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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2999-08T1

ADS ASSOCIATES GROUP, INC.,
and BRENDAN ALLEN,

Plaintiffs-Appellants/
Cross-Respondents,

v.

ORITANI SAVINGS BANK,

Defendant-Respondent/
Cross-Appellant,

and

ASNEL DIAZ SANCHEZ,

Defendant.

Argued November 30, 2010 - Decided December 29, 2011

Before Judges Graves, Messano and Waugh.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3648-06.

Gary S. Newman argued the cause for appellants/ cross-respondents (Newman & Denburg, LLC, and Seidman & Pincus, L.L.C., attorneys; Mr. Newman and Mitchell B. Seidman, of counsel and on the brief).

Gregg S. Sodini argued the cause for respondent/ cross-appellant (Law Offices of Gregg S. Sodini, LLC, attorneys; Lauren Graham Delehey, on the brief).

Christopher J. Carey argued the cause for cross-respondents Gary S. Newman and Newman & Denburg, LLC (Graham Curtin, attorneys; Mr. Carey, of counsel; Patrick B. Minter, William D. Tully, Jr., and John D. Gagnon, on the brief).

PER CURIAM

In October 2003, Brendan Allen and Asnel Diaz Sanchez opened a business checking account in the name of Sanchez's corporation, ADS Associates Group, Inc. (ADS), at Oritani Savings Bank (Oritani or the Bank), where ADS had existing accounts. Shortly thereafter, without Allen's knowledge, Sanchez began transferring funds electronically from the new account to the other ADS accounts over which Allen had no control. After Allen learned of the transfers, he filed a lawsuit against Oritani and Sanchez.

Early in the proceedings, the court determined that ADS was the Bank's "customer" under the Uniform Commercial Code (UCC), and the court dismissed Allen's individual claims against the Bank. However, the court allowed Allen to file an amended complaint with ADS as the plaintiff, and the court authorized Allen to prosecute the matter on behalf of ADS. The amended complaint alleged breach of contract, conversion, UCC violations, negligence, breach of fiduciary duty, misrepresentations and omissions in violation of the Consumer

Fraud Act, and general fraud against the Bank.[1] The Bank denied any wrongdoing and sought attorneys' fees and costs under the frivolous litigation statute, N.J.S.A. 2A:15-59.1.

The trial took place in September and October 2008. At the close of evidence, the trial court dismissed all claims against Oritani except for count three, which alleged the unauthorized internet transfers from the ADS account violated the UCC.

The jury returned a verdict for ADS in the amount of $295,500. ADS then moved for additur, interest, and counsel fees; and Oritani cross-moved for judgment notwithstanding the verdict (JNOV). The court denied ADS's motion, and it granted Oritani's motion for JNOV based on indemnity agreements between ADS and the Bank. ADS filed a motion for reconsideration, which the court denied. The court also found the amended complaint was not frivolous and Oritani's post-judgment motion for counsel fees and costs was denied.

Among other things, Allen contends on appeal that the trial court erred in dismissing his individual claims against Oritani. In addition, Oritani cross-appeals from the order that permitted Allen to proceed on behalf of ADS and from various other orders entered by the court. For the reasons that follow, we conclude

[1] The amended complaint filed on behalf of ADS also noted that all claims against Sanchez were stayed because Sanchez had filed for bankruptcy.

that Allen should have been allowed to pursue his common law non-customer claims against the Bank. We therefore reverse and remand for a new trial.

The facts adduced at trial are relatively straightforward. Allen and his family were involved in the construction industry for many years, and in 2003 he was "presented with an opportunity" to haul material from the Hudson-Bergen Light Rail Project (the Project). Allen's business was not incorporated, but he had worked with Sanchez and knew that Sanchez, the president and sole shareholder of ADS, had an established business with "minority status."[2] Therefore, Allen proposed "a joint venture for the project," and Sanchez "thought it was a good idea."

According to Allen, he was responsible for contributing the initial capital, for getting the work and for negotiating terms with the Project representatives, and Sanchez was to "fill out all the truck manifests, handout the paperwork, collect the paperwork, [and] do the billing." Allen said they planned to review "the invoices from the subcontractors" together to "determine how much they were going to get paid," and they further agreed the profits would be split seventy/thirty with

[2] According to Allen, "minority status" would help ADS "get work in a public job, such as the Hudson-Bergen Light Rail."

seventy percent going to Allen, and thirty percent going to ADS. Allen explained the agreement was not reduced to writing because they initially thought the work would only last "a few weeks."

