

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF YORK

C. W. Collins Co., Inc. and the Estate of
Calvin W. Collins, Jr.,

Plaintiffs,

v.

South State Bank,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL
CIRCUIT

CASE NO.: 2019-CP-46-01041

**ORDER DENYING DEFENDANT
SOUTH STATE BANK'S MOTION
FOR SUMMARY JUDGMENT**

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JUN 30 2020

SC Court of Appeals

Defendant South State Bank has filed a Motion for Summary Judgment in the above-captioned case pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Plaintiffs and Defendant each submitted Memoranda and affidavits in relation to this Motion. This Court heard arguments on this motion on February 4, 2020.

STANDARD OF REVIEW

In determining whether summary judgment is proper, this Court must view all evidence in the light most favorable to the non-moving party. Summary Judgment is appropriate only when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 285, 543 S.E.2d 53, 56 (Ct. App. 2001). "Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusion to be drawn from those facts." *Wade v.*

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Berkeley County, 330 S.C. 311, 498 S.E.2d 684, 687 (Ct. App. 1998). “In determining whether a genuine issue of fact exists, a court must consider everything in the record, pleadings, depositions, interrogatories, admissions on file, affidavits, etc.” *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

“The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by “showing” – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party’s case.” *Richardson v. STATE-RECORD COMPANY, INC.*, 330 S.C. 562, 499 S.E.2d 822, 824-825 (Ct. App. 1998). Once the moving party carries its initial burden, the “opposing party must, under Rule 56(e), ‘do more than simply show there is some meta physical doubt as to the material facts’ but ‘must come forward with specific facts showing that there is a genuine issue for trial....’” *Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E. 2d 327 (St. App. 2001). “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Even when there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment should be denied.” *Etheredge v. Richland Sch. Dist. 1*, 330 S.C. 447, 452, 499 S.E.2d 238 (Ct. App. 1998).

DISCUSSION

- 1. Plaintiffs have established the *prima facie* elements of their claims regarding negligence.**

The Plaintiffs’ first cause of action alleged in this case is Negligence on the part of

Defendant South State Bank, resulting in a loss on the part of the Plaintiffs in excess of \$140,000.00. Under South Carolina law, to recover under a negligence action, a plaintiff must establish:

- (a) a duty of care owed by the defendant to the plaintiff;
- (b) a breach of that duty by a negligent act or omission;
- (c) damages proximately resulting from this breach.

Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct.App. 1989); *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2d 530 (Ct.App. 2002).

A duty is "that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care." *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991). A duty to exercise due care is imposed on banking institutions by both long-standing South Carolina caselaw (see *Read v. South Carolina National Bank*, 286 S.C. 534, 335 S.E.2d 359 (S.C. 1985); see also *Dennis v. South Carolina National Bank*, 299 S.C. 34, 382 S.E.2d 237 (Ct. App. 1988)) and statutory authority (see S.C. Code Ann. § 36-4-103, "Action or non-action approved by this chapter...is the exercise of ordinary care...The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could have been realized by the exercise of ordinary care").

A breach of this duty is shown where the plaintiff establishes that the defendant did not exercise the amount of due care imposed upon it by law. To better establish breach in this case, Plaintiffs submitted the Affidavit of Danny F. Dukes, the founder and

Managing Member of Danny F. Dukes and Associates, LLC, as an expert in the fields of bank security and fraud prevention in this case. In his Affidavit, Mr. Duke points out that “[t]he forgery activity involved in this case began after over 4 years of previous account activity; during the almost 32 month period of forgeries...the account should have been closely monitored for increase in transaction numbers and amounts.” Mr. Dukes goes on to conclude that “South State Bank violated applicable banking, money laundering and fraud prevention standards by not complying with monitoring and notification standards...[and] by not matching signatures on checks processed over their teller line with signature cards readily available on their teller system.”

This Affidavit is also submitted to establish that this breach of duty proximately caused the resulting loss to the Plaintiff in excess of \$140,000.00 – an amount that is well-established in the discovery materials provided by South State Bank as well as the other supporting affidavits. Plaintiffs have therefore established a case of negligence against South State Bank in this case far exceeding the prima facie case necessary to survive summary judgment.

2. Defendant’s assertions that contractual provisions establish a complete bar to Plaintiffs’ claims against South State Bank are contrary to South Carolina caselaw and statutory law.

