SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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April 3, 2014

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RE: *Sussex Environmental Health Consultants, LLC v. Citizens Bank*
C.A. No. S13C-08-007 RFS

Dear Counsel:

Before the Court is Defendant Citizens Bank's ("Defendant's") Motion for Judgment on the Pleadings against Plaintiff Sussex Environmental Health Consultants, LLC ("Plaintiff"). This Motion is **DENIED**.

Plaintiff is a Delaware limited liability company. Susan White ("White") serves as its managing member. Plaintiff held two accounts with Defendant, account #7921, a money market account, and account #9755, a checking account. In June 2012, #7921 held approximately $43,000.00. White only drew on this account once or twice a year. Also in June 2012, White invited a friend of her family, James Poole ("Poole"), a man recently out on work release from the Sussex Correctional

Institution, to stay in her home on occasion.

In August 2012, White noticed checks missing from #7921. She confronted Poole, who stated that his uncle had taken the checks, that Poole was attempting to recover the purloined money, and that he had reported the theft to the police. White believed Poole. She also contacted Defendant to report the missing checks, in an effort to determine whether it was necessary for her to file a claim. A representative of Defendant did not advise White to file a claim. White therefore believed that Poole's reporting the matter to the police would settle the situation.

In December 2012, White noticed missing checks from #9755. Poole apparently vanished with more checks and a Jeep Wrangler, which White recovered. On December 27, 2012, White filed reports with the police and Defendant. Defendant later notified Plaintiff that it declined to reimburse the wrongly paid funds.

A Deposit Account Agreement ("Agreement") existed between White and Defendant. In it, White agreed (1) that she would use care in safeguarding unsigned checks against theft or misuse; (2) that she would carefully review her monthly account statements and notify Defendant in writing of any issues within 30 days; (3) that she could not pursue any claims against Defendant if she did not follow the 30-day notification procedure; (4) that she understood that Defendant processed checks automatically, without visual inspection; (5) that Defendant did not fail in exercising ordinary care if it paid a check that was forged in such a manner that a reasonable

person could not detect the forgery.

Trial for this matter is scheduled for January 5, 2015. Discovery has not yet been performed.

Defendant principally argues that the Agreement bars Plaintiff bringing this action, at least with respect to #7921.[1]

Plaintiff argues that the Agreement does not bar it from bringing this action because Defendant contributed to its loss. From June to September 2012, #7921 experienced an enormous depletion of funds, which Defendant neither spotted nor reported. Also, White informed a representative of Defendant of the missing checks in August 2012, and was advised not to file a claim.

Plaintiff cites Defendant's obligation to act with ordinary care and in good faith.[2] Under local banking standards, which Plaintiff claims control Defendant's duties to its customers, and under White's own experience, live tellers typically inspect all checks and request identification. Evidence exists that this was not done. Plaintiff also notes that one account specifically instructed Defendant to pay out only to authorized signatures. Additionally, #7921 is a money market account that mostly

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[1] Defendant points to 6 *Del. C.* § 4-103(a) ("The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.").

[2] *See id.*

remained dormant.[3] Therefore, White would only view the account once or twice a year, hence her contacting Defendant's representative in August 2012. White did not report a problem until December because that was when she learned of Poole's conduct.[4] Regardless of the Agreement, the facts support a reasonable inference that Defendants did not exercise ordinary care, which Plaintiff must be entitled to prove through discovery.[5]

Defendant counters that Plaintiff's arguments rest heavily on facts not asserted in its complaint, which should thus be ignored. Also, the alleged facts asserted by Plaintiff do not overcome the established facts that White trusted Poole's explanations of the missing funds, that she received regular bank statements that should have notified White of the problem, and that she never informed Defendant

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[3] Plaintiff contends that even an automated system should have picked up unusual activity in an account such as #7921. Also, even if the Agreement stipulates that automation is *per se* reasonable, Plaintiff argues that red flags should have been raised based on the amount and irregularity of the checks, and flurry of activity in a historically dormant account. Furthermore, Plaintiff contends that evidence exits that a live teller of Defendant's did handle a certain transaction, thus showing that automation was not always employed.

[4] Plaintiff asserts that Poole was not living with White, but was rather an occasional guest. Thus, White did not fail, per the Agreement, to safeguard unsigned checks against theft or misuse.

[5] Plaintiff cites 6 *Del. C.* § 4-406. In particular, Plaintiff argues that although Section 4-406(c) imposes on a bank's customer the duty to check statements and promptly report issues to the bank, failure of which can result in the bank's being absolved from liability under Section 4-406(d), Section 4-406(e) allows for the customer's loss to be offset by the bank if "the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to [the customer's loss." 6 *Del. C.* § 4-406(e).

Plaintiff also argues that if it can prove lack of good faith, Section 4-406(d) does not apply at all, thus allowing Plaintiff to recover fully.

of the problem *in writing*. Additionally, Plaintiff does not allege that Defendant payed a forged check that would be detected as a forgery by a reasonable person.

This Court's Civil Rule 12(c) lays out the standard by which this Court adjudicates a motion for judgment on the pleadings:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in [Civil] Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.[6]

"On such a motion, the Court must accept all the complaint's well-pled as true and construe all reasonable inferences in favor of the non-moving party."[7] This analysis "is almost identical to the standard for a motion to dismiss."[8] The Court will grant the motion "when no material issues of fact exist, and the moving party is entitled to judgment as a matter of law."[9]

Although Plaintiff was bound by its Agreement with Defendant, with which Plaintiff may or may not have complied, Defendant's exercise of ordinary care is a

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[6] Super. Ct. Civ. R. 12(c).

[7] *Blanco v. AMVAC Chem. Corp.*, 2012 WL 3194412, at *6 (Del. Super. Aug. 8, 2012) (citation omitted).

[8] *Id.* (citation omitted) (internal quotation marks omitted).

[9] *Velocity Express, Inc. v. Office Depot, Inc.*, 2009 WL 406807, at *3 (Del. Super. Feb. 4, 2009).

triable issue.[10] Furthermore, despite Plaintiff's assertion of extraneous facts in its brief,[11] Plaintiff's Complaint clearly states that upon learning of the problem, White informed a representative of Defendant of the problem, and was advised not to make a claim for the funds. Such an asserted fact could demonstrate a lack of exercising ordinary care on Defendant's part. Therefore, this Motion is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary
Judicial Case Manager

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[10] 6 *Del. C.* § 4-406(e). *See also Murphy v. Mellon Bank (Delaware) N.A.*, 1988 WL 130381, at *4 (Del. Super. Nov. 30, 1988) ("The law places the risk of loss from forged endorsements on the drawee bank unless it can affirmatively prove the drawor's negligence and its own due care. Such a legal presumption accords with the practical realities of commercial banking transactions since the banks are in a better position tha[n] private parties . . . to secure means of insurance against loss by forgeries." (quoting *Perley v. Glastonbury Bank & Trust Co.*, 368 A.2d 149, 155 (Conn. 1976)).

[11] *See Fagnani v. Integrity Fin. Corp.*, 167 A.2d 67, 75 (Del. Super. 1960) (Stiftel, J.) ("The briefs actually supply many more facts to the [C]ourt than do the complaint and answer. The briefs, containing assertions of facts and inferences drawn therefrom not present in the pleadings, cannot be considered as part of the pleadings for the purpose of considering this motion." (citation omitted)).

Plaintiff could move to amend her complaint under this Court's Civil Rule 15. Leave to amend is freely given, but this avenue would needlessly prolong the litigation and increase expenses. An amendment is not technically necessary for the purposes of deciding the present question.