After a contract was awarded to ADS in September 2003, Allen and Sanchez decided to open a business checking account in ADS's name at Oritani because the checks "were going to come in under the contract" in ADS's name, Sanchez "had business there already," and Allen "had no other banking relationships." Although the parties planned to use a single business account, Allen testified they agreed that both of their signatures would be required to remove any money from the account.

On October 2, 2003, Allen and Sanchez opened Account No. XXXXXX3604 (3604) in ADS's name at Oritani, where ADS already had two existing accounts (Account No. XXXXXX1520 (1520) and Account No. XXXXXX3869 (3869)). According to Allen, they explained to the Oritani representative that they wanted the account set up so that neither one of them could "take money out without the other person knowing." On a form entitled "New Business Account Interview," Sanchez was listed as ADS's president, Allen was listed as treasurer, and the form stated: "Number of Signatures Required: 2."

On a separate business account signature card, Allen and Sanchez confirmed their respective titles, and they authorized

the Bank to recognize "2 of the 2 signatures" for the "payment of funds or in the transaction of any business for this account." Based on the documents that Allen and Sanchez signed and their discussion with the Bank's representative, Allen believed they "both had to sign to get money out of the account."

Allen and Sanchez also signed a business checking form, which contained the following indemnity provision: "You are liable for any losses or expenses caused by your employees, owners, principals or agents who forge or alter any instrument or endorsement or make any unauthorized charge to your account." The document also provided as follows under the heading "Statements":

> You will receive a monthly statement reflecting all account activity, all charges assessed therewith and the balance of your account, together with canceled checks for the period. In order to preserve your rights, you must examine the statement and report any problem or error with an account statement within 60 days after the statement is sent to you or the Bank is not liable for such problem or error. This includes a forged, unauthorized or missing signature or endorsement, a material alteration, a missing or diverted deposit, or any other error or discrepancy. You must promptly notify the Bank in writing of any changes in your address.

Allen testified the Bank required the checking account statements to be sent to ADS's address. According to Allen, he

offered to pay for a duplicate set of statements, but he was told: "[We] don't do that. We can't do that. It's through a computer." Therefore, the account statements were sent to Sanchez and Sanchez kept the checkbook.

Allen and Sanchez also signed a corporation resolution. But none of the documents they signed authorized internet banking. Moreover, Allen testified there was no mention of internet withdrawals or transfers from the account:

> Q. Now during your meeting at the bank did anybody discuss internet transfers?
>
> A. No.
>
> Q. Was there any discussion at all about the ability to take out this money without two signatures on the check?
>
> A. Yes.
>
> Q. There was?
>
> A. Yes.
>
> Q. What discussion was there?
>
> A. That the only way money was going to come out of the account was if we both signed the checks.
>
> Q. Okay. And who said that?
>
> A. The woman at the bank.
>
> Q. How many times?
>
> A. About five.

Q. Did the woman at the bank say anything in any of your discussions about internet transfers?

A. No.

Q. Did the lady at the bank during the hour that you were there say anything about the ability to have access to the account from the internet?

A. No.

Q. Did [Sanchez] say anything at that meeting regarding anything to do with the internet?

A. No.

Q. Did you sign any paperwork at that meeting that authorized anything to be done through the internet?

A. No.

Q. Did you ever sign any paperwork, anything talking about the ability of anything to be done through the internet?

A. No.

Sanchez, however, had already authorized "online internet banking" for the two other ADS accounts at Oritani.

Allen deposited $750 to open the account, and he subsequently deposited $28,000 into the account "to pay the vendors while [ADS was] waiting to get paid." On cross-examination, Allen acknowledged that he did not make any additional deposits to the account and that all other deposits were "joint venture proceeds."

While working on the Project, Allen and Sanchez met about "every two weeks" to determine which vendors "had to get paid" and to "sign the checks." Because the check register maintained by Sanchez did not show the account's current balance, Allen sometimes asked to see the bank statements, but Sanchez told him the statements were not available for various reasons. Allen testified it was not "a big deal" because Sanchez was his friend, and Allen believed that two signatures were required to remove money from the ADS account.

