

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

WESSELING & BRACKMANN, P.C.,  
a Michigan corporation,

Plaintiff,

vs.

Case No. 15-00245-CZB

HON. CHRISTOPHER P. YATES

HUNTINGTON BANCSHARES  
FINANCIAL CORPORATION d/b/a  
HUNTINGTON BANK, an Ohio  
corporation,

Defendant.

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ORDER GRANTING SUMMARY DISPOSITION TO DEFENDANT,  
BUT ALLOWING PLAINTIFF TO FILE AN AMENDED COMPLAINT

Every experienced law firm knows better than to take seriously an offer to transfer funds for a Nigerian prince who reaches out to the firm in an e-mail, but modern legal representation routinely involves dealings with seemingly legitimate clients who choose to correspond with firms exclusively *via* e-mails and telephonic communications. In this case, a person who identified himself as James Walter sought out Plaintiff Wesseling & Brackmann, P.C. (“W&B”) for assistance in an oil-rig sale. Walter sent W&B a \$380,000 cashier’s check, which W&B deposited into its IOLTA account with Defendant Huntington Bancshares Financial Corporation (“Huntington”). At Walter’s request, and after consulting with Huntington about the availability of funds from the cashier’s check, W&B told Huntington to transfer by wire \$200,000 to another bank. As it turned out, the cashier’s check was dishonored and Huntington could not recover \$58,155.20 from the \$200,000 wire transfer, so the Court must decide whether W&B or Huntington must bear that loss.

Defendant Huntington has filed a motion for summary disposition under MCR 2.116(C)(8). As our Supreme Court recently noted, “[a] motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint.” *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 62 (2014). Such a motion “is properly granted if ‘[t]he opposing party has failed to state a claim on which relief can be granted.’” *Id.* at 62-63. To decide the motion, the Court “considers only the pleadings” and “must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them.” *Id.* at 63. Therefore, the Court must assess Plaintiff W&B’s claims by considering only its complaint.

Plaintiff W&B has been a customer of Defendant Huntington for years, *see* Complaint, ¶ 5, maintaining a trust account for client funds with the bank. *See id.*, ¶ 12. In September 2014, W&B received an inquiry from a man purporting to be Jason Walter,<sup>1</sup> who sought legal representation in connection with the sale of an oil-drilling rig. *See id.*, ¶ 6. Walter signed a retainer agreement on October 6, 2014, *see id.*, ¶ 8 & Exhibit B, and then sent W&B a \$380,000 cashier’s check on Friday, October 17, 2014.<sup>2</sup> *See id.*, ¶¶ 9-10 & Exhibit D. W&B promptly deposited the \$380,000 cashier’s check into its IOLTA trust account at Huntington, *see* Complaint, Exhibit E, and then waited until the following Monday to use the funds from the cashier’s check.

On Monday, October 20, 2014, at the behest of Jason Walter, Plaintiff W&B commenced the process of transferring \$200,000 from its trust account to an account at U.S. Bank. *See* Complaint, ¶ 14. Before undertaking that transfer, W&B called Defendant Huntington “to ask for confirmation

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<sup>1</sup> Although the complaint consistently refers to that man as “Jason Walters,” the documents attached as exhibits to the complaint make clear that his name was Jason Walter.

<sup>2</sup> The “Official Check” purportedly from CitiBank, N.A., bore the date of “10/14/2014.” *See* Complaint, Exhibit D (copy of check).

that the Cashier's Check in the amount of \$380,000 had cleared." Id., ¶ 15. The complaint alleges that a "Huntington representative that [W&B shareholder Douglas] Brackmann spoke with advised him that the Cashier's Check had, in fact, cleared." Id., ¶ 19. Consequently, Brackmann "instructed Huntington to wire transfer \$200,000 to U.S. Bank as directed by Jason Walter." Id., ¶ 20. And as a result, Huntington "wire transferred from Plaintiff's IOLTA account \$200,000 to U.S. Bank" *per* the instruction of Brackmann on behalf of W&B. See id., ¶ 21 & Exhibit G.

In the wake of the \$200,000 wire transfer, Defendant Huntington learned that the cashier's check for \$380,000 was fraudulent. See Complaint, ¶ 22. Huntington undertook efforts to recover the \$200,000 it had transferred to the U.S. Bank account, but Huntington came up \$58,155.20 short in its endeavor to retrieve the \$200,000. Because Huntington refused to fully reimburse the IOLTA trust account of Plaintiff W&B, a \$58,155.20 shortfall resulted in W&B's trust account. Therefore, W&B filed a four-count complaint against Huntington demanding \$58,155.20 based on theories of innocent misrepresentation, negligent misrepresentation, promissory estoppel, and negligence. In response, Huntington moved for summary disposition under MCR 2.116(C)(8), identifying a host of grounds for relief. Although most of Huntington's arguments require the Court to delve into the factual support for W&B's claims, Huntington's argument predicated upon MCL 440.4207 serves as a potential trump card in this litigation. Accordingly, the Court shall focus on that theory.

Under MCL 440.4207, which constitutes Michigan's version of section 4-207 of the Uniform Commercial Code ("UCC"), there exist transfer warranties for financial instruments such as checks. "[E]ach person who obtains payment of a check from the drawee and each prior transferor warrants to the party who pays the check that he has good title to the instrument." See Dominion Bank, NA v Household Bank, FSB, 827 F Supp 463, 466 (SD Ohio 1993). "The rationale of UCC § 4-207 is

that the party who took from the [preparer of a fraudulent instrument] is in the best position to have prevented the fraud.” Id. “That rationale may, in many cases, bear little relationship with reality.” Id. “In fact, all of the parties in the chain of collection may have acted in a commercially reasonable manner and in complete good faith.” Id. “Nevertheless, the UCC provision satisfies the need for a rule for the assignment of liability among innocent parties.” Id. Defendant Huntington contends that that rule, set forth in MCL 440.4207, should place the financial responsibility for the fraudulent cashier’s check in this case squarely upon Plaintiff W&B, which handled that cashier’s check in the first instance.

