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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4623-12T2

ANN COVINGTON,

Plaintiff-Appellant,

v.

PHYLLIS DANIEL, CFIC HOME MORTGAGE, EXODUS FINANCIAL SERVICES, INCORPORATED, SARASOHN & COMPANY, AMERICAN CLAIMS MANAGEMENT, BALBOA INSURANCE COMPANY, BRADFORD DANIEL and BED CONSTRUCTION COMPANY,

Defendants,

and

BANK OF AMERICA,

Defendant-Respondent.

Argued: September 16, 2014 – Decided: September 22, 2014

Before Judges Koblitz and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2470-10.

Gerald D. Miller argued the cause for appellant (Miller, Meyerson & Corbo, attorneys; Mr. Miller, of counsel and on the brief).

Gregg S. Sodini argued the cause for respondent.

PER CURIAM

In this action seeking the recovery of insurance proceeds, plaintiff appeals from the November 9, 2011 order of the Law Division granting defendant Bank of America's motion for summary judgment and dismissing plaintiff's claim against it. After reviewing the record before us, and in light of prevailing legal standards, we agree with the legal conclusions reached by the motion judge and affirm substantially for the reasons set forth in her thorough oral opinion.

We recite the record in the light most favorable to plaintiff, the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On August 1, 2008, plaintiff's home was severely damaged in a fire. The home was insured by Balboa Insurance Company (Balboa). The next day, plaintiff contacted her longtime insurance agent and friend, Phyllis Daniel, regarding her loss. Daniel operated a company called Exodus Financial Services, Inc. (Exodus), which maintained a bank account with Bank of America (BOA).[1] Although they did not sign a written contract, plaintiff and Daniel agreed that Daniel would handle the repairs needed on plaintiff's home.

[1] Daniel also operated a second company called CFIC Home Mortgage (CFIC).

With Daniel's assistance, plaintiff retained a fire insurance adjuster, LeFante & Sarasohn (Sarasohn) on August 2 to work with Balboa on her claim. Balboa retained American Claims Management, Inc. (ACM) to process plaintiff's claim. At her deposition, plaintiff testified Daniel told Sarasohn's representative to give the checks received from Balboa or ACM to Daniel and that she would use the money to pay for the repairs on the home. Daniel planned to use a construction company owned by her husband, BED Construction Company (BED), to make at least some of the repairs.

On September 26, 2008, ACM mailed a check for $284,059.20 to Sarasohn. Plaintiff and Sarasohn were the payees on this check, which is the check that is the subject of the current dispute. When Sarasohn received the check, its representative endorsed it and took it to Daniel on October 6, 2008. On that date, Daniel issued a check to Sarasohn for $28,405.92 from her Exodus account at BOA. This check represented Sarasohn's ten percent adjuster's fee. The next day, October 7, 2008, Daniel signed plaintiff's name on the back of the $284,059.20 check she received from ACM and deposited it in the Exodus account at BOA.

On November 4, 2008, ACM mailed a check for $37,761.17 to Sarasohn. This check named plaintiff and Sarasohn as the payees. Sarasohn and plaintiff signed the back of the check and

gave it to Daniel. Daniel deposited the check in her Exodus account at BOA and gave Sarasohn's representative a check for $4,276.12 as its adjuster's fee. The parties have advised us "that a number of checks in smaller amounts were delivered" to Daniel, and signed by plaintiff prior to Daniel's deposit of them in the Exodus account.

Over the course of the next six months, Daniel paid out over $100,000 from the insurance proceeds in the Exodus account for repairs related to plaintiff's home, and she produced checks concerning these payments. For example, Daniel issued checks to the architect, a debris removal company, a home improvement supply store, and to the municipality for building permits. She also made payments to her husband's company for work on the home.

After six months, plaintiff became dissatisfied with the progress of the repairs. At that time, plaintiff learned that Daniel had spent approximately $134,000 of the funds she received from ACM on a "clothing business" Daniel operated.[2] Daniel told plaintiff that all of the insurance proceeds were gone.

[2] Plaintiff and Daniel disagreed about whether plaintiff authorized Daniel to invest in this business venture. However, that dispute in not involved in this appeal.