On June 8, 2004, Allen and Sanchez wrote a check in the amount of $70,000 from ADS to Gallen Contracting, Inc., a company owned by Allen and his wife. The check was returned for insufficient funds, however. Allen spoke with Sanchez on June 15, 2005, and Sanchez said there was "no more money" because he "used it for expenses."

After speaking with Sanchez, Allen went straight to the Bank, and he learned there were numerous internet transfers from ADS's Account 3604 to other ADS accounts at Oritani. Shortly thereafter, Allen received copies of the account statements, which showed the transfers began on October 15, 2003.[3]

[3] The parties stipulated that the sum of $151,072.26 was transferred from Account 3604 to Account 3869 between October 2003 and May 2004; and the sum of $462,900 was transferred from (continued)

When Allen was asked why he didn't file a criminal complaint against Sanchez, he said, "I didn't want to put him in jail. I wanted my money back." Allen did not cancel the Project contract, because he still had money coming in, more work to do, and bills that needed to be paid. According to Allen, Sanchez promised to pay him back, and from that point forward when a check came in, Sanchez would give it to Allen and he "would get the money." For the next year or so, they followed that procedure, but from time to time Allen gave Sanchez money he needed "to continue the business."

Allen testified that Sanchez "walked off the job" in approximately April 2005 because "[n]obody wanted to deal with him anymore." Allen continued working on the Project under the ADS name, until he "finished the job." The last check he received was dated September 1, 2005.

Allen also testified Sanchez owed him "a lot of money," but Allen admitted he did not know the actual amount:

> Q. Did you ever do a calculation in that regard that by keeping him in business, how much of your money you got back?
>
> A. No, I'm not an accountant.

(continued)
Account 3604 to Account 1520 between October 2003 and June 2004. Thus, the transfers totaled $613,972.26.

> Q. Do you . . . believe that you got some of your money back by keeping him in business?
>
> A. Not enough.
>
> Q. Do you have any idea of the scope of the money you got back that you claim he took from you by keeping him in business?
>
> A. Actually, in the long run, you know what's the irony about it? It cost me more money. So no, I don't.

Allen estimated there would have been a profit of "about $800,000" if Sanchez had not been allowed to transfer funds from the ADS account without Allen's authorization. Allen also claimed the money that was "missing" from the account was part of the profit he should have received.

When Sanchez testified, he confirmed that Allen approached him about the Project in August 2003 because Allen "needed . . . a company with union contracts [that was] an established minority business." Sanchez confirmed there was to be a seventy/thirty split of profits, but he did not agree that the arrangement was a "joint venture" because ADS assumed all of the liabilities. Sanchez also acknowledged that between September 2003 and the end of 2004 the Project constituted ninety percent of ADS's work.

Sanchez explained that he enrolled in internet banking at Oritani in March 2003 (about six months before he and Allen got

involved in the Project), for the convenience of transferring funds from ADS's then-existing payroll and business accounts. According to Sanchez, when he and Allen opened the new ADS account at Oritani, they told the Bank representative about their two-signature requirement for checks, but they did not discuss internet banking. Sanchez understood from the paperwork they signed that it was their obligation to review the bank statements periodically, and to notify the bank of any problems. He also confirmed that he received the statements regularly thereafter, and that the statements were correct.

Sanchez testified Allen was a "hard person to get a hold of," and some expenses, like the "union hall, diesel, truck payments, [and] vendors" needed to be paid promptly. Therefore, when payments to ADS were delayed, Sanchez said he used a $100,000 line of credit available to ADS for "ongoing expenses." Sanchez explained he "linked" Account 3604 to ADS's other accounts at Oritani to pay ADS's expenses when he was unable to contact Allen. Sanchez also confirmed he began transferring funds to pay expenses "about two weeks" after Account 3604 was opened.

According to Sanchez, ADS received between $2.8 and $3 million for the work performed on the Project. However, he claimed there were no profits to be divided because ADS

"suffered a major loss." Sanchez testified that Allen's company, Gallen Contracting, Inc., was paid "[b]etween $900,000 and $1,100,000," but other vendors were still owed "between two and three hundred thousand," and the union was still owed about $50,000 "for audits in regards to employees hours and things like that."