The specific language of MCL 440.4207 defines the terms of the parties’ debate. According to MCL 440.4207(1)(b), any bank customer “that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank” that “all signatures on the item are authentic and authorized.” In the instant dispute, “because the [cashier’s] check was fraudulent,” Plaintiff W&B “violated the warranty that ‘all signatures on the item are authentic and authorized.’” See TCF Nat’l Bank v Adobe Liquidations, LLC, No 286335, slip op at 6 (Mich App Nov 24, 2009) (unpublished decision). Pursuant to MCL 440.4207(2): “If an item is dishonored, a customer . . . transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item . . . .” Thus, Defendant Huntington contends that W&B must pay for the loss resulting from the fraudulent cashier’s check. Indeed, as MCL 440.4207(3) clearly provides, any “person to whom the warranties under subsection (1) are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach[.]” In sum, the language of MCL 440.4207 seems to establish that W&B must compensate Huntington for any loss resulting from the fraudulent cashier’s check.

Plaintiff W&B contests the applicability of MCL 440.4207 on several grounds. First, W&B argues that a bank such as Defendant Huntington may use the statute offensively, but not defensively. Because Huntington has suffered no loss in this instance since it refused to return the \$58,155.20 in unrecovered funds to W&B's trust account, Huntington has no right to rely upon MCL 440.4207. To be sure, MCL 440.4207 creates a cause of action to redress violations of transfer warranties, but the statute may also be invoked to defeat claims from bank customers for negligence or breach of contract in connection with funds issued on fraudulent instruments tendered by customers to banks. TCF, No 286335, slip op at 7-8. As our Court of Appeals ruled, albeit in an unpublished decision, "to the extent that [the bank] was negligent or breached any contractual provision by relying on the information provided to them on the fraudulent check and by a fraudulent . . . representative [of another bank], such negligence was irrelevant and does not absolve [the bank customer] of his breach of statutory warranty." Id. Indeed, TCF involved a much more compelling case of misconduct by the bank than W&B has presented in the instant case, yet our Court of Appeals held that the bank's mistakes did not defeat the bank's transfer-warranty protection against claims by its customer.

Second, Plaintiff W&B insists that MCL 440.4207 cannot apply because W&B received no "settlement or other consideration" in exchange for the fraudulent cashier's check. Although MCL 440.4207(2) only imposes a reimbursement obligation on bank customers "receiving settlement or other consideration" for fraudulent instruments, the Court must reject W&B's contention that it did not receive "any settlement or other consideration" for the bogus cashier's check. At W&B's behest, Defendant Huntington made a wire transfer of \$200,000 from W&B's trust account at Huntington to a U.S. Bank account. Although W&B was not the recipient of that wire transfer, the funds that Huntington transferred surely constituted "other consideration" for W&B.

Third, Plaintiff W&B argues that Defendant Huntington failed to act in good faith when it advised W&B that the fraudulent cashier's check had cleared, so Huntington cannot avail itself of the remedy in MCL 440.4207(3) for anyone "who took the item in good faith."<sup>3</sup> A bank customer "may defend a breach of [transfer] warranty action on the ground that the paying bank lacked good faith." Wachovia Bank, NA v Federal Reserve Bank of Richmond, 338 F3d 318, 322 (4th Cir 2003). For purposes of the UCC, "[g]ood faith" . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing." See MCL 440.1201(2)(t). "The failure of the paying bank to exercise ordinary care is insufficient to establish a lack of good faith." Wachovia Bank, 338 F3d at 322. Thus, W&B's accusations of negligence on the part of Huntington fall short of the conduct necessary to defeat Huntington's reliance upon the transfer warranty prescribed by MCL 440.4207. Accordingly, the Court must award summary disposition under MCR 2.116(C)(8) to Huntington on all claims set forth in W&B's complaint because the transfer warranty defeats each of those claims as pleaded.

But as Plaintiff W&B pointed out at oral argument, MCR 2.116(I)(5) permits a plaintiff to amend a complaint in the wake of a summary-disposition ruling under MCR 2.116(C)(8) unless such an amendment "would be futile." See Ormsby v Capital Welding, Inc, 471 Mich 45, 52-53 (2004). W&B requested an opportunity to amend its complaint, and the Court cannot conclude that such an amendment would be futile. Thus, the Court shall permit W&B to file an amended complaint within 14 days of the entry of this order, provided that the amended complaint alleges conduct on the part

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<sup>3</sup> Plaintiff W&B has referred to the obligation of a "collecting bank" to "exercise ordinary care in" circumstances such as "[s]ending notice of dishonor or nonpayment or returning an item" to a customer "after learning that the item has not been paid or accepted," see MCL 440.4202(1)(b), but that provision appears inapplicable to the instant case, where Defendant Huntington purportedly misinformed its customer that the fraudulent cashier's check had cleared.

of Huntington that amounts to something more than mere negligence. Having reviewed the terms of MCL 440.4207 and judicial interpretations of section 4-207 of the UCC, the Court is convinced that mere negligence cannot defeat Huntington's reliance upon the transfer warranty available under Michigan's version of the UCC.

IT IS SO ORDERED.

Dated: July 13, 2015



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HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge