

copy

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
FILED-CLERK OF COURT
GREENVILLE, CO. S.C.
PAUL B. WICKENSIMMER
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Overland, Inc., d/b/a Land Rover
Greenville,

Plaintiff,

v.

Lara Marie Nance, Charlie Andrew Nance
Roger Fields, Synovus Financial
Corporation d/b/a NBSC, Branch Banking
and Trust Company, Bank of America
Corporation, and SunTrust Banks, Inc.,
Defendants.

DEC 15 PM 4 04

C.A. No. 2010-CP-23-5880

RECEIVED

MAR 09 2015

ORDER

SC Court of Appeals

This matter came before the Court on Plaintiff's Motion to Transfer Funds held by Defendant Bank of America; Plaintiff's Motion to Compel Discovery; Defendant Bank of America's Motion for Summary Judgment as to the 17th and the 20th Causes of Action; and Defendant SunTrust's Motion for Summary Judgment on All Claims and Defenses. A hearing on these motions was conducted on October 29, 2014 before this Court. During this hearing, Plaintiff voluntarily withdrew its 20th cause of action, which alleged a violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 to -560 (2014).

Background

This case arises out of a check fraud scheme perpetuated by Plaintiff's former employee, Defendant Lara Marie Nance. Over a period of several years, Ms. Nance embezzled at least \$1,282,000.00 from her employer, Plaintiff Overland, Inc. (Overland). (Third Am. Compl. 9, ¶ 37.) The undisputed facts are set forth below.

Handwritten signature and number 1

Ms. Nance was hired by Overland as an accounts payable clerk in 2006. (Nance Dep. 9:19-22, Jan. 15, 2014.) She eventually gained access to Overland's computerized accounting system, ADP, and began to generate checks bearing the forged signature of Overland's owner. (Third Am. Compl. 10, ¶¶ 40-41.) Each check was made payable to an actual vendor of Overland, including Taylor Enterprises, Atlantic British, and Invision Industries. (Id. at 9-10, ¶ 39.) Ms. Nance often duplicated the amount of an actual check paid to these companies that was already entered into the ADP system. (Id. at 10, ¶ 40.)

Ms. Nance opened various accounts with Defendants Bank of America and SunTrust in the names of these businesses for the purpose of depositing the forged checks. (Id.) Each check was drawn on Overland's business accounts, which it maintained with Defendants Synovus Financial Corporation d/b/a NBSC (NBSC) and Branch Banking and Trust (BB&T). (Id. at 10, ¶ 42.) Ms. Nance also opened and maintained personal checking accounts with Defendants Bank of America and SunTrust. (Id.) Ms. Nance's scheme lasted for two and one-half years before it was discovered. (Id. at 4, ¶ 14.)

Ms. Nance pled guilty to wire fraud in the United States District Court. United States v. Lara Marie Nance, No. 6:10cr634-1 (Feb. 14, 2011). As a portion of her federal sentence, Ms. Nance was ordered to pay restitution to Overland in the amount of \$1,282,749.90. Judgment in a Criminal Case, United States v. Lara Marie Nance, No. 6:10cr634-1 (Aug. 24, 2011).

Discussion

I. Defendants' Motions for Summary Judgment

During the hearing on Defendants' Motions for Summary Judgment, both Bank of America and SunTrust raised similar legal arguments. For the purposes of this Order, the Court will jointly consider their motions.



A. Standard for Summary Judgment

Summary Judgment is warranted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any genuine issue of fact exists, the evidence and all inferences which can be reasonably drawn must be viewed in the light most favorable to the non-moving party. Bloom v. Ravoira, 399 S.C. 417, 421–22, 529 S.E.2d 710, 712 (2000). Where there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

If the moving party demonstrates an absence of evidentiary support for the opponent's case, the non-moving party must present specific facts showing that there are genuine issues necessitating a trial. Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005). The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Grant v. Mount Vernon Mills, Inc., 370 S.C. 138, 142, 634 S.E.2d 15, 17–18 (Ct. App. 2006). However, where “triable issues” exist, those issues should be presented to a jury. Rife, 363 S.C. at 213, 609 S.E.2d at 567.

B. Merits of the Motions for Summary Judgment

Overland asserts in its seventeenth cause of action that Bank of America and SunTrust were negligent, grossly negligent, and reckless in their handling of Ms. Nance's transactions. Particularly, Overland avers that the banks failed to exercise ordinary care in their practices for opening business checking accounts; depositing and transferring corporate checks; and employing commercially reasonable procedures for identifying forged signatures. In support of these contentions, Overland cites several portions of South Carolina's Uniform Commercial

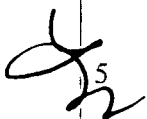
Code (UCC): § 36-3-404, § 36-3-405, and § 36-3-406. To the extent that Overland is attempting to assert a common law claim against the banks, this Court finds that the South Carolina UCC has displaced common law actions in this area. See Equitable Life Assur. Soc. Of U.S. v. Okey, 812 F.2d 906, 908–09 (4th Cir. 1987); Flavor Inn, Inc. v. NNCB Nat'l Bank of S.C., 309 S.C. 508, 511–12, 424 S.E.2d 534, 536 (1992).