Sanchez maintained he was "the personal guarantor of every single account" and, as a result, his house was in foreclosure; he was forced to declare bankruptcy; and he could no longer get construction work. Sanchez also confirmed that he never authorized Allen or ADS to file a lawsuit, and he could not identify any damages ADS suffered as a result of Oritani's conduct. When questioned regarding specific transfers from Account 3604 to Accounts 1520 and 3869, Sanchez insisted they were made to pay legitimate business expenses. Sanchez also denied that he ever stole any money from ADS.

Robert Pierson testified he "started with the Bank in February 2001" as an assistant vice president and deposit operations manager, and at the time of trial, he was the Bank's security officer. According to Pierson, the Bank did not normally send duplicate account statements to different addresses in October 2003, because "[i]t wasn't set up automatically to be done." Based on the interview form and the

signature card for Account 3604, Pierson agreed that any transaction carried out without the approval of both Allen and Sanchez was unauthorized:

> Q. [The account interview form] uses the word required, does it not?
>
> A. Yes.
>
> Q. The customer was requesting that two signatures be required, correct?
>
> A. Correct.
>
> Q. This is the bank's form, correct?
>
> A. Correct.
>
> Q. The bank put the word required on there, correct?
>
> A. Correct.
>
> Q. The customer requested two signatures for this account, correct?
>
> A. Correct.
>
> Q. Wouldn't you agree with me that any transaction carried out that didn't have the approval of both the president and the treasurer on Account 3604 was unauthorized?
>
> A. Based on what you're showing me, yes.

At the time of trial, Rocco Pinto was the manager of the Oritani branch where the parties opened Account 3604. He said that the signature card along with the corporate resolution were the key documents regarding account use. Based on the signature

card for Account 3604, which authorized the Bank "to recognize 2 of the 2 signatures subscribed above in the payment of funds," Pinto testified "it would take both parties to transact any type of check writing, [or] cash withdrawal."

Pinto also confirmed that for a two-signature account, both parties were required to sign an internet banking authorization form:

> Q. Now let's say a customer wanted to have internet banking. How would that be . . . done in October of 2003?
>
> A. There was . . . an application that needed to be filled out by . . . the customer at the bank, signed, and forwarded to the internet banking department.
>
> . . . .
>
> Q. What if the account is a two-signature account?
>
> A. Then two parties would sign the application.
>
> Q. Okay. So if there's a two-signature account in order to have internet banking you need a signature of the two signators on the account. Is that a fair statement?
>
> A. Yes.
>
> Q. So without an internet banking authorization with two signatures on that account you could not have internet capability. Is that correct?
>
> A. Yes.

. . . .

> Q. Without an internet transaction form having been completed by all signators on the account is an internet transfer out of that account authorized?
>
> A. No.

In his closing statement, ADS's attorney argued "Mr. Allen was a signator on this account. No money could be removed from this account without Mr. Allen's authorization. That's it. That's the bottom line." On the other hand, the Bank's attorney argued that Allen left Sanchez "holding the bag," and then concocted "a bogus scheme to get more money from Oritani, not for ADS, but for Mr. Allen and his counsel."

After the jury returned its verdict, the court asked how it arrived at the figure of $295,500. The jury foreperson explained: "It represents from April 2, 2004 to June 14, 2004 any internet transfers out of Account 3604 and that is representative [of] sixty days from the date of notification."

On appeal, Allen and ADS present the following arguments:

> POINT I
>
> THE TRIAL COURT ERRED BY GRANTING ORITANI JNOV AND THE VERDICT SHOULD BE REINSTATED.
>
> POINT II
>
> IT WAS ERROR TO DISMISS PLAINTIFFS' CONSUMER FRAUD ACT, COMMON LAW FRAUD, AND BREACH OF CONTRACT CLAIMS.

POINT III

IT WAS ERROR FOR THE COURT TO (I) RULE THAT ALLEN IS NOT ORITANI'S CUSTOMER, AND (II) DISMISS ALLEN'S "NON-CUSTOMER" CLAIMS.

POINT IV

ORITANI IS STRICTLY LIABLE FOR THE PRINCIPAL AMOUNT OF THE TRANSFERS.

POINT V

OTHER ISSUES ON APPEAL.

In addition, Oritani presents the following points in its cross-appeal:

POINT I

THE TRIAL COURT CORRECTLY FOUND THAT ALLEN LACKS STANDING TO SUE ORITANI IN HIS INDIVIDUAL CAPACITY.

