

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Joyce Pincus,)
)
 Plaintiff,)
)
 vs.)
)
 Wachovia Bank, a division of Wells)
 Fargo Bank, N.A., f/k/a Wachovia)
 Bank, N.A., and First National Bank)
 of the South,)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS

C. A. No. 2009-CP-40-2670

**PROPOSED JUDGMENT INCLUDING
 FINDINGS OF FACT AND
 CONCLUSIONS OF LAW**

RICHLAND COUNTY
 FILED
 2013 APR 30 AM 9:37
 JEANETTE M. HEBRIDE
 C. CLERK & G.S.

This is a breach of contract case codified by S.C. Code § 36-4-401 in which Plaintiff Joyce Pincus has alleged that Defendant Wachovia Bank, a division of Wells Fargo Bank, N.A. (“Wachovia”) improperly paid a total of eight (8) checks written and signed by her husband without her prior authorization. This case was tried before the Court sitting without a jury. For the reasons stated below, the Court grants judgment in favor of Wachovia, and pursuant to Rule 52(a), SCRCF, the Court makes the following Findings of Fact and Conclusions of Law.

Brief Procedural History

This action was originally filed on April 13, 2009 with First National Bank of the South (“First National”) being the sole named defendant. First National moved for summary judgment on April 7, 2010. On April 20, 2010, a consent order was entered allowing Plaintiff to amend the complaint to add Wachovia as a defendant. First National was dismissed from the action pursuant to Rule 41(a)(1)(B), SCRCF, on May 24, 2010. Plaintiff alleged four causes of action against Wachovia, including, in order alleged, “Breach of Contract/Improper Payment/Debit of Account, 36-4-401,” “Breach of Statutory Warranty, Violation of 36-4-207 and 36-3-417,” “Breach of Fiduciary Duty & Duty of Good Faith,” “Negligence/Negligent Misrepresentation,”

and “Unfair Trade Practices.” At the conclusion of Plaintiff’s case, Wachovia moved for directed verdict as to all causes of action. For the reasons set forth in Wachovia’s Memorandum in Support of Directed Verdict and with the consent of Plaintiff, the Court granted directed verdict for Wachovia on all but Plaintiff’s first cause of action. Thus, the sole remaining issue for the Court to decide was whether Plaintiff was entitled to relief pursuant to her breach of contract claim and S.C. Code § 36-4-401.

Findings of Fact

Upon hearing all of the evidence and weighing the credibility of the witnesses, the Court finds the following:

1. The lawsuit concerns eight (8) checks that were drawn on Plaintiff’s Wachovia checking account, Account Number 1000065153551 (“Wachovia Account”), between August 4, 2008 and September 19, 2008. The checks were as follows: 1. #2224 dated 8/1/08 for \$5000.00; 2. #2226 dated 8/4/08 for \$4000.00; 3. #2227 dated 8/12/08 for \$1800.00; 4. #2228 dated 8/18/08 for \$4800.00; 5. #2229 dated 8/26/08 for \$4000.00; 6. #2230 not dated for \$4500.00; 7. #2242 dated 9/9/08 for \$5500.00, and; 8. #2243 dated 9/17/08 for \$3800.00 (collectively admitted as Plaintiff’s Exhibit 1).
2. Accompanying the opening and continued holding of this account is a deposit agreement, which was entered into the record as Defendant’s Exhibit 1.
3. Without dispute, Plaintiff’s husband, Peter Lauffenberg, who was not identified on the Wachovia Account, wrote the eight checks and signed Plaintiff’s name, as maker, on each of the checks.
4. Seven of the eight checks were made payable to the order of “Joyce Pincus” and deposited into the Plaintiff’s and Mr. Lauffenberg’s joint account at First National (“First

National Account"). The First national Account was used principally to pay household expenses.

5. The remaining check, check #2227, was made payable to Bruner's Tree Service for services rendered on Plaintiff's and Mr. Lauffenberg's property.

6. Plaintiff's August 25, 2008 Wachovia Account statement (Defendant's Ex. 2), documented payment of checks, numbered 2224, 2226, 2227, and 2228, which totaled \$15,600.00.

7. Plaintiff would have received the Wachovia Account statement at her home no later than September 1, 2008.

8. According to the Wachovia Account's September 24, 2008 statement, (Defendant's Ex. 3), check Numbers 2229, 2230, 2242, and 2243 cleared Plaintiff's account on August 27, 2008, September 04, 2008, September 10, 2008, and September 19, 2008, respectively. Following payment of check number 2243 on September 19, 2008, Plaintiff's account fell into a negative balance of \$3,756.34.

