) of Torts §§ 551 & 552 (1977). One reason is that banks do not certify or guarantee their work. *See Popp*, 149 Ill. App. 3d at 963. Another is that the enormous volume of banking transactions makes it impossible for banks to investigate the legitimacy of deposits and depositors before making funds available. *See, e.g., Setera v. Nat'l City Bk.*, 2008 U.S. Dist. LEXIS 74009, 11 (N.D. Ill. Sept. 26, 2008); *Bell Bros. v. Bank One,*

Lafayette, N.A., 116 F.3d 1158, 1160 (7th Cir. 1997) ("Requiring a bank to restrict all deposits until satisfying itself that the depositor is entitled to the money would pour molasses on the gears of commerce – and with little benefit to people like the plaintiffs. . . .") (interpreting Indiana law). In short, the burden of making a bank responsible for each and every transaction would be, if not impossible, cost prohibitive.

In the face of generally accepted banking practices, Johnson relies on a single case that is unhelpful to his cause. In *Johnson v. Edwardsville Nat'l Bk. & Trust Co.*, 229 Ill. App. 3d 835 (5th Dist. 1992), the plaintiff, unlike Johnson in this case, was a bank depositor to whom the bank owed a duty of care. The court's conclusion favoring the plaintiff was, therefore, wholly consistent with the larger body of Illinois case law.

Johnson further diminishes his position by presenting six tangential arguments rather than directly identifying a legally recognized duty that MB owed to him. These arguments highlight that MB could not reasonably foresee Margolis's deplorable conduct or that it was even likely. In short, none of these arguments is sufficient to establish that MB owed Johnson a duty of care.

First, Johnson argues that his executed power of attorney is void because he did not notarize it. Relatedly, Johnson argues that the power of attorney was invalid because it did not explicitly indicate into which MB account the Margolis law firm was to deposit the settlement check. The Illinois Power of Attorney Act explains that the exemplar statutory short form power of attorney for property contained in section 3-3, "is not meant to be exclusive and [that] other forms of power of attorney may be used." 755 ILCS 45/3-1. The statute further provides that, as to that exemplar power of attorney, "THIS POWER OF ATTORNEY WILL NOT BE EFFECTIVE UNLESS IT IS NOTARIZED, USING THE FORM BELOW." 755 ILCS 45/3-3. Since section 3-1 unambiguously provides that powers of attorney other than the exemplar provided in section 3-3 may be used, it is a fair inference that those other powers of attorney need not be notarized. That inference is bolstered by the section 3-3 language indicating that notarization is required for "*THIS* POWER OF ATTORNEY. . . ." *Id.* (emphasis

added). The section is notably silent as to whether other powers of attorney must be notarized.

Second, Johnson's broader argument that MB negligently converted the settlement check improperly conflates two discrete acts. Properly viewed, Marrufo's endorsement of the settlement check is wholly distinct from the Margolis law firm depositing the check into the firm's general-operating account. Johnson cannot complain about the power of attorney's lack of notarization because the check had to be endorsed in order to be deposited in any account and Johnson eventually paid. In other words, the check's endorsement was plainly in Johnson's interest. Johnson's argument is also inherently flawed since he is at fault for not having notarized the power of attorney. That power of attorney contained the standard blanks to be completed by a notary public upon the document's execution. Yet Johnson failed to procure a notary public, and his motion provides no explanation for the omission. Rather, Johnson independently decided to execute the power of attorney outside a notary public's presence and mail it back to the Margolis law firm. To accept Johnson's argument would, therefore, excuse bad decision making with bank negligence. That is not the sort of private conduct this court should incentivize.

Third, Johnson argues that MB's violation of its internal policies is a basis for liability. This position argues too much because it begs the duty element. While the violation of internal rules or guidelines may serve as evidence of negligence, *see Blankenship v. Peoria Pk. Dist.*, 269 Ill. App. 3d 416, 423 (3d Dist. 1995), Illinois law has consistently held that internal rules or guidelines, by themselves, do not normally create a duty. *See Geimer v. Chicago Pk. Dist.*, 272 Ill. App. 3d 629, 636 (1st Dist. 1995). In other words, if internal policies and guidelines do not impose a duty, the failure to follow them cannot constitute a breach.

Johnson's cases are, once again, of no assistance. The court in *Smith v. General Cas. Co. of Wisconsin*, 75 Ill. App. 3d 971 (3d Dist. 1979), interpreted a prior and dissimilar version of UCC section 3-420, making it temporally useless. The other two cases involved situations in which the depositor had no entitlement to payment by the bank. *See Bellflower v. AG Serv., Inc. v. First Nat'l Bk. & Trust Co.*, 130 Ill. App.

3d 80 (4th Dist. 1985), and *National Bk. of Monticello v. Quinn*, 126 Ill. 2d 129 (1989). As noted above, Johnson returned a broad power of attorney that explicitly gave the Margolis law firm, "[t]he power to sign the settlement check. . . ."

Fourth, Johnson argues that MB did not rely on the power of attorney when it accepted the endorsed settlement check and deposited it into the Margolis law firm's general-operating account. That proposition may be true, but it is irrelevant. MB did not need to rely on the power of attorney because it was a contract exclusively between Johnson and the Margolis law firm.

Fifth, it is also true that the power of attorney did not authorize MB to deposit the settlement check exclusively into the Margolis law firm's client-trust account. That argument is, once again, irrelevant. MB did not dictate the settlement check's deposit, the Margolis law firm did. Indeed, the law firm decided what to name its accounts at MB; the law firm could have named them whatever it wished. By depositing the settlement check into the account according to the Margolis law firm's direction, MB fulfilled its duty. The only possible exception would be if MB had actual knowledge or should have known that the Margolis law firm had purposefully misnamed the accounts. Johnson has failed, however, to identify a statutory or common-law duty requiring banks to know the purposes, legitimate or otherwise, of their clients' accounts. No such duty exists because it would run counter to the need for the smooth functioning of commercial transactions.

Sixth, granting MB's summary judgment motion will not violate public policy by construing powers of attorney as conferring authority on attorneys to comingle funds. Those two concepts are wholly unrelated. Certainly if an attorney is intent on misappropriating client funds in violation of Rule of Professional Conduct 1.15, the attorney can do so from a business-operating account as well as from a client-fund account. Unprofessional conduct is driven by intent or stupidity, not the names on an attorney's bank accounts.

This court is not without sympathy for Johnson's position. He is an innocent party who unfortunately hired a mendacious and

despicable attorney who played a shell game with the funds of clients to whom he owed the highest professional duty. It is certainly cold comfort to Johnson that Margolis can no longer misuse other persons' money, but Illinois directs that his remedy lies with the difficult task of getting money from a stone-hearted, disbarred attorney and not MB.

CONCLUSION

Based on the foregoing, it is ordered that:

1. MB's summary judgment is granted;
2. Johnson's summary judgment motion is denied;
3. This case is dismissed with prejudice as to MB but continues as to the two remaining defendants; and
4. Pursuant to Illinois Supreme Court Rule 304(a), there is no just reason for delaying either the enforcement, the appeal, or both of this judgment.

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John H. Ehrlich, Circuit Court Judge