SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

PAGE AVENUE CHECK CASHING, LLC,

Plaintiff,

-against-

BANK OF AMERICA, N.A., CONTINENTAL INDEMNITY COMPANY and VINCENT GIAMBRONE,

Defendants.

ORDER

Hon. Kim Dollard

Index No. 152729/2017

motion 001

The following papers numbered 1, 2 and 2 were fully submitted on this 2nd day of March, 2018:

Notice of Motion on behalf of Plaintiff for summary judgment against defendants pursuant to CPLR§3213, in the sum of $60,000 plus pre judgment interest, Attorney's Affirmation & Exhibits.....1
(Dated December 20, 2017)

Affirmation in Opposition on behalf of defendants, BANK OF AMERICA, N.A. and CONTINENTAL INDEMNITY COMPANY & Exhibits.....2
(Dated February 22, 2018)

Reply Affirmation on behalf of Plaintiff & Exhibits.....3
(Dated February 27, 2018)

The plaintiff, PAGE AVENUE CHECK CASHING, LLC, moves for summary judgment pursuant to CPLR§3213 as against all defendants.

The facts of this case reveal that the defendant, VINCENT GIAMBRONE[1], settled a worker's compensation matter for the sum of $60,000 on or about October 25, 2017. At that time, defendant, GIAMBRONE, apparently acknowledged that child support payments in the sum of $181,209.82 were the subject of a restraining order and judgment which remained outstanding. Therefore, defendant GIAMBRONE, agreed that the proceeds of his award ($60,000) would be paid directly to the State of New York or its designated child support collection agency.

[1]. The defendant, GIAMBRONE, has not opposed this motion.

However, on or about November 6, 2017, two settlement checks totaling $60,000 were mistakenly mailed directly to defendant, GIAMBRONE, by the defendant, CONTINENTAL INDEMNITY COMPANY. One check was in the sum of $47,125.00 and the second was in the amount of $12,875.00. On November 10, 2017, the defendant, GIAMBRONE, presented the two checks to the plaintiff, PAGE AVENUE CHECK CASHING, LLC., which is a licensed check cashing business. The plaintiff, PAGE AVENUE CHECK CASHING, LLC., gave the full value of the two checks to defendant, GIAMBRONE, less the customary fees for cashing the checks.

The plaintiff, PAGE AVENUE CHECK CASHING, LLC, presented the checks to the drawee bank, defendant, BANK OF AMERICA, N.A., however, the check was dishonored based upon a "stopped payment" order issued to the drawee bank by defendant, CONTINENTAL INDEMNITY COMPANY. The plaintiff gave defendants notice of the protest and dishonor.

According to plaintiff, PAGE AVENUE CHECK CASHING, LLC., the defendant, GIAMBRONE, had previously cashed approximately 18 checks from defendant, CONTINENTAL INDEMNITY COMPANY drawn upon the defendant, BANK OF AMERICA, N.A., The previous checks were in the sum of $52.50, except for one check in the sum of $105.

The plaintiff moves for summary judgment pursuant to CPLR §3213, by summons and motion for summary judgment in lieu of a complaint. The plaintiff, PAGE AVENUE CHECK CASHING, LLC, claims entitlement to judgment on the basis that it is holder in due course pursuant to UCC §3-305 and lacked notice of any claim to the instrument.

The defendants, BANK OF AMERICA, N.A., and CONTINENTAL INDEMNITY COMPANY, oppose the summary judgment motion on several grounds, including that the bank is not liable on an unaccepted instrument; the defendant bank is not the maker/ obligor on the instrument and cannot incur any liability to a holder in due course; the conclusive establishment of holder in due course status is not conducive to summary disposition; and that issues of fact exist as to whether the plaintiff is a holder in due course.

Pursuant to CPLR §3213, a creditor in an action on an instrument for money only may proceed by summons and motion for summary judgment. This expedited procedure permits obligations that are presumptively valid, and holders of them, in the absence of questions of fact as to authenticity or default, to proceed without delay occasioned by formal pleading (*Interman Indus. Prods. v. RSM Electron Power*, 37 N.Y.2d 151, 154–155, 371 N.Y.S.2d 675, 678–680, 332 N.E.2d 859, 861–862; *Seaman–Andwall Corp. v. Wright Mach. Corp.*, 31 A.D.2d 136, 295 N.Y.S.2d 752). When the instrument itself calls for something more than the payment of money, however, the 3213 motion for summary judgment will be denied and the parties directed to plead (*see Jones v. CHC Industries, Inc.*, 63 A.D.2d 1119, 406 N.Y.S.2d 217; *Wagner v. Cornblum*, 36 A.D.2d 427, 428–429, 321 N.Y.S.2d 156, 157–158 and cases cited therein). *Logan v. Williamson & Company*, 64 A.D.2d 466, 468–469, 409 N.Y.S.2d 883, 884–885 (4th Dept. 1978) *appeal dismissed* 46 N.Y.2d 996, 416 N.Y.S.2d 242, 389 N.E.2d 837 (1979).

A check has been held to be "an instrument for the payment of money only." Any defenses to the underlying transaction between the parties which serves as a basis to stop payment of the checks do not alter the character of the checks as instruments for the payment of money only or prevent the use of the CPLR § 3213 procedure. *First Inter–County Bank of New York v. DeFilippis*, 160 A.D.2d 288, 289, 553 N.Y.S.2d 384, 385 (1st Dept. 1990).

Accordingly, the checks at issue are instruments for the payment of money only within the realm of CPLR §3213. Under these circumstances, this Court must then look to the substantive grounds raised in the opposition to the motion for summary judgment to determine whether defendants raised a triable issue of fact.

The defendants, BANK OF AMERICA, N.A., asserts that pursuant to UCC §3-409(1), a drawee-payor bank is not liable on an unaccepted instrument nor is it a maker/obligor on the instruments and can incur no liability to a holder in due course. Pursuant to UCC§ 3-408, a drawee is not liable on an unaccepted draft. This provision states that "a check . . . does not itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it". In the present action, because the defendant,

BANK OF AMERICA, N.A., is not liable on an unaccepted draft and since it did not accept the checks, this defendant cannot be held liable. Accordingly, summary judgment is denied as to this defendant and the court sua sponte dismisses the action against this defendant.

The defendants, BANK OF AMERICA, N.A. and CONTINENTAL INDEMNITY COMPANY, assert further that there are issues of fact as to whether the plaintiff is a holder in due course. It is also claimed that concerns should have been raised to plaintiff since the 18 prior checks that defendant, GIAMBRONE cashed were of much lesser amounts and because one check cashing teller assisted defendant, GIAMBRONE, for fourteen out of twenty transactions.

A holder in due course is a holder who takes an instrument (1) for value, (2) in good faith, and (3) without notice that it is overdue or has been dishonored or of any defense or claim against it on the part of another (Uniform Commercial Code, s 3-302, subd. (1)). It is beyond dispute that value was given for the checks at issue.

In Chemical Bank of Rochester v. Haskell, 411 N.E.2d 1339, 432 N.Y.S.2d 478, 51 N.Y.2d 85, 1980, the Court of Appeals examined the explanation of notice provided in article three, which states that: "the purchaser must have knowledge of the claim or defense or knowledge of such facts that his action in taking the instrument amounts to bad faith." (Uniform Commercial Code, s 3-304, subd. (7).) The Court of Appeals noted that this subdivision speaks in terms of "knowledge" and not the "reason to know" language used in subdivision (3) of the same section. This was deemed a meaningful distinction because "knowledge" under the code means "actual knowledge" (Uniform Commercial Code, s 1-201,.

With respect to the meaning of the terms "in good faith" and "without notice" as used in section 3-302, the Court of Appeals in Chemical Bank of Rochester, noted that good faith under the code is defined as "honesty in fact in the conduct or transaction concerned" (Uniform Commercial Code, s 1-201, subd. (19)) and indicated that the draftsmen intended that this language set a subjective and not objective standard. Therefore, the inquiry is not whether a reasonable person or entity would have known, or would have inquired concerning the matter, but rather, the inquiry is exactly what that person or entity itself actually knew.

If the person or entity did not have actual knowledge of some fact which would prevent a commercially honest individual from taking up the instrument or instruments, then its good faith would be sufficiently shown.

In applying these principles to the facts at bar, this Court finds that the plaintiff, PAGE AVENUE CHECK CASHING, LLC., met its burden of establishing that it was a holder in due course. The plaintiff attached an affidavit from Scott Mavica, the managing member of plaintiff, PAGE AVENUE CHECK CASHING, LLC. Mr. Mavica averred that in exchange for the sum of $47,125.00 and $12,875.00, paid by plaintiff to defendant, GIAMBRONE, the said defendant as payee, GIAMBRONE endorsed and presented to plaintiff checks in the sum of $47,125.00 and $12,875.00 respectively, drawn by GIAMBRONE on the account of defendant, CONTINENTAL INDEMNITY COMPANY at BANK OF AMERICA, N.A. Thereafter, when plaintiff presented the checks, they were dishonored due to a "stop payment" order issued to the drawee bank by defendant, CONTINENTAL INDEMNITY COMPANY. According to the affidavit, neither Movica or anyone at PAGE AVENUE CHECK CASHING, LLC, knew of the stop payment orders on the two checks at the time the checks were accepted and cashed. No one associated with the plaintiff knew of any reason why either of the two checks would not be paid upon presentment and no one associated with the plaintiff knew of the existence of any dispute between the defendant, GIAMBRONE and the defendant, CONTINENTAL INDEMNITY COMPANY, which would cause the checks to be dishonored. Plaintiff attests that it had every expectation that the two checks would be honored as they had in the past.

