

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

JUL 10 2015
SC Court of Appeals

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

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

vs.

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,

Of whom, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation,
and SunTrust Banks, Inc. are the Respondents.

INITIAL BRIEF OF RESPONDENT SUNTRUST BANKS, INC.

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I.

STATEMENT OF ISSUES ON APPEAL

1. Does this Court lack appellate jurisdiction because Appellant Overland's notice of appeal was filed more than 30 days after entry of summary judgment and the time to appeal was not tolled by Overland's untimely Rule 59(e) motion?

2. Did the Circuit Court correctly grant summary judgment in this double forgery check case because either (a) the Uniform Commercial Code does not authorize Overland's claim, or (b) Overland offered no evidence to raise a genuine issue as to each of the elements of its claim against SunTrust?

3. Did the Circuit Court abuse its discretion in deciding the summary judgment motion despite Overland's contention that it had not completed needed discovery where SunTrust Banks, Inc. ("SunTrust") had responded and/or objected to all outstanding discovery, Overland never filed a motion to compel as to SunTrust's discovery responses and objections, and the case had been pending for over four years?

II.

STATEMENT OF THE CASE

A. Procedural History

Appellant Overland and Bank of America ("BOA") provide adequate general summaries of the procedural history of this case. Missing from Overland's rendition, however, are two key facts - - (1) SunTrust had responded and/or objected to all discovery requests issued to it by Overland, and (2) Overland made no motion to compel discovery as to SunTrust's responses and objections at the time of the Court entering summary judgment.

B. Substantive Facts

SunTrust adopts the facts in the brief of BOA but adds the following concerning SunTrust's particularly limited involvement in the overall factual history of the case.

Right before discovery of Lara Nance's fraudulent double forgery scheme by Overland in late January 2010, Nance opened two business checking accounts at SunTrust. The first account, ending in -80238, was titled "Lara M. Nance d/b/a Taylor Enterprises" and opened on January 19, 2010 (the "Taylor Enterprise Account"). (Deposition of Nance at 94:7-10; SunTrust's Answ. Interrog. No. 16). The second account, ending in -08600, was titled "Lara M. Nance d/b/a Atlantic British" and opened on January 28, 2010 (the "Atlantic British Account"). (Depo. of Nance at 99:2-15; SunTrust's Answ. Interrog. No. 16).

No forged checks from Overland were deposited into the Atlantic British Account. (Depo. of Nance at 99:2-18, 163:12; SunTrust's Answ. Interrog. No. 22). Only a total of 18 checks, which were made out to "Taylor Enterprises" and allegedly bore forged maker's signatures, were deposited into the Taylor Enterprise Account at SunTrust. (Deposition of Dr. Jack L. Frasher Jr. at 381:22 – 383:5; SunTrust's Answ. Interrog. No. 22). The sum of these checks was \$54,671.38. (SunTrust's Answ. Interrog. No. 22). These checks were all dated within a span of only one week: January 18, 2010 to January 25, 2010. (Depo. of Nance at 162:9-12). The deposits were in groupings of three checks - - one each from the Greenville, Asheville, and Columbia locations of Overland - - for a total of six deposits. (Depo. of Nance at 161:20-24; Depo. of Dr. Frasher at 329:8 – 330:9, 331:19 – 332:12; SunTrust's Answ. Interrog. No. 22).

In late January, Nance's fraudulent conduct was discovered by Overland's Allison Autrey Malone, when she found that Nance had been writing and cashing duplicate

checks for the same invoices to Overland. (Deposition of Allison Autrey Malone at 77:15 – 79:6, 118:14-16). Overland alleges that Nance embezzled over \$1.28 million from it for roughly two and a half years before her fraud was uncovered. (Affidavit of Michael F. O’Shea, p. 2, ¶ 5, p. 8). SunTrust’s involvement in this two and a half year, \$1.28 million scheme was roughly one week right before Ms. Nance was caught and well less than five percent of the amount allegedly stolen.

III.