It is well-established that banks owe a limited duty of care to their customers. Kerr v. Branch Banking & Trust Co., 408 S.C. 328, 333, 759 S.E.2d 724, 726 (April 9, 2014). This limited duty exists because the relationship between a bank and a customer is merely a lender-borrower (or creditor-debtor) relationship—it is generally not fiduciary in nature. See Burwell v. S.C. Nat'l Bank, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); Regions Bank v. Schmauch, 354 S.C. 648, 669–70, 582 S.E.2d 432, 443–44 (Ct. App. 2003). Consequently, South Carolina has refused to extend banks' duties to non-customers, where the non-customers' claims are premised upon contractual obligations between a bank and its customer, and where the non-customer is not an intended third-party beneficiary to that contract. Kerr, 408 S.C. at 333, 759 S.E.2d at 727. In short, absent fraud or misrepresentation a non-customer does not have the right to rely on the faithful execution of a bank's duties, particularly where the non-customer is in the best position to safeguard his interests against loss. Id.; cf. Florentine Corp. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985) (finding that the plaintiff had not shown it had a right to rely on the defendant's representation).

Other courts have found that a bank does not owe a duty to a non-customer, even where the non-customer was defrauded by the bank's customer through the use of the bank's services. See Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220, 225–26 (4th Cir. 2002). For example, in McCallum v. Rizzo the defendant solicited donations for a presidential campaign, deposited the

donations into a campaign account, and then converted the funds to his own use. No. 942878, 1995 WL 114812 (Mass. Super. Ct. Oct. 13, 1995). Though the defendant's bank may have considered the his activities suspicious, the bank did not investigate the activity. Id. at *1. The court determined that, in spite of its defendant's suspicious banking activities, the bank could not be found negligent because it did not owe a duty to the victims of the scheme. Id. at *2-3. Similarly, in Eisenberg v. Wachovia Bank, the plaintiff sued the bank that maintained the account in which fraudulently-obtained funds were deposited. 301 F.3d at 223. Though the plaintiff was the victim of the fraudulent scheme, he was unable to demonstrate that the bank owed him any duty, either in opening or maintenance of the account, because he was not the bank's customer. Id. Therefore, the non-customer plaintiff was not able to maintain a viable action against the bank. Id. at 225, 227.

The South Carolina UCC contemplates a possible cause of action by a drawee against a depository bank, where the depository bank taking a check might have detected the fraud and thus have prevented the loss by the exercise of ordinary care. See S.C. Code Ann. § 36-3-404, Comment 3. However, the law also states that where a bank processes checks by automated means, "reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage." S.C. Code Ann. § 36-3-103(a)(9). This effectively creates a presumption of reasonable care in automated check processing systems. Therefore, if the bank in question utilizes automated check processing, the sole avenue for demonstrating a lack of ordinary care must be based upon a different procedure or activity by the bank. There will be no liability on the instrument itself.

 5

Read v. First National Bank of Habersham is factually similar to the case at bar. 286 S.C. 534, 335 S.E.2d 359 (1985). However, on the question of the existence of a duty or the creation of a direct cause of action, it is not instructive because it was a suit between a customer and his bank, Read at 353, 335 S.E.2d at 360, whereas Overland is a third party suing its former employee's bank.

In the present matter, Overland only maintained accounts with NBSC and BB&T. Ms. Nance opened each account at Bank of America and SunTrust. Additionally, Overland has not alleged that either Bank of America or SunTrust committed fraud or made a misrepresentation to it regarding these accounts. Therefore, Overland is unable to demonstrate that Bank of America or SunTrust owed it any duty regarding these matters.

Furthermore, Overland has not demonstrated that Bank of America or SunTrust failed to exercise ordinary care in their check-processing procedures. At the hearing on the summary judgment motions, the parties agreed that these two banks utilize automated check processing. Overland has failed to show that Defendant banks' procedures varied in any way from general banking usage. Further, Overland has not provided any evidence that Bank of America or SunTrust failed to exercise ordinary care in their maintenance of Ms. Nance's accounts.

Therefore, the Defendants' Motions for Summary Judgment as to the Seventeenth Cause of Action should be GRANTED.

II. Plaintiff's Motion to Transfer Funds

Overland additionally submits a Motion to Transfer Funds Held by Bank of America. The funds in question are those which still remain in Ms. Nance's personal checking account (ending in -6180). (Overland Mot. to Compel 1, ¶ 2.a.) The current balance of the account is \$28,645.59. (Id. at 2, ¶ 2.b.) Bank of America has placed this account in a litigation freeze.

