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BofA Can't Escape Negligence Suit Over Fraudulent Account

By **Nathan Hale**

Law360 (May 13, 2020, 5:24 PM EDT) -- Bank of America cannot escape negligence claims levied by a South Florida scrap metal company over a fraudulent account the business's chief financial officer set up to steal its funds, a Florida state appeals court ruled on Wednesday, finding disputed factual issues remain.

Florida's Third District Court of Appeal granted ABC Salvage Inc. partial reversal of a summary judgment that a lower court issued in favor of Bank of America NA, with which it has a corporate checking account. The appellate panel affirmed rulings in favor of the bank on several claims, but revived allegations of negligence related to the opening of the fraudulent account and payment of checks to it, as well as the bank's failure to provide adequate supervision and to detect fraud and money laundering.

ABC Salvage owners Ernest Moczik and Barbara Casavant sued Bank of America and Frank Greenberg — ABC's CFO and bookkeeper — after discovering that Greenberg used Casavant's social security number to open a second account in the name of himself and the nonexistent person "Barbara C. Savage."

Greenberg, who has had a default order entered against him in the case, deposited customer checks made payable to B.C. Salvage, the operative name of the business, into the "Barbara C. Savage" account, according to the opinion. He used the second account to pay ABC's legitimate expenses and transfer funds to Moczik but also fraudulently transferred funds to himself, the opinion said.

He also convinced Bank of America to change the signature card on ABC's corporate account to replace Casavant's name as president of ABC with "Barbara C. Savage," and listed himself as secretary and a Rosita Greenberg as treasurer, the opinion said.

The trial court granted Bank of America summary judgment based on part of Florida's Uniform Commercial Code that bars certain customers from suing a bank for an unauthorized signature or alteration of a bank instrument if the customer does not report the problem within 180 days of receiving a statement, the opinion said.

But the Third District said ABC's claims are more akin to case law that allows customers to bring a negligence claim against banks for allowing accounts to be created in their names using forged signatures.

"Here, ABC has provided evidence that, if credited by the jury, indicates [Bank of America] could have been negligent, among other things, in allowing Greenberg to open the 'Barbara C. Savage' account; to make the unauthorized change of the signatures on the ABC corporate account; and to allow the deposit of at least some of the larger checks made out to B.C. Salvage to the 'Barbara C. Savage' account," the panel said.

"In addition, there is a disputed issue of material fact concerning whether [Bank of America] provided ABC the bank statements or other items that would have allowed a reasonably diligent customer to detect the thefts that ensued," it added.

The Third District also rejected the trial court's finding that ABC ratified the creation of the "Barbara C. Savage" account because Moczik received transfers from that account.

"It is far from clear in this record, however, that either Moczik realized the account was different or, even if he did, that Moczik was acting on behalf of ABC in doing so," the panel said. "Thus, while ABC and some of its principals may have received checks from the 'Barbara C. Savage' account, an issue of fact remains whether ABC or its principals realized the account was being used to steal funds from ABC."

Because it must construe all reasonable inferences in favor of the non-movant when weighing summary judgment, the court said it found genuine disputes remained on material issues of fact.

Attorney Donna Greenspan Solomon, who is representing ABC Salvage, said they are looking forward to proceeding to trial.

"The appellate court properly found that we showed evidence of the bank's negligence in connection with an account that was allegedly used to defraud our client," she told Law360.

Counsel for Bank of America did not immediately respond to a request for comment.

Judges Kevin Emas, Thomas Logue and Monica Gordo sat on the panel for the Third District Court of Appeal.

ABC Salvage is represented by Donna Greenspan Solomon of Solomon Appeals, Mediation & Arbitration and Lawrence J. Bohannon PA.

Bank of America is represented by Adam J. Wick and Alan Michael Pierce of Liebler Gonzalez & Portuondo.

The case is ABC Salvage Inc. vs Bank of America NA et al., case number 3D18-1232, in the Third District Court of Appeal of Florida.

--Editing by Nicole Bleier.