Subsequently, plaintiff filed a complaint against Daniel, Exodus, CFIC, Daniel's husband, and BED seeking to recover all of the insurance payments issued by Balboa to her through ACM.[3] Plaintiff also named Balboa, ACM, Sarasohn,[4] and BOA as defendants. With regard to BOA, plaintiff alleged Daniel forged her name on the September 26, 2008 check for $284,059.20, and that BOA improperly cashed it for Daniel when she deposited the funds into her Exodus account at BOA. Therefore, plaintiff asserted that BOA was liable to her for the full amount of this check.

Following discovery, BOA filed a motion for summary judgment. BOA argued that plaintiff made an arrangement with Daniel to handle the repairs on her home, and knew that: (1) Daniel would be using the insurance proceeds to pay for those repairs; (2) the checks had gone to Daniel; and (3) Daniel was using the funds to pay for the repairs. Relying upon our decision in Stella v. Dean Witter Reynolds, Inc., 241 N.J. Super. 55, 68 (App. Div.), certif. denied, 122 N.J. 418 (1990), BOA argued that it was not liable to plaintiff based upon its

[3] Plaintiff obtained a $471,820.37 default judgment against Daniel and Exodus.

[4] Balboa and ACM were granted summary judgment on plaintiff's claims against them. Plaintiff's claims against Sarasohn were dismissed following a trial.

acceptance of Daniel's deposit of the check into the Exodus account because the money reached the intended person, Daniel.

In support of its motion, BOA relied upon plaintiff's deposition testimony in which she testified as follows:

> Q. Okay. Who was supposed to make the repairs?
>
> A. Miss Daniel.
>
> Q. You had an agreement with Miss Daniel to make the repairs?
>
> A. I didn't sign no contract or anything like that. She just said I'll make the repairs on the house. She told [Sarasohn's representative] Kevin Mulligan to give her the checks.
>
> Q. Okay. So in six months you realized that the work was not done?
>
> A. Yes.
>
> Q. You expected the work to be done by that time?
>
> A. Before that.
>
> Q. Did you give Miss Daniel any money to perform the work?
>
> A. No.
>
> Q. So how was she supposed to pay for the work to be done?
>
> A. The checks the insurance company sent her.
>
> Q. The checks? More than one check?
>
> A. Yeah.

Q. How many checks were there?

A. I believe it was -- well, from what I know it should have been three checks.

Q. So Miss Daniel was supposed to complete the work from three checks that the insurance company submitted?

A. (Witness nods in the affirmative.)

Q. Do you know how much the checks were for?

A. Yes.

Q. How much were they for?

A. One check was 284,000 and I think $57. And the next check was 37,000. And the amount, I know there was an amount there.

Q. Okay. So Miss Daniel was supposed to use those three checks to complete the job?

A. Yes.

Q. That was part of your agreement?

A. I didn't sign an agreement. She said she would do it.

Q. She orally told you that she would do it?

A. Yes.

Q. With those three checks?

A. Yes.

Plaintiff opposed BOA's motion and submitted a certification in which she asserted she never endorsed the $284,059.20 check over to Daniel and did not authorize Daniel to deposit it in the Exodus account. She also claimed she did not know that Sarasohn had received the check or given it to Daniel.

In a thoughtful oral opinion, Judge Lourdes Santiago granted BOA's motion for summary judgment. Relying upon our holding in Stella, supra, the judge found BOA was not liable to plaintiff because the funds were delivered to the intended person, Daniel, for use in paying for the repairs to plaintiff's home. The judge explained:

> The facts are undisputed that the check was issued by Balboa, handled by Sarasohn and Phyllis Daniel, and eventually settled into the [BOA] account. It is also undisputed that [other] checks, though not . . . falsely signed by [Daniel], made a similar way . . . into the [BOA] account.
>
> [T]he Stella case sets out an important standard that governs in this case. Although the case was not decided on motion for summary judgment grounds, as argued by plaintiff's counsel, the facts are similar in that the plaintiff entrusted another individual with the funds, which ended up becoming misappropriated.
>
> In Stella, as in this case, the bank merely accepted the checks and placed them in the account that they were intended for, from which they were later misappropriated. And as [the] Stella [c]ourt -- clearly points out, if the funds obtained by the forgery reach the intended payee, the maker

> has suffered no injury and is not entitled to recover from the bank which paid on the forged instrument. The [c]ourt reached this holding based on the interpretation of banking law that states generally that a bank is liable on forged endorsements in the absence of estoppel, contributory negligence, or ratification, unless the money has reached the intended person.