9. There is a dispute as to what caused her to visit the branch, but without dispute, on September 25, 2008, Plaintiff visited Wachovia's Sparkleberry branch location.

10. Once there, she spoke to Financial Specialist Joseph Eubanks regarding her account balance.

11. At that point, it is undisputed that Mr. Eubanks discussed with Plaintiff the fact that her account was overdrawn, provided her with a copy of her transactional history, showed her copies of the eight checks in question, and opened a new account for her.

12. Plaintiff testified at trial that upon seeing the checks, she stated the following to Mr. Eubanks: "the signature on the checks is not mine, I did not write those checks."

13. Plaintiff testified to no further statements and had no recollection of any other details of the conversation. Plaintiff did not recall what response, if any, Mr. Eubanks had to her alleged statement.

14. Plaintiff testified she knew immediately that all of the checks had been written by her husband. Yet, at no point did she provide that information to Mr. Eubanks or to Wachovia generally.

15. Wachovia disputes Plaintiff's claimed statement to Mr. Eubanks. Mr. Eubanks testified that when he showed Plaintiff the checks, he asked her if she recognized them. He recalled her response being simply, "I'll take care of it."

16. At no point did Plaintiff assert that the eight (8) identified checks were fraudulent, unauthorized or forgeries. At no point did Plaintiff ask Mr. Eubanks to open an investigation or request a return of the funds to her account.

17. Following Plaintiff's September 25, 2008 visit to the Wachovia Branch, no fraud claim was opened. Had Plaintiff, at any point, notified Wachovia that the checks were unauthorized, Wachovia's fraud department would have been contacted, a fraud investigation would have been immediately commenced, and a fraud claim number would have been documented on Plaintiff's account. A fraud claim number was first noted on Plaintiff's account in May of 2010 after service of the Complaint.

18. In addition, Wachovia would have required Plaintiff to document the alleged fraud. It is uncontested that Plaintiff never filled out a fraud affidavit, filed a police report, or otherwise documented the alleged unauthorized signatures.

19. Upon hearing the testimony of the witnesses, considering all of the facts in evidence surrounding the events giving rise to this suit, and weighing the relative credibility and

biases of the witnesses, I find by a preponderance of the evidence that Wachovia was not notified of an unauthorized or fraudulent transaction on Plaintiff's Wachovia Account during the September 25, 2008 meeting between Plaintiff and Mr. Eubanks.

20. Upon leaving the Wachovia branch, Plaintiff returned to work without contacting her husband to inquire about the checks.

21. Plaintiff did not discuss the matter with her husband when she got home from work.

22. Plaintiff does not recall exactly when she finally confronted her husband or exactly what was said during that conversation.

23. Plaintiff never demanded that Mr. Lauffenberg pay her back. However, she testified she assumed up until his death that he would eventually do so.

24. Other than the meeting with Mr. Eubanks on September 25, 2008, Plaintiff had no other conversations with anyone at Wachovia in regards to the checks.

25. On November 4, 2008, more than a month after discovering her account was overdrawn as a result of the alleged fraudulent transactions, Plaintiff transferred money from another account at Wachovia to satisfy the overdraft and close the account.

26. Other than the filing of this lawsuit, Plaintiff made no attempt to recover the money either from her husband, First National or Wachovia.

27. Wachovia was first notified of this claimed fraud upon being served through its registered agent with the Amended Summons and Complaint on April 26, 2010, more than a year and half after Plaintiff received notice of the checks.

Conclusions of Law

In light of these findings of fact, the Court concludes as follows:

1. With the Court's grant of partial directed verdict, Plaintiff's case was tried on a single cause of action pursuant to S.C. Code Ann. § 36-4-401.

2. Section 4-401 provides in pertinent part that "[a] bank may charge against the account of a customer an item that is properly payable An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank." S.C. Code Ann. § 36-4-401(a).

3. In accordance with S.C. Code Ann. § 36-4-406, in order to maintain a cause of action against the bank, Plaintiff must be diligent in examining her statements and promptly notify the bank of all relevant facts regarding the alleged forgery. Section 4-406(f) further provides:

Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (Subsection (a)) discover and report the customer's unauthorized signature on or any alteration of the item is precluded from asserting against the bank the unauthorized signature or alteration.

S.C. Code Ann. § 36-4-406; see also § 4-406, South Carolina Reporter's Comment to subsection (f) ("The one-year bar is absolute in the sense that it applies without regard to the negligence of the bank or the customer.")

4. Similarly, Wachovia's deposit agreement provides as follows:

You are in the best position to discover a forged, unauthorized or missing signature or endorsement, a material alteration, a missing or diverted deposit, illegible image or any other error or discrepancy relating to a check, deposit or other credit or debit entry to your account. Therefore, you agree to promptly and carefully examine your statement(s) and its contents when you, or a party designated by you, receive them. If you think that an

unauthorized person has withdrawn funds from your account, that one or more deposits is not reflected on your statements, or that there is any other error or discrepancy in your statements, you should notify us immediately. The statement is considered correct unless you notify us promptly after receipt of the statement, its contents, or the checks themselves, or after any error is discovered or reasonably could have been discovered, whichever occurs first.

(Def. Ex. 1, p. 9, ¶ 9)

Plaintiff failed to timely report the claim of fraud and unauthorized signatures within the one-year period provided by statute.

5. Without dispute, at the latest date, Plaintiff was fully aware of the checks and the condition of her account as of September 25, 2008. By law, Plaintiff was obligated to provide notice to the bank of the fraud and/or unauthorized signature, as well as all of the relevant facts regarding the alleged forgery, on or before September 25, 2009. Given that the Court has found that Plaintiff factually failed to meet that obligation during the meeting with Mr. Eubanks at the Wachovia branch on September 25, 2008 and the record lacks any evidence that Plaintiff or her attorney ever made any further attempts to contact Wachovia, at all, regarding this incident until the Complaint was served on April 26, 2010, Plaintiff failed to timely report the fraud and/or unauthorized signatures. Therefore, Plaintiff is precluded as a matter of law from now asserting against the bank the fraud and/or unauthorized signature. As such, the Court finds for Defendant on Plaintiff's cause of action.

6. Moreover, even if the Court were to accept that Plaintiff made the statement "the signature on the checks is not mine, I did not write those checks" to Mr. Eubanks, as claimed, the Court finds such statement, in and of itself, and in light of all the pertaining circumstances surrounding this incident, insufficient to confer notice of the unauthorized signatures as a matter of law. The Court finds support for its conclusion in Watseka First Nat'l Bank v. Horney, 292 Ill. App. 3d 933, 686 N.E.2d 1175 (Ill. App. Ct. 3d Dist. 1997) (Customer of bank failed to "report"

signatures to Wachovia on September 25, 2008 or any time thereafter, because Plaintiff did not believe the checks were fraudulent or unauthorized.

10. For these reasons, even if the Court were to accept that Plaintiff made the statement “the signature on the checks is not mine, I did not write those checks” to Mr. Eubanks, which the Court does not, the Court otherwise reaches the same conclusion that Plaintiff failed to provide the requisite notice within the one-year period provided and the Court finds for Defendant on Plaintiff’s cause of action.

In the Alternative, Plaintiff Ratified the Signatures on the Checks with Her Conduct

9. In the alternative, even if Mr. Lauffenberg’s signing of the checks was initially unauthorized, the Court finds as a matter of law that Plaintiff ratified his actions by her words and actions.

10. By law, a person may ratify an unauthorized signature by word or deed. See S.C. Code § 36-3-403; In Bankers Trust of South Carolina v. South Carolina National Bank, 284 S.C. 238, 325 S.E.2d 81 (App. Ct. 1985); see also Rakestraw v. Rodriguez, 8 Cal 3d 67, 500 P2d 1401 (Cal. 1972) (Wife who discovered her husband had forged her signature on a note within a couple of days, but took no action to repudiate it, could not disaffirm the signature three years later); see generally 93 A.L.R.3d 967 (analyzing cases in which courts, referring to UCC § 3-304, determined whether the acts of a party constituted a ratification of an unauthorized signature).

11. The Court finds that Plaintiff’s actions upon learning of this claimed fraud were inconsistent with the allegation that the eight (8) checks in question were unauthorized or fraudulent. Specifically, outside of filing this lawsuit, Plaintiff made no attempt to recover the money. She knew or should have known that the money was deposited into the First National

Account. She had access to that account. Had she reviewed her August statement from Wachovia when she received it, she would have discovered the first four checks written by her husband. Had she promptly investigated those checks, she would have known that three of the four checks were deposited into the First National Account. According to her First National Account statements (Defendant's Exhibit 5), there was nearly \$7,000 in the account on September 9, 2008. Had she acted with diligence, she could have immediately withdrawn that money and returned it to her account at Wachovia. Even assuming she did not learn of the checks until she met with Mr. Eubanks on September 25th, had she acted then, she still could have recovered a little more than \$1800 of the money. However, Plaintiff admitted that she never tried to recover any of the money from the First National Account. Further, Plaintiff testified that she expected that her husband would return the money. It was not until that was no longer a possibility due to his suicide that Plaintiff sought legal counsel and eventually relief from the bank.