In support of Defendant’s Motion for Summary Judgment, Defendant cites provisions from three different agreements between the parties to establish a complete bar to Plaintiffs’ claims. Reflective of these agreements, the 2016 Business Deposit Account Agreement that Defendant cites states in relevant part:

If you do not notify us in writing of any unauthorized signature or endorsement, a missing endorsement or an alteration or counterfeit item within 60 days from the mailing

date (or the date that we make it available to you) containing those items, you agree (a) we will not be liable for paying any such item and you will be precluded from any recovery from us, *regardless of any lack of care we may have exercised in handling your account*, and (b) you may not bring any legal proceeding or action against us to recover any amount alleged to have been improperly paid out of your account. (Emphasis added)

Defendant goes on to assert that this agreement's provisions establish that South State Bank was "not liable for any subsequent unauthorized signature or alteration by the same person" if there was a similar failure to report within the prescribed 60 days. To justify the inclusion of this contractual limitation, Defendant cites S.C. Code Ann. § 36-4-406 to define the duty owed by a bank customer to be diligent in examining monthly statements and notifying the bank promptly regarding any irregularities, and S.C. Code Ann. § 36-4-103(1) to establish the bank's authority to modify the statutory provisions of Chapter 4 of the Commercial Code. Defendant also goes on to assert that S.C. Code § 36-4-406(d)(2), as modified by the 2016 Agreement provides a complete bar for recovery of any losses incurred more than 60 days after notice, due to C.W. Collins Co.'s failure to notify South State Bank of the "first unauthorized signatures."

While § 36-4-406 does in fact, establish the customer's duty to examine monthly statements and report irregularities, subsection (e) of that statute goes on to state "[i]f the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to the loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with Subsection (c) and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under Subsection (d) does not apply." S.C. Code Ann. § 36-4-406(e). South Carolina law, therefore, leaves banks potentially liable

in those instances where they are shown to have exercised a lack of ordinary care or a lack of good faith, even where the customer has failed to comply with all of the duties imposed under subsection (c) of that statute. This is reflective of the rule as delineated in prior South Carolina caselaw. (See *Dennis v. South Carolina National Bank*, 299 S.C. 34, 382 S.E.2d 237 (Ct. App. 1988), “The preclusion...does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the items.”)

Moreover, the modifications to S.C. Code Ann. §§ 36-4-406(d)(2) and 406(f) that Defendant asserts are authorized by S.C. Code Ann. § 36-4-103(a) are in fact not allowed under that latter statutory provision. Subsection (a) states in relevant part “The effect of the provisions of this chapter may be varied by agreement, *but the parties to the agreement cannot disclaim a bank’s responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure.*” S.C. Code Ann. § 36-4-103(a) (emphasis added). Yet these are the exact effects of the modifications that the Defendant asserts are legitimate under South Carolina law. These provisions, presented here as contracts of adhesion, violate South Carolina statutory law and are unconscionable as contrary to public policy. These contractual terms – to the extent that they seek to disclaim South State Bank’s responsibility for its lack of good faith or failure to exercise ordinary care, or to otherwise limit the measure of damages for any such lack of good faith or failure to exercise ordinary care – are therefore unenforceable under state law and inapplicable in this case.

CONCLUSION

Defendant has failed to establish that there is no genuine issue of material fact in this case. To the contrary, viewing all evidence in the light most favorable to the

Plaintiffs, this Court finds that they have established the elements of their claims as more than sufficient to survive summary judgment. Further, the contractual provisions cited by Defendant South State Bank in seeking to undermine Plaintiffs' claims violate state law – most specifically S.C. Code Ann. § 36-4-103(a) – and are therefore unenforceable in this case. For the foregoing reasons, Defendant South State Bank's Motion for Summary Judgment is hereby

DENIED.

AND IT IS SO ORDERED.

ROGER E. HENDERSON
Presiding Judge,
Sixteenth Judicial Circuit

February _____, 2020.



York Common Pleas

Case Caption: C W Collins Co Inc , plaintiff, et al VS South State Bank

Case Number: 2019CP4601041

Type: Order/Summary Judgment

So Ordered

s/Roger E. Henderson 2754

EXHIBIT B

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 C.W. Collins, Inc. and the)
 Estate of Calvin W. Collins, Jr.,)
)
 Plaintiffs,)
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 vs.)
)
 South State Bank,)
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 Defendant.)

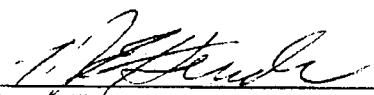
IN THE COURT OF COMMON PLEAS
 CASE NO.: 2019-CP-46-01041

ORDER

After considering Defendant's Motion for Reconsideration and the parties' briefings in support of their positions, I respectfully deny the Defendant's Motion for Reconsideration.

IT IS ORDERED that the Defendant's Motion for Reconsideration in the above captioned case is respectfully denied.

AND, IT IS SO ORDERED.



 Roger E. Henderson
 Circuit Court Judge

Date: June 10, 2010
 Chesterfield, South Carolina



York Common Pleas

Case Caption: C W Collins Co Inc , plaintiff, et al VS South State Bank

Case Number: 2019CP4601041

Type: Order/Other

So Ordered

s/Roger E. Henderson 2754

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