A. THE TRIAL COURT CORRECTLY FOUND THAT ALLEN LACKS STANDING TO SUE ORITANI FOR ALLEGED VIOLATIONS OF THE UCC BECAUSE HE IS NOT ORITANI'S CUSTOMER.

B. THE TRIAL COURT CORRECTLY FOUND THAT ALLEN LACKS STANDING TO SUE ORITANI FOR BREACH OF CONTRACT.

POINT II

THE TRIAL COURT SHOULD NOT HAVE ALLOWED ALLEN AND HIS ATTORNEYS TO PROSECUTE THIS ACTION ON BEHALF OF ADS.

POINT III

THE TRIAL COURT PROPERLY LIMITED PLAINTIFF'S EVIDENCE AT TRIAL BASED ON FAILURE TO PROVIDE TIMELY DISCOVERY RESPONSES.

A. THE TRIAL COURT PROPERLY BARRED PLAINTIFF'S PURPORTED EXPERT REPORT AND TESTIMONY.

B. THE TRIAL COURT PROPERLY DEEMED ORITANI'S REQUESTS FOR ADMISSION CONCLUSIVELY ADMITTED.

POINT IV

THE TRIAL COURT PROPERLY DISMISSED COUNTS I, II AND IV-VI OF THE AMENDED COMPLAINT.

A. THE TRIAL COURT PROPERLY FOUND THAT ORITANI DID NOT BREACH ITS CONTRACT WITH ADS.

B. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CONVERSION CLAIM.

C. THE TRIAL COURT CORRECTLY FOUND THAT ORITANI IS NOT LIABLE TO ADS FOR NEGLIGENCE OR GROSS NEGLIGENCE.

D. THE TRIAL COURT CORRECTLY FOUND THAT ORITANI IS NOT LIABLE TO ADS FOR BREACH OF FIDUCIARY DUTY.

E. THE TRIAL COURT PROPERLY FOUND THAT ORITANI IS NOT LIABLE FOR ANY ALLEGED BREACH OF DUTY OF GOOD FAITH.

F. THE TRIAL COURT CORRECTLY FOUND THAT ORITANI IS NOT LIABLE UNDER THE NEW JERSEY CONSUMER FRAUD ACT.

G. THE TRIAL COURT PROPERLY FOUND THAT ORITANI CANNOT BE LIABLE TO ADS FOR "GENERAL FRAUD."

POINT V

THE TRIAL COURT SHOULD HAVE DISMISSED THE AMENDED COMPLAINT IN ITS ENTIRETY BECAUSE ALL OF THE INTERNET TRANSFERS WERE AUTHORIZED AND [E]FFECTIVE AND THE UCC BARS RECOVERY.

A. THE INTERNET TRANSFERS WERE AUTHORIZED.

1. DIAZ SANCHEZ HAD ACTUAL AUTHORITY TO TRANSFER FUNDS FROM ONE ADS ACCOUNT TO ANOTHER.

2. DIAZ SANCHEZ HAD APPARENT AUTHORITY TO EFFECT THE INTERNET TRANSFERS.

B. THE INTERNET TRANSFERS WERE "EFFECTIVE" PURSUANT TO THE UN-DISPUTABLY COMMERCIALLY REASONABLE SECURITY PROCEDURES AGREED TO BY ORITANI AND ADS.

C. N.J.S.A. 12A:4A-505 PRECLUDES ANY CLAIMS ON THE INTERNET TRANSFERS.

POINT VI

THE TRIAL COURT SHOULD HAVE DISMISSED THE AMENDED COMPLAINT IN ITS ENTIRETY BECAUSE ADS HAS SUFFERED NO DAMAGES AS A RESULT OF ANY CONDUCT OF ORITANI.

A. NO EVIDENCE OF DAMAGES AT TRIAL.

B. ALL OF THE INTERNET TRANSFERS WENT FROM ONE ADS ACCOUNT TO ANOTHER.

C. THE TRANSFERRED FUNDS WERE USED TO PAY VALID EXPENSES OF ADS.

D. ALL OF THE INTERNET TRANSFERS HAVE BEEN RATIFIED BY ADS, ADS HAS WAIVED ANY OBJECTIONS TO THE TRANSFERS, AND ADS SHOULD BE LEGALLY ESTOPPED FROM CHALLENGING THE TRANSFERS.