A handwritten signature in black ink, appearing to be the initials 'JG' with a small '6' written below it.

Overland asserts that it is entitled to these funds as part of Ms. Nance's restitution order imposed by the United States District Court. (Id. at 2, ¶ 2.c.) Overland also requests interest accrued upon this account beginning on February 4, 2010. (Id. at 2, ¶ 3.)

On November 11, 2014, the Court received communication from Ms. Nance's attorney regarding these funds. (Letter of James H. Price, III, Esquire, Nov. 11, 2014.) Ms. Nance stated that she desires the money in her Bank of America account be transferred to Overland and applied to the United States District Court's restitution order. (Id.)

This Court finds that the funds held in Ms. Nance's Bank of America account (ending in - 6180) must be transferred immediately to Overland as partial satisfaction of its outstanding civil judgment. These funds are to be transferred with interest beginning on February 4, 2010.

III. Plaintiff's Motion to Compel Discovery

In light of this Court's decision to grant Defendants Bank of America and SunTrust summary judgment as to the seventeenth cause of action, the Court finds Overland's Motion to Compel Discovery moot.

Conclusion

For the foregoing reasons, this Court GRANTS Defendants' Motions for Summary Judgment as to Plaintiff's seventeenth cause of action and GRANTS Plaintiff's Motion to Transfer Funds. Additionally, Plaintiff's Motion to Compel Discovery is moot.

It is so ordered.

This 8 day of December, 2014.



Letitia H. Verdin
Circuit Judge
Thirteenth Judicial Circuit



Comp
Verdin

OVERLAND, INC., D.B.A LAND ROVER GREENVILLE

FILED - CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENS IME

LARA MARIE NANCE, CHARLIE ANDREW NANCE,
 ROGER FIELDS, SYNOVUS FINANCIAL CORPORATION
 D/B/A NBSC, BRANCH BANKING AND TRUST
 COMPANY, BANK OF AMERICA CORPORATION, AND
 SUNTRUST BANKS, INC.

2015 FEB 5 PM 12 23

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. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- 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

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:

This matter came before the Court on Plaintiff's Motion to Alter or Amend Judgment, or in the alternative to Reconsider Pursuant to Rule 59(e), SCRPC. Defendants Bank of America Corporation and SunTrust Banks, Inc. submitted responses and memoranda in opposition to Plaintiff's Motion.

Plaintiff's Motion is respectfully DENIED.

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT 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 (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

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.**

[Signature]
Circuit Court Judge

2162
Judge Code

2/5/15
Date

For Clerk of Court Office Use Only

This judgment was entered on the 5th day of Feb 20 15 and a copy mailed first class or placed in the appropriate attorney's box on this 5th day of Feb 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

James Walter Fayssouy

ATTORNEY(S) FOR THE PLAINTIFF(S)

James H. Price III
David L Moore Jr
Bruce A Byrholdt

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

- _____ A Allys
- _____ Elbert Stockman Dorn Sr
- _____ Andrew A Mathias
- _____ Martin Mason Tomlinson
- _____ Joshua L Howard
- _____ James W Sheedy
- _____ Susan Elizabeth Driscoll
- _____ Howard W Boyd, Jr
- _____ Ammon Tice Leshar
- _____ Sima Bhakta Patel
- _____ Lauren Thorne Maxwell
- _____
- _____
- _____
- _____

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

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

JUDGMENT IN A CIVIL CASE
CASE NO: 2010CP2305880

2014 DEC 15 PM 4 04

RECEIVED

MAR 09 2015

SC Court of Appeals

Overland Inc vs. Lara Marie Nance

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. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- 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: _____

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; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 15th day of December, 2014, and a copy mailed first class this 15th day of December, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

James Walter Fayssoux Jr. Fayssoux Law Firm,
P.A. P.O. Box 10207 Greenville, SC 29603

James H. Price III 644 E. Washington St.
Greenville, SC 29601
David L. Moore Jr. Nexsen Pruet, LLC P.O. Drawer

10648 Greenville, SC 29603-0648

Bruce A. Byrholdt 2315 N. Main Street, Suite 117
Anderson, SC 29621

Elbert Stockman Dorn Sr. 1101 Johnson Ave., Ste.
300 Myrtle Beach, SC 29577

Andrew A. Mathias PO Drawer 10648 Greenville,
SC 29603-0648

Joshua L. Howard PO Box 2048 ONE North Main
Street, 2D Fl. (29601) Greenville, SC 29602

James W. Sheedy Driscoll Sheedy, P.A. 11520 N.
Community House Road, Suite 200 Charlotte, NC
28277

Susan Elizabeth Driscoll Driscoll Sheedy, P.A.
11520 n. community house road, suite 200 Charlotte,
NC 28277

W. Howard Boyd Jr. PO Box 10589 Greenville, SC
29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court