ARGUMENT

A. The Court Lacks Appellate Jurisdiction Over Overland’s Untimely Appeal.

This Court previously denied SunTrust’s motion to dismiss Overland’s appeal but ruled that SunTrust’s arguments regarding the timeliness of Overland’s appeal could be raised in its initial brief. *See* Order denying motions to dismiss, dated June 4, 2015. As discussed in its motion to dismiss, this Court cannot hear Overland’s appeal for two reasons. First, Overland failed to file its notice of appeal within 30 days of the order granting summary judgment as required by Rule 203(b), SCACR. Overland received the Court’s order granting summary judgment on December 17, 2014, and Overland did not file a notice of appeal until two and a half months later, on March 4, 2015. (Overland’s Rule 59(e) Motion, p. 1; Overland’s Notice of Appeal, dated March 4, 2015).

Second, Overland did not serve a motion to alter or amend under Rule 59(e), SCRCR, within the 10-day period required by the rule, which would have stayed the time for appeal. (Rule 59(e) Motion, dated January 7, 2015). Instead, it sought and obtained an extension from the trial court to file a Rule 59 motion. (Resp. to Mot. to Dismiss Appeal, Ex. C). But that extension was without legal effect, as this Court has unequivocally stated that the “ten-day time limit [under Rule 59(e)] may not be extended.” *Gobbi v. People’s*

Fed. Bank, 2006 WL 7285959, *4, Op. No. 2006-UP-245 (S.C. Ct. App. May 16, 2006).

Additionally, it is important to note that Appellant never sought an extension from SunTrust, failing to include it on any requests for extension or asking that an extension be granted as to the ruling for summary judgment as to SunTrust. Overland's failure to file its notice of appeal by January 16, 2015, results in its notice being tardy and therefore barred as a matter of law. For these reasons and those asserted in BOA's initial brief at pages 4-7, which are fully incorporated and adopted herein, SunTrust respectfully requests that Overland's appeal be dismissed.

B. The Circuit Court Correctly Granted Summary Judgment in Favor of SunTrust.

The trial court properly concluded that Overland's case for negligence against SunTrust failed on the law and facts at summary judgment. As an initial matter, the UCC does not provide for a negligence claim by a noncustomer, such as Overland, against a depository bank, such as SunTrust, in a double forgery case. Further, if such a claim is permitted at all, Overland failed to establish a genuine issue of material fact as to each of the required elements of its claim. Accordingly, the trial court's order granting summary judgment should be affirmed.

1. Standard of Review.

This Court reviews a trial court's ruling on summary judgment *de novo*. *See, e.g., Meredith v. Stoudemayer*, No. 2004-UP-012, 2004 WL 6248289, at *2 (S.C. Ct. App. Jan. 14, 2004); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) ("An appellate court reviews the granting of summary judgment under the same standard applied by the trial court . . ."). Summary judgment is proper unless a party shows a genuine issue of material fact as to each element of its claim. *See*

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991). As discussed below, Overland has made no such showing.

2. Overland Cannot Assert a Negligence Claim Against SunTrust Under the UCC.

SunTrust is similarly situated to BOA as a depository bank and accordingly it adopts BOA's arguments in pages 9-15 of its brief. As BOA correctly argues, the UCC does not provide for a negligence claim by a noncustomer against a depository bank in double forgery cases. Case law is clear that a bank generally owes no duty of care to a noncustomer. *See, e.g., Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 727 (2014) (finding bank owed no duty of care to noncustomer); *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003) (finding credit card issuer owed no duty of care to noncustomer).

That rule equally applies under the UCC. The South Carolina Supreme Court's ruling in *Read v. South Carolina National Bank*, 286 S.C. 534, 542, 335 S.E.2d 359, 363-64 (1985), is dispositive here. In that case, the Court found that a depository bank is not liable to the drawer for taking a doubly forged check for deposit because the loss suffered by a drawer is the result of the forged drawer's signature, not an improper payee's indorsement. *Id.*, 286 S.C. at 542, 335 S.E.2d at 364. Overland's losses in this case are the result of doubly forged checks based on Overland's forged signature. Overland cannot transfer blame to SunTrust, as the losses Overland suffered are not related to improper payee indorsements.

Overland's argument that *Read* is abrogated by revisions to sections 36-3-404(d) and 36-3-405(b) of the South Carolina Code is belied by the statutory history. Indeed, the amendments do not even mention double forgery cases, and the comments to those

amended sections abrogate some case law, but not *Read*. Given that the comments to the amendments specifically abrogated certain case law and not others, a proper reading of the amendments establishes that the law not specifically abrogated remains in full effect and was not intended to be changed, including the analysis of the Supreme Court in the double forgery case of *Read*.