12. Moreover, I find further evidence to support ratification in Plaintiff's handling of the overdrawn Wachovia Account. Despite now claiming the bank owes her \$32,000, Plaintiff never once followed up with the bank regarding her claimed report of fraud. She never asked the bank to return the money or credit her account. In fact, rather than requesting a credit, Plaintiff settled a substantial overdraft of her account herself by transferring money from another account.

13. Finally, a person may also ratify an unauthorized signature by retaining benefits received in the transaction with knowledge of the unauthorized signature. S.C. Code § 36-3-403 (Official Comment, ¶ 3); see also In Bankers Trust, 284 S.C. at 244, 325 S.E.2d at 85 (no damage is suffered when funds have been put to their proper use). In this case, Plaintiff admitted that at least one of the checks, the \$1800.00 check made payable to Bruner's Tree Service, was

unauthorized signatures within one year statute of limitations when conversations with bank were devoid of any specific information and other than referring to a possible forgery, customer failed to take any further action including requesting bank to restore funds) and Hatcher Cleaning Co. v. Comerica Bank, 995 S.W.2d 933, 1999 Tex. App. LEXIS 4890 (Tex. App. Fort Worth 1999) (General references to a possible forgery are not sufficient; a customer must relate, tell, or give an account of his unauthorized signature).

7. By this decision, the Court does not suggest that an account holder must use “magic words” when reporting account fraud to their bank. However, a person must by their words and actions convey to the bank that they believe a fraud has occurred to give the bank notice that they desire the bank to take action to rectify the fraud. Plaintiff’s statement that the signatures were not hers was not in and of itself indicative that the signatures were unauthorized. See S.C. Code Ann. § 36-1-201(43) (unauthorized signature “means one made without actual, implied or apparent authority and includes a forgery.”).

8. Further, despite having a year to act, Plaintiff made no attempt to make any further claims on the bank before or after her husband’s death in December 2008, nor did she attempt to follow-up on her claimed fraud report on September 25, 2008.

9. Moreover, the evidence at trial is that the signatures on the checks in question were placed there by her husband, Mr. Lauffenberg. Plaintiff testified that following her visit with Mr. Eubanks and her subsequent conversation with Mr. Lauffenberg, Plaintiff believed that Mr. Lauffenberg would return the money. Additionally, without any apparent complaint, Plaintiff returned to the bank in November 2008, more than a month after the meeting with Mr. Eubanks, to rectify the overdraft on the Wachovia Account. The Court finds these facts to be further evidence that as a matter of law Plaintiff did not provide notice of fraud or unauthorized

put to its proper use for which she received a benefit. The remaining checks were all deposited into an account that she testified was used to pay household expenses. Plaintiff was unable to prove that any of those funds were used for a purpose other than to pay household expenses.

14. Put another way, Plaintiff cannot establish that she suffered a loss as a result of her husband's actions. See Hefner v. United Southern Bank, 1998 Tenn. App. LEXIS 401 (Tenn. App. Ct. 1998) (citing National Surety Corp. v. City Bank & Trust Co., 248 Wis 32, 20 N.W.2d 559, 561 (Wis. 1945) (a bank is not liable for an unauthorized signature on a check unless the check has caused a loss to the owner).

15. In the alternative, based on the above, even if the checks were initially unauthorized by Plaintiff, the Court finds that Plaintiff, by her words and conduct, as a matter of law ratified the signature on the eight (8) disputed items. As such, the items were properly payable and not actionable against the bank. For this reason, in the alternative, the Court likewise finds for Defendant in this matter.

16. To the extent that any finding of fact should be more properly identified as a conclusion of law, it should be considered as such. To the extent that any conclusion of law should be more properly identified as a finding of fact, it should be considered as such.

Conclusion

For the reasons stated herein, the Court hereby finds in favor of Defendant Wachovia, and in so doing, denies all relief sought by Plaintiff.

It is therefore,

ORDERED that judgment be entered for Defendant Wachovia.

IT IS SO ORDERED.

Re Hood

The Honorable Robert E. Hood
Resident Judge of the Fifth Judicial Circuit

April 29, 2013

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2009-CP-40-2670

Joyce Pincus

Wachovia Bank and First National Bank of the South

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Non Suit); Rule 43(k), SCRPC (Settled); Other Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

RICHLAND COUNTY
FILED
2013 APR 30 AM 9:31
JENNIFER M. GIBSON
CLERK

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge Re Hood Judge Code 2164 Date 4-29-2013

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of April, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride