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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0099-14T1

ESTATE OF MICHAEL YAHATZ,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,
PROVIDENCE NURSING AND REHAB,
and NYDIA DAVILA,

Defendants-Respondents.

Argued November 10, 2015 – Decided December 14, 2015

Before Judges Yannotti and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1607-13.

Mark A. Kriegel argued the cause for appellant.

Robert C. Neff, Jr., argued the cause for respondent Bank of America, N.A. (Wilson Elser Moskowitz Edelman & Dicker, LLP, attorneys; John R. Kelly and Mr. Neff, on the brief).

PER CURIAM

Plaintiff, the Estate of Michael Yahatz, appeals a February 11, 2014, order granting summary judgment in favor of defendant, Bank of America (BOA). We affirm.

I.

The facts, founded upon the competent evidence before the trial court and viewed in the light most favorable to the plaintiff, are summarized as follows.

In March 2003, Michael Yahatz (Yahatz) opened an account with Fleet Bank. In April 2004, BOA acquired Fleet Bank and Yahatz's Fleet Bank account was converted to a BOA money market account. On August 11, 2005, Yahatz signed a BOA Personal Signature Card (signature card) thereby acknowledging and agreeing that his accounts would be governed by the terms and conditions set forth in BOA's Deposit Agreement and Disclosures (deposit agreement), as amended from time to time. The deposit agreement provided in relevant part as follows:

> We Are Not Liable If You Fail To Report Promptly: Except as otherwise expressly provided elsewhere in this agreement, if you fail to notify us in writing of suspected problems or unauthorized transactions within 60 days after we make your statement or items available to you, you agree that:
>
> - You may not make a claim against us relating to the unreported problems or unauthorized transactions, regardless of the care or lack of care we may have exercised in handling your action; and
> - 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.

The deposit agreement included a provision regarding "Powers of Attorney/Appointment and Payment to Agents":

> You may decide to appoint someone to act for you as your agent or attorney-in-fact ("agent") under a power of attorney. Please note that the form must be satisfactory to us in our discretion . . . . We may [] accept any form that we believe was executed by you and act on instructions we received under that form without any liability to you.

In July 2012, Yahatz was placed in a nursing and rehabilitation center for in-patient care. Nydia Davila (Davila), an employee of the center, was one of Yahatz's caretakers.

In November 2012, Yahatz signed a power of attorney designating Davila as his attorney-in-fact. Plaintiff does not dispute that Yahatz signed the power of attorney, that it is dated November 28, 2012, and that it was provided to BOA. The power of attorney authorized Davila to "deposit and withdraw funds (by check or withdrawal slips) that [Yahatz had] on deposit or to which [Yahatz] may be entitled in the future in or from any bank, savings and loan, or other institution."

Davila withdrew over $80,000 from Yahatz's BOA account during December 2012. Yahatz died on January 2, 2013. BOA sent a monthly statement to Yahatz's address during January 2013, which contained "Important Information for Bank Deposit Accounts," including instructions for reporting problems

promptly within the sixty-day time period specified in the deposit agreement. BOA did not receive notice challenging the Davila withdrawals until plaintiff filed the complaint in this matter on July 29, 2013.

Plaintiff's complaint alleged causes of action against the rehabilitation center, Davila, and BOA. The complaint alleged BOA was negligent (count six) and liable under N.J.S.A. 3B:14-57 (count seven).

BOA filed a motion for summary judgment in December 2013, which plaintiff opposed. The court heard oral argument and, for reasons set forth in an oral decision, entered a February 11, 2014 order granting summary judgment in favor of BOA and dismissing the complaint against BOA with prejudice.[1] This appeal followed.

II.

We review an order granting summary judgment de novo, applying the same standard as the trial court. Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). We "view the evidence in the light most favorable to the non-moving party." Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012).

[1] The claims against the rehabilitation center and Davila were resolved pursuant to stipulations of dismissal filed with the court.

If the record reveals that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law," then summary judgment should be granted. R. 4:46-2(c). A genuine issue of material fact exists where "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

We are convinced the trial court correctly found there were no genuine issues of material fact and that BOA was entitled to judgment as a matter of law on plaintiff's negligence claim and claim under N.J.S.A. 3B:14-57. The claims are time barred under the terms of the deposit agreement because plaintiff first notified BOA it contested the withdrawals made by Davila more than sixty days after the January 2013 statement was sent to Yahatz's address.

A bank is required to "make available to a customer a statement of account showing payment of items for the account." N.J.S.A. 12A:4-406(a). The customer is responsible to "exercise reasonable promptness in examining the statement" to determine if there are any unauthorized payments. N.J.S.A. 12A:4-406(c).

"A customer owes [a] duty to his bank to examine . . . statements received from the bank and to give timely notice of any irregularities." Western Union Tel. Co. v. Peoples Nat'l Bank, 169 N.J. Super. 272, 278 (App. Div. 1979) (citations omitted); see also, N.J. Steel Corp. v. Warburton, 139 N.J. 536, 547 (1995); N.J.S.A. 12A:4-406(c) (a customer must "promptly notify the bank of the relevant facts" relating to the unauthorized payments).

The deposit agreement required that notice of any unauthorized transactions be provided to BOA within sixty days of plaintiff's January 2013 bank statement. The sixty-day time deadline is enforceable against plaintiff. Western Union Tel. Co., supra, 169 N.J. Super. at 278-79 ("time limitations for bringing suit may be imposed by statute . . . or by agreement between the bank and its customer.").

We are convinced the undisputed facts before the trial court established that plaintiff failed to challenge the Davila transactions within the sixty-day time period set forth in the deposit agreement and, as a matter of law, the failure barred plaintiff's claims.[2] Ibid. A customer who fails to notify a bank

[2] We conclude the trial court erred to the extent it ruled plaintiff's claims were barred under the sixty-day deadline for challenging "electronic fund transfer[s]" under Federal Reserve System Regulation E, 12 C.F.R. § 205.6 (Regulation E). The (continued)

of an unauthorized transaction within the time limitation set forth in a deposit agreement is precluded from challenging a transaction the customer alleges was unauthorized. N.J.S.A. 12A:4-406(d)(1); Estate of Paley v. Bank of America, 420 N.J. Super. 39, 54 (App. Div. 2011).

If a customer's claim is precluded under N.J.S.A. 12A:4-406(d), the customer may still "prove[] that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to [the] loss[]." N.J.S.A. 12A:4-406(e). Ordinary care under N.J.S.A. 12A:4-406(e) is defined as the "observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." N.J.S.A. 12A:3-103(a)(7); see U.C.C., § 3-103 official cmt. 4;[3] see also Estate of Paley, supra, 420 N.J. Super. at 54 (citing Travelers Indem. Co. v. Good, 325 N.J. Super. 16, 23 (App. Div. 1999)).

(continued)
regulation applies to "electronic fund transfer[s]" as defined under 12 C.F.R. § 205.3. There was no competent evidence before the court that the challenged transfers made by Davila were "electronic fund transfer[s]" within the meaning of Regulation E.

[3] "Ordinary care" is defined under Article 3, N.J.S.A. 12A:3-103(a)(7), but "is applicable . . . to Article 4 as well." U.C.C., § 3-103 official cmt. 5.

"If the bank fails to exercise ordinary care, the comparative negligence test set forth in N.J.S.A. 12A:4-406(e), in which the loss is allocated between the customer and the bank, applies." Estate of Paley, supra, 420 N.J. Super. at 54 (citing Travelers Indem. Co., supra, 325 N.J. Super. at 23). If the customer can prove the bank did not exercise good faith in paying the item, the preclusion under subsection N.J.S.A. 12A:4-406(d) does not apply. N.J.S.A. 12A:4-406(e); Estate of Paley, supra, 420 N.J. Super. at 54.

Plaintiff argues the trial court erred because it granted BOA's motion for summary judgment before discovery was complete. Plaintiff's claimed need for additional discovery is based solely upon the contention that the power of attorney was "invalid on its face" and that discovery might establish that BOA acted negligently or in bad faith in its reliance upon the document.

"When 'critical facts are peculiarly within the moving party's knowledge,' it is especially inappropriate to grant summary judgment when discovery is incomplete." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988) (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)). When a suit is "in an early stage and still not fully developed, [the appellate court] ought to review a judgment

terminating it now from the standpoint of whether there is any basis upon which plaintiff should be entitled to proceed further." Bilotti v. Accurate Forming Corp., 39 N.J. 184, 193 (1963).

"A party challenging a motion for summary judgment on grounds that discovery is as yet incomplete must show that 'there is a likelihood that further discovery would supply . . . necessary information' to establish a missing element in the case." Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012) (quoting J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 204 (App. Div. 1996)). In opposing summary judgment, it is insufficient for a party to state that discovery was incomplete, without explaining "with some degree of particularity" what discovery he is seeking and how it could make a difference to the outcome of the motion. Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977).

We are convinced the trial court correctly found plaintiff failed to demonstrate that additional discovery could make a difference in the outcome of the summary judgment motion. Ibid. To establish an entitlement to the N.J.S.A. 12A:4-406(e) exception to the time bar preclusion under N.J.S.A. 12A:4-406(d), plaintiff would have to establish that BOA did not

exercise the care required by "observance of reasonable commercial standards" prevailing in the area in which BOA is located. N.J.S.A. 12A:4-406(e); N.J.S.A. 12A:3-103(a)(7). Plaintiff claims BOA may have violated its duty of ordinary care, and may have acted in bad faith, because it relied upon the power of attorney which was not executed in accordance with N.J.S.A. 46:14-2.1.

We conclude plaintiff's argument was properly rejected by the trial court. The alleged defects in the power of attorney upon which plaintiff relies relate solely to the manner in which it was signed and notarized. Plaintiff, however, concedes as a matter of fact that Yahatz signed the power of attorney. Any failure of BOA to require strict compliance with the dictates of N.J.S.A. 46:14-2.1 could not have been the product of either negligence or bad faith where, as here, there is no dispute that the document was signed by the account holder.

Plaintiff's argument that the lack of compliance with N.J.S.A. 46:14-2.1 rendered the power of attorney "invalid on its face" is incorrect. Enacted in 1991, N.J.S.A. 46:2B-10 to -19 established standards for the use and acceptance of powers of attorney for banking transactions. The legislation did not include a specific statutory requirement for the execution of a power of attorney, but instead simply required that a power of

attorney be "duly signed and acknowledged." N.J.S.A. 46:2B-10. Execution of a power of attorney in accordance with N.J.S.A. 46:14-2.1 could not have been required because the statute had not been enacted at the time N.J.S.A. 46:2B-10 to -19, became effective.

Plaintiff's contention that the power of attorney here was "invalid on its face" is founded in N.J.S.A. 46:2B-8.9, which was enacted in 2000 as part of the "Revised Durable Power of Attorney Act" (Act), N.J.S.A. 46:2B-8.1 to -8.14. N.J.S.A. 46:2B-8.9 provides that a power of attorney must comply with N.J.S.A. 46:14.2.1.

By its express terms, the Act "complement[ed]," but did "not supersede the provisions of" N.J.S.A. 46:2B-10 to -19, as to powers of attorney for banking transactions. N.J.S.A. 46:2B-8.14. As a result, the statutory provisions under N.J.S.A. 46:2B-10 to -19, governing powers of attorney for banking transactions, were unaffected by the enactment of the Act. One of those provisions, N.J.S.A. 46:2B-17, expressly states that the requirements of the statutes are "not intended to be the exclusive method of providing powers of attorney for banking transactions and nothing [in the statutes] shall be deemed to invalidate or make inoperable any power of attorney which is not made pursuant to the [statutes] which is otherwise valid."

"[T]he Legislature is assumed to be aware of existing laws when it passes subsequent enactments . . . ." Ocha v. Twp. Of Middletown Police Dep't., 155 N.J. 1, 27 (1998). It must therefore be assumed the Legislature was aware of N.J.S.A. 46:2B-17 when it subsequently enacted N.J.S.A. 46:2B-8.9 in 2000. As a result, the validity of the Yahatz power of attorney was not dependent upon compliance with N.J.S.A. 46:2B-8.9, because under N.J.S.A. 46:2B-17 a power of attorney for banking transactions which is otherwise valid is not invalid because of a lack of compliance with the requirements of the statutes.

Plaintiff argues only that BOA's alleged failure to investigate the lack of compliance with N.J.S.A. 46:14-2.1, as required under N.J.S.A. 46:2B-8.9, raises genuine issues of material facts as to BOA's alleged negligence and bad faith. We conclude the trial court properly found there were no issues of material fact which precluded the entry of summary judgment because under N.J.S.A. 46:2B-17, strict compliance with N.J.S.A. 46:14-2.1 was not required as a matter of law for the power of attorney to be valid and there is no evidence the Yahatz power of attorney was otherwise "invalid on its face." Additionally, plaintiff concedes Yahatz signed the power of attorney and plaintiff does not argue the power of attorney was "otherwise [in]valid."

While plaintiff asserts that the lack of compliance with N.J.S.A. 46:14-2.1 required BOA to make inquiry regarding the execution of the document, such inquiry would have resulted only in what plaintiff concedes here — that Yahatz signed the power of attorney appointing Davila his attorney-in-fact. There can be no violation of a duty of ordinary care, or a finding of bad faith, where a bank fails to take action to confirm the authenticity of a signature the customer does not dispute is his own.

Plaintiff's acknowledgment and concession that Yahatz actually signed the power of attorney made futile its request for additional discovery regarding any deviation from the requirements of N.J.S.A. 46:14-2.1 in the power of attorney. Plaintiff did not base its request for additional discovery on any other claim. We conclude the trial court properly found that the requested additional discovery was not required "to establish a missing element in the case." Mohamed, supra, 424 N.J. Super. at 498.

Affirmed.