The judge concluded:

> The check in this situation was handled by [BOA] in the same manner as the other checks in this case. The bank accepted the endorsed checks and put them in the proper account. Although there was a forged name on the [$284,000] check, the undisputed fact[] is that the money reached the intended bank account, from which [plaintiff's] home was to be repaired. Subsequently, the money was misappropriated, but [BOA] ensured that the money reached its intended location.

This appeal followed.

On appeal, plaintiff contends the judge erred in applying our holding in Stella, supra, and that there were material facts in dispute that required the denial of BOA's motion. We disagree.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Nicholas v. Mynster, 213 N.J. 463, 477-78 (2013). Summary judgment must be granted if "'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)). Thus, we consider, as the motion judge did, whether "'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.'" Ibid. (quoting Brill supra, 142 N.J. at 540). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We accord no deference to the trial judge's conclusions on issues of law and review issues of law de novo. Nicholas, supra, 213 N.J. at 478.

Applying these standards, we discern no basis for disturbing the judge's decision to grant BOA's motion for summary judgment and we affirm substantially for the reasons set forth in Judge Santiago's oral opinion. We add the following comments.

Generally, a depositary bank[5] under the Uniform Commercial Code is strictly liable for conversion on a forged or stolen instrument. Leeds v. Chase Manhattan Bank, N.A., 331 N.J. Super. 416, 422 (App. Div. 2000); see N.J.S.A. 12A:3-420 cmt. 1. A conversion occurs when "a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." N.J.S.A. 12A:3-420a. The depositary bank is liable even if it acted in a commercially reasonable manner. N.J.S.A. 12A:3-420 cmt. 3. Thus, absent an applicable defense, BOA, as the depositary bank, would be strictly liable to plaintiff for the $284,059.20 check Daniel signed and deposited into the Exodus account.

In Stella, supra, we canvassed the law from a number of jurisdictions concerning defenses available to a depositary bank in actions seeking the recovery of converted checks and held that:

> '[g]enerally a bank is liable . . . on a forged endorsement, in the absence of estoppel, contributory negligence, or ratification, or unless the money has reached the intended person.' If the funds obtained by the forgery reach the intended payee, the maker has suffered no injury and is not entitled to recover from the bank which paid on the forged endorsement.

[5] "'Depositary bank' means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter." N.J.S.A. 12A:4-105b.

> [Stella, supra, 241 N.J. Super. at 68 (citations omitted).]

The record amply supports the judge's finding in this case that the proceeds of the $284,059.20 check reached the intended person and, therefore, BOA was not liable to plaintiff. As plaintiff admitted during her deposition, she had an agreement with Daniel for Daniel to handle the repairs on her home. Daniel asked Sarasohn's representative "to give her the checks" and plaintiff was aware of this arrangement. Plaintiff did not give Daniel any money to make the repairs and she knew that Daniel was supposed to use "[t]he checks the insurance company sent her" to pay for the repairs. Plaintiff identified the $284,059.20 check as one of the checks Daniel was to use.

Under these circumstances, we conclude, as did Judge Santiago, that the $284,059.20 check reached the intended person, Daniel. Therefore, under our clear holding in Stella supra, BOA was not liable to plaintiff, whose injury was the result of her entrusting the funds to Daniel and not the result of the manner in which they were transmitted by BOA.

Plaintiff argues that Stella does not apply here because, in that case, we discussed the defenses available to a depositary bank in the context of a jury verdict, rather than on a motion for summary judgment. However, that is not a

meaningful distinction. Nothing in our decision indicates that our ruling, or the defenses recognized therein, were limited to cases which proceeded to trial.

Plaintiff also asserts there was a material dispute as to the facts of this case based upon her assertion in her affidavit that she never authorized Daniel to sign or deposit the insurance checks into the Exodus account. However, it is well established that an affidavit submitted in opposition to a motion for summary judgment should be disregarded when earlier deposition testimony contradicts the statements, unless explained by the affiant. See Shelcusky v. Garjulio, 172 N.J. 185, 194 (2002). Plaintiff offered no such explanation here.

Moreover, even if plaintiff did not authorize Daniel to sign or deposit the check into the Exodus account, she certainly knew, based on her deposition testimony, that the insurance proceeds were to wind up with Daniel so that she could use them to repair the home. Thus, because the funds reached their intended destination, BOA was not liable to plaintiff. Stella, supra, 241 N.J. Super. at 68.

Affirmed.