Based on South Carolina's UCC provisions and their interpreting case law, Overland cannot assert a negligence claim as a noncustomer against a depository bank such as SunTrust in a double forgery case. Accordingly, the trial court's granting of summary judgment should be affirmed.

3. Overland Failed to Establish a Genuine Issue of Material Fact as to Each of the Elements of its Negligence Claim Under the UCC.

If permitted at all, to establish a claim under S.C. Code sections 36-3-404(d) or 36-3-405(b), a party must show four things: (a) those sections apply to the facts of the case (b) a bank's negligence in paying or taking a check for collection, (c) causation, and (d) damages. Overland failed to establish genuine issues of fact as to the first three elements.

(a) Overland Failed to Prove That the Disputed Checks Fell Within the Scope of Sections 3-404 or 3-405.

As explained in full detail in BOA's initial brief at pages 15-17, which arguments are fully adopted herein, Overland has failed to show that S.C. Code sections 3-404 and 3-405 apply to this matter. Overland presents no evidence that Nance's scheme falls within the terms of these statutes, and therefore its claim for negligence against SunTrust fails.

(b) Overland Failed to Offer Proof SunTrust Was Negligent in Taking the Checks For Collection.

Overland further failed to raise a genuine issue of fact as to SunTrust's alleged failure to use ordinary care in "paying the instrument or taking it for value or for collection." See S.C. Code Ann. §§ 36-3-404(d), -405(b). There is no evidence that SunTrust employed anything other than its automated check processing procedure for the acceptance of checks deposited into Nance's Taylor Enterprises Account. Automated check processing is explicitly allowed and included in the definition of "ordinary care" in the UCC. S.C. Code Ann. § 36-3-103(9). Overland failed to present any evidence showing an issue with SunTrust's automated check processing. Thus, there is no indication that SunTrust's paying or collecting of the alleged fraudulent checks deviated from the necessary ordinary care.

Overland contends, however, that it raises a genuine issue of fact as to its negligence claim against SunTrust because Nance did not produce any documentation to SunTrust "that she was doing business as Taylor Enterprises and Atlantic British"¹ and "Nance admitted to forging Charlie Nance's signature on the authorization cards at SunTrust." Those are not genuine issues of material fact. To start, as explained above, the bank does not owe a duty of care to noncustomers, and it surely does not owe a duty of care to a noncustomer in the opening of an account by a customer (*i.e.*, when documentation would be provided concerning a business account opened by an individual). See *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 225-26 (4th Cir. 2002)

¹ Overland seems to misunderstand the fact that doing business as an entity does not mean that SunTrust would need or be able to retain business records relating to the business. When a person opens an account as a D/B/A, they are still operating as the individual/sole proprietorship and the only information necessary for opening an account is the individual person's identification and social security number.

("The mere fact that a bank account can be used in the course of perpetrating a fraud does not mean that banks have a duty to persons other than own customers. To the contrary, the duty is owed exclusively to the customer, not to the persons with whom the customer has dealings."). Further still, sections 36-3-404(d) and 36-3-40(b) provide for liability only where there is lack of ordinary care "in paying or taking the instrument." Neither of those is present by allowing Nance to open an account doing business as Taylor Enterprises and Atlantic British without obtaining documents relating to her D/B/As.

The same analysis applies equally to Nance's forgery of a signature on authorization cards. Again, that concerns the opening of the account and has nothing to do with paying or taking the instruments at issue. Claiming this as a material fact is even more of a red herring as none of the checks at issue as to SunTrust were made out to, indorsed by, or in any way dealt with Larry Nance. In short, Appellant fails to raise any issue of fact as to its claim against SunTrust, much less a material one. For the above reasons and those cited in BOA's brief at pages 17-22, which are fully adopted herein, summary judgment should be affirmed.

(c) Overland Failed to Prove Causation.

Both S.C. Code sections 36-3-404(d) and 36-3-405(b) require proof that the bank's failure to exercise ordinary care "substantially contribute[d] to [the] loss." As discussed above, there is no duty of care between noncustomers and depository banks in double forgery cases because the harm is suffered as a result of the forged drawee's signature, not the forged indorsements of the payee. Thus, the harm suffered by Overland was the result of Nance's conduct in forging Overland's signature, not the acceptance of the forged indorsements by SunTrust. Accordingly, Appellant cannot show that SunTrust's actions in anyway substantially contributed to the loss suffered.