E. THE DOCTRINE OF AVOIDABLE CONSEQUENCES LIMITS ANY DAMAGES AVAILABLE TO ADS.

POINT VII

ORITANI IS ENTITLED TO ITS REASONABLE ATTORNEY'S FEES AND COSTS FROM ALLEN AND HIS COUNSEL.

A. THE NOVEMBER 2007 NEWMAN CERTIFICATION AND THE NOVEMBER 2007 ALLEN CERTIFICATION WERE A PALPABLE SHAM RESULTING IN A WRONGFUL DENIAL OF ORITANI'S SUMMARY JUDGMENT MOTIONS.

B. ORITANI IS ENTITLED TO REASONABLE ATTORNEY'S FEES AND COSTS PURSUANT TO THE FRIVOLOUS PLEADING STATUTE AND COURT RULE.

C. BRENDAN ALLEN SHOULD BE LIABLE TO ORITANI FOR ALL DAMAGES CAUSED BY ALLEN'S PROSECUTION OF THIS LAWSUIT OSTENSIBLY ON BEHALF OF ADS.

The primary issue on appeal is whether Allen had a right to pursue his individual claims against the Bank. Allen contends

the court erred by finding that he was not the bank's customer under New Jersey's UCC banking provisions. According to Allen, he had the right to maintain the action in his own name and, given the proofs, he was entitled to recover against the bank. In fact, he claims that under the UCC the bank was strictly liable to him. Allen also argues that even if he was not a "customer" under the UCC, he still had a common law right to assert non-customer claims against the bank. In either event, Allen insists the court erred in dismissing his individual claims.

On the other hand, Oritani contends the court erred in allowing Allen to prosecute the case on behalf of ADS because Sanchez, ADS's president and sole stockholder, never authorized the lawsuit that Allen filed in its name. In the alternative, Oritani argues that any claims against the bank should have been dismissed because Sanchez authorized all internet transfers, and neither Sanchez nor Allen notified the bank of any improper transfers within the time required and in the manner prescribed under the UCC.

On several occasions early in the proceedings, the court addressed the question of Allen's status. Nevertheless, prior to selecting a jury, the trial judge agreed to conduct a Rule 104 hearing to determine whether Allen had "standing to bring

suit on behalf of ADS." Following the hearing, the court ruled that ADS, not Allen, was the Bank's customer and that Allen had the "authority and standing" to assert corporate claims on behalf of ADS "because of his position as an officer in the corporation." The court also refused to revisit the issue of whether Allen had "the ability to bring claims in his own name."

In ruling on various counts of the complaint and counterclaim at the close of evidence, the court concluded that there was no breach of contract between ADS and the Bank. The Bank sent ADS the monthly statements as required by the checking account agreement, and ADS did not inform the Bank of any irregularities. The court also concluded that ADS had not sustained its burden of proving any damages with respect to its contract claim.

As for ADS's negligence claims, the court found internet banking was not a topic that was generally discussed in 2003 when the account was opened; the paperwork completed at the time identified ADS's additional Oritani accounts; and ADS had "failed to sustain its burden of proof on the issue of negligence." Additionally, the court found no evidence of intentional or fraudulent misrepresentations, and it dismissed ADS's claims for consumer fraud, general fraud, breach of good faith, and fiduciary duty, as well as all of the Bank's

counterclaims against ADS. Therefore, the case went to the jury on only one issue——whether the internet transfers were authorized and, if not, the extent of damages that resulted.

As evidenced by its verdict, the jury concluded that certain internet transfers were not authorized by ADS and it awarded damages to ADS in the amount of $295,500. Nevertheless, the court granted the Bank's post-judgment motion for JNOV, reasoning as follows:

> It is to be noted that the indemnification provisions in this case do not purport to disclaim the defendant bank's obligation to refund the payment orders under the UCC. All the indemnification provisions state is that, if the unauthorized transactions are made by an agent, principal, etc. . . . of the customer (which is the plaintiff, ADS Associates Group, Inc.), the customer (plaintiff, ADS Associates Group, Inc.) must indemnify or repay the bank for the amount of the refund it is obligated to make under the UCC statute.
>
> Since [Sanchez] was an authorized signatory to ADS Account 3604 . . . and used the pin password . . . he chose for plaintiff, ADS, to accomplish every internet transfer and since he held all of the positions with plaintiff, ADS, as set forth above at the time he made these transfers, from one ADS account to another, the indemnity provisions of both the 3604 account agreement and the 3604 corporate resolution operate to indemnify the defendant, Oritani, by the plaintiff, [ADS], for any and all losses allegedly caused by the internet transfers in this case.

> Whether or not these internet transfers were authorized by the plaintiff presented a genuine issue of material fact that the jury decided. Furthermore, whether [Sanchez] had express or implied or apparent authority from the plaintiff, ADS, to send the internet transfers was also a question of fact that the jury resolved. They were not, as defendant Oritani contends, authorized as a matter of law.
>
> Defendant, Oritani, contends that because the court ruled that plaintiff failed to prove any ascertainable loss and failed to meet its burden of proving damages that plaintiff, ADS, cannot recover against the defendant, Oritani. However, the defendant fails to realize that it was part of the court's ruling in dismissing the Consumer Fraud Act allegation, that plaintiff failed to prove an ascertainable loss, and that, as one of the many reasons I gave in dismissing plaintiff's breach of contract claim was that damages were not proven. Those dismissals, and the reasons therefore, had nothing to do with the UCC count.

In this case, as the trial court noted, Account 3604 was at all times in ADS's name, and the fact that Allen and Sanchez were authorized to write checks on behalf of the corporation did not transform the account into a personal account in their joint or individual names. Under the UCC, a "customer" is a person or entity either having an account with the bank, or from whom the bank has agreed to receive payment orders. N.J.S.A. 12A:4-104(a)(5); N.J.S.A. 12A:4A-105(c). In his capacity as ADS treasurer and signatory on the account, Allen fell into neither

category. Therefore, we agree with the trial court's determination that ADS, rather than Allen, was the Bank's customer.

We do not concur, however, with the trial court's conclusion that Allen was authorized to prosecute ADS's corporate claims against the Bank. Under N.J.S.A. 14A:6-15(4), all officers of a corporation "have such authority and perform such duties in the management of the corporation as may be provided in the by-laws, or as may be determined by resolution of the board not inconsistent with the by-laws." In this case, ADS's by-laws are not part of the appellate record. However, on July 1, 2008, after Allen filed the amended complaint on behalf of ADS, ADS passed a resolution signed by Sanchez, which confirmed that he was ADS's president, sole director, and only shareholder. The resolution also stated that Allen had "never been a shareholder, director, or owner of ADS"; any authority he claimed to have "to act for, sue on behalf of and/or otherwise take action on behalf of ADS" was "terminated effective immediately"; and Allen had "no authority whatsoever" to file or prosecute any lawsuits on behalf of ADS. Therefore, at that point, Allen had no authority to act on behalf of ADS, and Oritani's summary judgment motion should have been granted.

Even though Allen could not pursue "customer claims" against the Bank in his own name because he was not the owner of Account 3604, and could not prosecute ADS's claims against the Bank because he was not authorized to do so, Allen contends the court erred when it dismissed his common law "non-customer" claims against Oritani. We agree.

"Absent a special relationship, courts will typically bar claims of non-customers against banks." City Check Cashing v. Mfrs. Hanover Trust Co., 166 N.J. 49, 60 (2001). Among the possible sources, this court has identified an "agreement, undertaking or contact" between the parties as evidence of such a relationship. Pennsylvania Nat'l Turf Club, Inc. v. Bank of W. Jersey, 158 N.J. Super. 196, 203 (App. Div.), certif. denied, 77 N.J. 506 (1978). In further defining those concepts as they apply in the banking context, our Supreme Court has explained:

> An agreement is essentially a meeting of the minds between two or more parties on a given proposition. Black's Law Dictionary 44 (6th ed. 1991). An undertaking is the willing assumption of an obligation by one party with respect to another or a pledge to take or refrain from taking particular action. Id. at 1060. A contact is the loosest of the three terms, defined as the "establishment of communication with someone." Webster's Ninth New Collegiate Dictionary 282 (9th ed. 1984). Both an agreement and an undertaking will give rise to a duty with respect to the subject agreed upon or undertaken. Whether a contact

> creates a duty is determined by its nature and surrounding circumstances.
>
> [City Check Cashing, supra, 166 N.J. at 62.]

