Third District Court of Appeal

State of Florida

Opinion filed May 13, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1232
Lower Tribunal No. 09-58138

ABC Salvage, Inc.,
Appellant,

vs.

Bank of America, N.A., etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Solomon Appeals, Mediation & Arbitration, and Donna Greenspan Solomon (Fort Lauderdale); Lawrence J. Bohannon, P.A., and Lawrence J. Bohannon (Fort Lauderdale), for appellant.

Liebler Gonzalez & Portuondo, and Adam J. Wick and Alan Michael Pierce, for appellee Bank of America.

Before EMAS, C.J., and LOGUE and GORDO, JJ.

LOGUE, J.

ABC Salvage, Inc. ("ABC") appeals the trial court's entry of an order granting final summary judgment in favor of Bank of America, N.A. ("BANA"). Among other things, ABC's chief financial officer stole funds by creating a separate account at BANA under a similar, but fake name using the social security number of another corporate officer and by changing the signatories on ABC's corporate account at BANA. ABC sued BANA for its role in allowing the theft to take place. Because disputed issues of material fact exist as to ABC's causes of action that sound in negligence, we affirm in part and reverse in part.

FACTS

In this review of an order granting summary judgment, we state the facts in the light most favorable to the non-movant. See, e.g., Moradiellos v. Gerelco Traffic Controls, Inc., 176 So. 3d 329, 334–35 (Fla. 3d DCA 2015). ABC is a Florida corporation engaged in the business of salvaging and selling scrap metal. Ernest Moczik was ABC's buyer and salesman. His wife, Barbara Casavant, was its titular president. Frank Greenberg was its bookkeeper and chief financial officer.

In 1990, ABC opened a corporate checking account at a bank which ultimately merged with BANA. The account's signature card had three authorized signers: Moczik, Casavant, and Greenberg. ABC did business under the name "B.C. Salvage." Accordingly, almost all checks received by ABC were made payable to

"B.C. Salvage" and were delivered to Greenberg for deposit into ABC's account at BANA.

On January 14, 2000, Greenberg opened a separate account at BANA in the name of himself and a nonexistent person, "Barbara C. Savage." To open the account, Greenberg used the social security number of Casavant, who was also a BANA customer. BANA had internal procedures intended to prevent the opening of multiple accounts under the names of different persons using the same social security number. Nevertheless, BANA allowed Greenberg to open this account.

Greenberg then began depositing checks from ABC's customers – made payable to the "B.C. Salvage" – into the "Barbara C. Savage" account. Apparently, Greenberg then used the "Barbara C. Savage" account to pay ABC's legitimate expenses, to transfer funds to Moczik, and to fraudulently transfer funds to himself. There is evidence that BANA's policies and procedures required checks in excess of $25,000 to be reviewed by a bank supervisor before deposit but BANA allowed at least one $90,000 check that was payable to "B.C. Salvage" to be deposited into the "Barbara C. Savage" account without this review which might have detected the fraud.

On June 16, 2004, Greenberg, without authorization from ABC, convinced BANA to change the signature card on ABC's corporate checking account. The new card removed the name of Casavant – the President of ABC – and inserted as

President the non-existent Barbara C. Savage. The signature card also listed Greenberg as Secretary and Rosita Greenberg as Treasurer. During the years 2004 through 2006, a BANA manager waived the normal holding period for the transfer of funds based on checks by ABC customers that were being deposited into the "Barbara C. Savage" account, thus allowing Greenberg faster access to funds deposited in that account. There is evidence that a bank manager and a teller at BANA received gifts in the amount of $100 or $200 from Greenberg. When Casavant learned of the existence of the "Barbara C. Savage" account which was using her social security number, she demanded to see the statements for the account, which BANA initially refused.

ABC sued Greenberg and BANA. At one point, the complaint, which was amended several times, contained 24 counts. ABC voluntarily dismissed some counts and other counts targeted only Greenberg, against whom a stipulated order of default was entered. BANA made a series of motions for summary judgment on the remaining counts, which the trial court granted. ABC timely appealed.

ANALYSIS

We affirm without extended discussion the trial court's grant of summary judgment on all counts except for the following counts. We reverse as to counts VII (negligence in opening "Barbara C. Savage" account), VIII (negligence for failure to detect fraud), IX (negligence for failure to detect money laundering), X

(negligence for paying checks to "Barbara C. Savage" account), and XXIII (negligent supervision). Regarding these counts we find a genuine issue of material fact precluding summary judgment.

A. Summary Judgment Standard.

A trial court's ruling on a motion for summary judgment is reviewed de novo. Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Id. Summary judgment "is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings." The Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006).