Further still, Overland introduced no evidence to prove the causation element of its claim in the trial court. In fact, Overland ignored this requisite element in its submissions to the trial court, and it has now done so again before this Court. (*See* Overland's Response to Summary J. Mots., p. 6-7 Overland's Initial Brief, pp. 8-10, 14-15). It was the conduct of Nance left unchecked by Overland that resulted in the losses suffered. Overland cannot hold SunTrust responsible for its own negligence. Overland has failed to raise a genuine issue of fact as to causation and therefore the trial court's grant of summary judgment should be affirmed.

C. The Circuit Court did not Abuse its Discretion in Granting Summary Judgment Despite Overland's Objection That it had not Completed Discovery.

1. Standard of Review.

This Court applies an abuse of discretion standard in determining whether the trial court properly granted summary judgment where a party claims discovery is not complete. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 347, 565 S.E.2d 309, 313 (Ct. App. 2002) (“[W]e find no abuse of discretion in the trial court's finding that discovery was complete for purposes of summary judgment.”).

2. Discovery was Complete as to SunTrust.

The trial court did not abuse its discretion in granting SunTrust's motion for summary judgment despite Overland's argument that discovery was incomplete. Most importantly, this is because discovery was complete as it relates to SunTrust (or at least Overland had failed to take the appropriate steps to seek further discovery).² This fact is

² On October 3, 2014, counsel for Overland sent an email to counsel for SunTrust attaching the motion to compel Overland filed against Bank of America. In that email, Overland's counsel stated that he had yet to confer with SunTrust regarding its discovery responses but had a number of issues with SunTrust's objections. He further stated that

conspicuously absent from Overland's argument. SunTrust had responded and/or objected to all outstanding discovery requests from Overland, and Overland did not file a motion to compel against SunTrust as to any of the objections. It cannot now come before the Court and say that discovery was incomplete to avoid summary judgment as to SunTrust.³

Further still, the lower court case had been pending for over four years by the time the summary judgment motion was filed. To say Overland had sufficient time to conduct discovery would be an understatement. Overland has not even attempted to explain its delay or why it asserts this ground for reversal against SunTrust given that it never filed any motion indicating that discovery between it and SunTrust was not complete. Finally, as explained above in the arguments on the merits, further discovery would have been futile. Accordingly, for these and the reasons asserted in BOA's brief at pages 23-27, summary judgment should be affirmed.

IV.

CONCLUSION

For the reasons stated above and those asserted in BOA's initial brief, the contents of which are fully incorporated herein, the Court should affirm the summary judgment entered in SunTrust's favor.

detailed correspondence regarding what Overland believed to be insufficient would be forthcoming. No such correspondence was received by SunTrust, nor was a motion to compel against SunTrust. If Overland needed further discovery and/or wanted to challenge SunTrust's responses and objections, it could have done. It chose not to. Thus, any delay in seeking or compelling discovery by the time of the summary judgment ruling cannot be laid at the feet of SunTrust.

³ To the extent Overland claims that summary judgment was improper because it did not have discovery from other defendants, that argument fails. Outstanding discovery from other parties, to the extent there was any, would have no bearing on SunTrust and its limited involvement in the case.

Respectfully submitted,



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vs.

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And Trust Company, Bank of America Corporation, and
SunTrust Bank, Inc. Defendants.

Of whom Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and
SunTrust Banks, Inc. are the Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the 8th day of July, 2015, he served a copy of the
Initial Brief of Respondent, SunTrust Banks, Inc. and Designation of Matter, upon all counsel of
record, by depositing a copy thereof in the United States Mail, postage prepaid, and addressed as
follows:

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July 8, 2015

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Re: *Overland, Inc., d/b/a Land Rover Greenville v. Lara Marie Nance, et al.*
C.A. No.: 2010-CP-23-5880
Appellate Case No.: 2015-000523

Dear Ms. Kitchings:

Please find enclosed for filing the original and two (2) copies of the Initial Brief of Respondent SunTrust Banks, Inc. in the above-captioned case, along with the original and two copies of our Proof of Service.

We would appreciate your filing the originals and returning a clocked copy of each document in the envelope provided. As always, your assistance with this matter is greatly appreciated. If you have any questions, please feel free to contact me.

Sincerely yours,

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