As noted above, even when there is no agreement or undertaking, a bank can still be liable to a non-customer on the basis of a "contact," depending on the nature of the contact and the surrounding circumstances. Thus, resolution of this issue turns on the evidence of what Allen told the Bank's representative when the account was opened and what, if it can be determined, the representative knew or should have known.

At trial, Allen characterized what he had told the representative about their account needs as follows: "[I told her that t]he only way that money could come out was if we both signed the check"; "[t]hat it's a two of two signature account. It has to have two signatures"; and "[t]hat the only way money was going to come out of the account was if we both signed the checks." Moreover, Allen's unrefuted testimony was that during the approximate one-hour meeting when they set up the account, the subject of money being transferred from the account without "both signatures" "on the check" was discussed about five times. There was no evidence that anyone mentioned anything about internet transfers and, in fact, Allen said they did not discuss it. Sanchez, too, acknowledged that they specified to the representative they had a two-signature requirement, and that no

one addressed internet transactions. Moreover, Sanchez admitted he had done all of his banking at that particular branch, and that he was known there already.

The representative did not testify. But while Pinto insisted that as of 2003 internet banking was still "new," the bank clearly had internal protocols in place for allowing such transactions, as evinced by the date of Sanchez's first unauthorized internet transaction on Account 3604, only a few weeks after the account was opened. The record also includes the internet enrollment form Sanchez signed in March 2003 for ADS Account 1520.

Thus, at the time Allen and Sanchez opened Account 3604, Sanchez and the bank both knew of the possibility of internet transfers from Account 3604 to one of the other ADS accounts at Oritani without Allen's signature or consent. Given Allen's characterization of the conversation with the Bank's representative, it is reasonable to conclude that the representative should have disclosed to Allen the availability and effect of internet banking, and how it could result in an electronic transfer of funds from the account without two-signature authorization.

The court, not the jury, decides whether a duty exists. City Check Cashing, supra, 166 N.J. at 59. The issue is decided

as a matter of law, and "is largely a question of fairness or policy." Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991). Considerations include the relationship of the parties, the nature of the risk and the public interest implicated. Kelly v. Gwinnell, 96 N.J. 538, 544 (1984). And see Wang, supra, 125 N.J. at 15 (citing Kelly). Cases involving "nonfeasance" require a "'definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act.'" City Check Cashing, supra, 166 N.J. at 59 (quoting W. Page Keeton et. al., Prosser & Keeton on Torts § 56 at 374 (5th ed. 1984)). "[A] duty to disclose may arise where good faith and common decency require it." Ibid. And see Highlands Ins. Co. v. Hobbs Group, L.L.C., 373 F.3d 347, 355 (3d Cir. 2004) (finding that an insurance broker's duty of disclosure to its insured was not limited to "special relationship situations," but under New Jersey law "may also arise in any situation called for by good faith and common decency . . . conforming to the holding in City Check Cashing [supra, 166 N.J. at 59.]"). Ultimately, therefore, whether "a contact creates a duty is determined by its nature and surrounding circumstances." City Check Cashing, supra, 166 N.J. at 62.

Based on Allen's concerns when Account 3604 was opened, the Bank's knowledge of the other two ADS accounts, the testimony of

Pinto and Pierson, and the jury's determination that the internet transfers were not authorized, we conclude that Allen's "contact" with the Bank created a special relationship, and the Bank had a duty to disclose its internet policy to Allen when Account 3604 was opened even though he was not a "customer." See Barak v. Obioha, 74 F.App'x 164, 165-66 (3d Cir. 2003) (interpreting City Check Cashing to mean that the "specific facts surrounding the relationship between a plaintiff and a bank must be carefully examined" to see if they give rise to a "special relationship" creating a duty).

In view of the foregoing, the order that dismissed Allen's common law non-customer claims is reversed and the matter is remanded to allow a jury to determine whether the Bank unreasonably created "a risk of foreseeable harm for which fairness requires a remedy." City Check Cashing, supra, 166 N.J. at 64. The jury must also consider whether Allen's own conduct contributed to any of his damages. Prior to the retrial, the parties should have a reasonable opportunity to conduct discovery. In light this disposition, we do not address the parties' remaining contentions.

Reversed and remanded.