"A court considering summary judgment must avoid two extremes." Gonzalez v. Citizens Property Ins. Corp., 273 So. 3d 1031, 1035 (Fla. 3d DCA 2019). On one hand, "a motion for summary judgment is not a trial by affidavit or deposition. Summary judgment is not intended to weigh and resolve genuine issues of material fact, but only identify whether such issues exist. If there is disputed evidence on a material issue of fact, summary judgment must be denied and the issue submitted to the trier of fact." Perez–Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017). At the same time, a "party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict."

Perez-Rios v. Graham Cos.,183 So. 3d 478, 479 (Fla. 3d DCA 2016) (citing Martin Petroleum Corp. v. Amerada Hess Corp., 769 So. 2d 1105, 1108 (Fla. 4th DCA 2000)). Finally, as we said in Encarnacion v. Lifemark Hospitals of Florida, 211 So. 3d 275 (Fla. 3d DCA 2017):

> A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. Bishop v. R. J. Reynolds Tobacco Co., 96 So. 3d 464, 467 (Fla. 5th DCA 2012) ("Issues of fact are 'genuine' only if a reasonable jury, considering the evidence presented, could find for the non-moving party.") (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Id. at 277.

B. Section 674.406(6) of Florida Statutes.

The trial court granted summary judgment on two grounds. First, the trial court found that the causes of action were barred by section 674.406(6), Florida Statutes, which is part of Florida's Uniform Commercial Code. Section 674.406(6) bars a customer from making a claim against a bank for an unauthorized signature or an alteration of an instrument when the customer fails to report the problem within 180 days of receiving his or her statement. It provides:

> (6) Without regard to care or lack of care of either the customer or the bank, a customer who does not within 180 days after the statement or items are made available to the customer (subsection (1)) discover and report the customer's unauthorized signature on or any alteration on the item or who does not, within 1 year after that time, discover and report any unauthorized endorsement is precluded from asserting against the

> bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under s. 674.2081 with respect to the unauthorized signature or alteration to which the preclusion applies.

§ 674.406(6), Fla. Stat. (2019) (emphases added).

In Anderson v. Branch Banking & Trust Co., 119 F. Supp. 3d 1328, 1356-58 (S.D. Fla. 2015), the court held that, while this section bars an action by certain customers asserting a bank was negligent in allowing funds to be transferred out of their accounts, it did not bar actions by other customers asserting the bank was negligent in allowing accounts to be created in their names using forged signatures. In so holding, the court noted that "[p]laintiffs' accusations with respect to BankAtlantic's lack of care exceed simple objections to unauthorized funds transfers. Instead, they extend to the imprudent handling of the account openings." Id. at 1358. See Gilson v. TD Bank, N.A., 2011 WL 294447, at *8-10 (S.D. Fla. 2011) ("Because the crux of Plaintiffs' negligence claim is TD Bank's lack of care during the account openings, not the wire transfers . . . . the Court holds that UCC Article 4A as adopted by Florida law does not preempt Plaintiffs' negligence claim.").

Here, ABC has provided evidence that, if credited by the jury, indicates BANA 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. In addition, there is a disputed issue of material fact concerning whether BANA provided ABC the bank statements or other items that would have allowed a reasonably diligent customer to detect the thefts that ensued. This is particularly true because it appears that ABC would have needed access to the statements in both the ABC corporate account and the "Barbara C. Savage" account to detect some of the thefts. For these reasons, section 674.406(6) does not justify entry of summary judgment on the negligent counts identified above.

C. Ratification.

The trial court also granted summary judgment based on ratification. Under Florida law, "[r]atification of an agreement occurs where a person expressly or impliedly adopts an act or contract entered into in his or her behalf by another without authority." Deutsche Credit Corp. v. Peninger, 603 So. 2d 57, 58 (Fla. 5th DCA 1992) (citations omitted). Ratification cannot occur unless the principal has "full knowledge of all material facts and circumstances relating to the unauthorized act or transaction at the time of the ratification." Id. (citing G & M Restaurants Corp. v. Tropical Music Serv., Inc., 161 So. 2d 556, 558 (Fla. 2d DCA 1964). Moreover, the issue of whether an agent's act has been ratified by the principal is a question of fact. Frankenmuth Mut. Ins. Co. v. Magaha, 769 So. 2d 1012, 1022 (Fla. 2000).

Here, BANA asserts ABC ratified the creation of the "Barbara C. Savage" account because, among other reasons, 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. 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 we are required in this summary judgment analysis to draw all reasonable inferences in favor of the non-movant, we find that the record contains genuine disputes as to material issues of fact on this point and the other points discussed above.

Affirmed in part and reversed in part.