Based upon the foregoing, the plaintiff, PAGE AVENUE CHECK CASHING, LLC, has met its burden of entitlement to summary judgment. In opposition, the defendants have failed to raise any issues of fact.

It is unreasonable to expect in this situation that plaintiff, PAGE AVENUE CHECK CASHING LLC, foresee any improprieties with respect to the transaction and instrument, which it learned afterwards. Moreover, even if another check cashing facility might have felt it prudent to investigate further as defendants contend, this is not enough. PAGE AVENUE CHECK CASHING

LLC, was not bound to be " alert for circumstances which might possibly excite the suspicions of wary vigilance " (Hall v. Bank of Blasdell, 306 N.Y. 336, 341, 118 N.E.2d 464,). There was no obligation on plaintiff to investigate the reason these checks were greater than those previously cashed, as defendant CONTINENTAL INDEMNITY COMPANY contends.

Therefore, the plaintiff, PAGE AVENUE CHECK CASHING LLC, is a holder in due course, and takes the instruments free from all claims and defenses.

Accordingly, plaintiff's motion for summary judgment pursuant to CPLR §3213 is granted as against defendants, CONTINENTAL INDEMNITY COMPANY and VINCENT GIAMBRONE, in the sum of $60,000.00 and plaintiff may enter judgment for $60,000, plus interest from November 16, 2017. The motion is denied as to the defendant, BANK OF AMERICA, N.A., and the summons dismissed as to this defendant.

Lastly, while defendant, CONTINENTAL INDEMNITY COMPANY requests judgment over and against the defendant, GIAMBRONE, since this defendant never cross-moved for such relief and because there is no answer served with cross-claims against GIAMBRONE, this request is denied.

Dated: May 2, 2018

ENTER

Kim Dollard

Hon. Kim Dollard
Acting Justice Supreme Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Y/afa

_____AD3d_____ Argued - June 7, 2019

WILLIAM F. MASTRO, J.P.
MARK C. DILLON
VALERIE BRATHWAITE NELSON
ANGELA G. IANNACCI, JJ.

2018-05929 DECISION & ORDER

Page Avenue Check Cashing, LLC, respondent,
v Bank of America, N.A., et al., defendants,
Continental Indemnity Company, appellant.

(Index No. 152729/17)

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York, NY (Patrick J. Lawless of counsel), for appellant.

Russell Macnow Attorney at Law, LLC, New York, NY (Lauren Papaleo of counsel), for respondent.

In an action to recover on two checks, commenced by motion for summary judgment in lieu of complaint pursuant to CPLR 3213, the defendant Continental Indemnity Company appeals from a judgment of the Supreme Court, Richmond County (Kim Dollard, J.), entered May 9, 2018. The judgment, insofar as appealed from, upon an order of the same court dated May 2, 2018, inter alia, granting that branch of the plaintiff's motion which was for summary judgment in lieu of complaint insofar as asserted against the defendant Continental Indemnity Company, is in favor of the plaintiff and against the defendant Continental Indemnity Company in the principal sum of $60,000.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

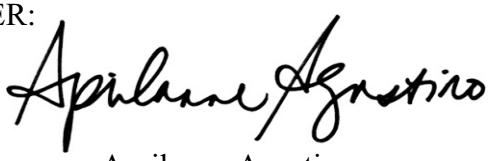
The plaintiff, a check cashing company, established its entitlement to judgment as a matter of law by submitting copies of the endorsed checks drawn by the defendant Continental Indemnity Company, evidence of that defendant's failure to make payments called for by those

checks, and evidence that the plaintiff was a holder in due course (UCC 3-302[1]; *see Hartford Accident & Indem. Co. v American Express Co.*, 74 NY2d 153, 160; *US Premium Fin. v Terranova Masonry, Inc.*, 172 AD3d 1139; *cf. Eisenberg v HSBC Payment Serv. [USA]*, 307 AD2d 950). In opposition, Continental Indemnity Company failed to raise a triable issue of fact (*see Green v Darwish*, 171 AD2d 644, 645; *Tropical Ornamentals, Inc. v Visconti*, 115 AD2d 537, 538-539).

Accordingly, we agree with the Supreme Court's determination to grant that branch of the plaintiff's motion which was for summary judgment in lieu of complaint insofar as asserted against Continental Indemnity Company.

MASTRO, J.P., DILLON, BRATHWAITE NELSON and IANNACCI, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court