STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

NORTHWESTERN BANK,

Plaintiff,

v

File No. 04-23673-CK
HON. PHILIP E. RODGERS, JR.

CLIFFORD E. JAMES,

Defendant.
/

Lawrence R. LaSusa (P41558)
Jack E. Boynton (P23137)
Attorneys for Plaintiff

James C. Baker (P62668)
H. Wendell Johnson (P24247)
Attorneys for Defendant

DECISION AND ORDER

The Defendant sold his boat over the internet. The purchaser sent him a cashier's check,[1] signed by the Bank of America as drawer, for an amount in excess of the sale price. On February

[1]A "cashier's check" is a bill of exchange drawn by a bank upon itself. The bank becomes both the drawee and the drawer, rather than merely the drawee as in the ordinary check scenario. *Bruno v Collective Federal Savings & Loan Ass'n*, 147 NJ Super 115; 370 A2d 874 (1977); *Swiss Credit Bank v Virginia National Bank-Fairfax*, 538 F2d 587 (CA 4, 1976). A cashier's check, therefore, is accepted by the bank upon issuance and is a primary obligation of the issuing bank, rather than of the purchaser of the check. *Munson v American National Bank & Trust Co of Chicago*, 484 F2d 620 (CA 7, 1973); *Pennsylvania v Curtiss National Bank of Miami Springs, Florida*, 427 F2d 395 (CA 5, 1970). By issuing a cashier's check, the bank promises to draw the amount of the check from its own resources and to pay it upon demand. Consequently, this promise to pay ordinarily cannot be countermanded. *Florida Frozen Foods, Inc v National Commercial Bank & Trust Co*, 81 AD2d 978; 439 NYS2d 771 (1981); *Wertz v Richardson Heights Bank & Trust*, 495 SW2d 572 (Tex., 1973). See, *Mutual Sav and Loan v National Bank of Detroit*, 185 Mich App 591; 462 NW2d 797 (1990).

9, 2004, the Defendant presented the cashier's check in the amount of $250,000 to the Plaintiff Bank for deposit. On February 10, 2004, he wrote a check to Huntington Bank to pay off his boat loan. On February 11, 2004, he wire transferred $51,500 to an account in England that purportedly belonged to the purchaser.

On February 12, 2004, the Bank of America returned the cashier's check endorsed unpaid and dishonored as a "counterfeit item." On February 14, 2004, the Plaintiff Bank orally notified the Defendant that the cashier's check had been dishonored. On March 15, 2004, the Plaintiff Bank gave the Defendant written notice of dishonor and demanded reimbursement.

The Plaintiff initiated this action alleging that the Defendant endorsed and transferred the counterfeit check to the Plaintiff and received value in the face amount of the check. On December 22, 2004, the Plaintiff Bank filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). The Plaintiff Bank claims that, as a matter of law, the Defendant breached the statutory transfer warranties, MCL 440.4207(2) and (3), and is required to pay the Plaintiff the face value of the check, plus its expenses, including reasonable attorney fees, and loss of interest. The Defendant filed a response to the motion. The Court entertained the oral arguments of counsel on January 31, 2005 and took the matter under advisement. For reasons that will now be described, the Plaintiff's motion is granted.

STANDARD OF REVIEW

MCR 2.116(C)(10)

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

APPLICABLE STATUTE

MCL § 440.4207, entitled Transfer Warranties, provides as follows:

(1) **A customer** or collecting bank **that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank** all of the following:

(a) That the warrantor is a person entitled to enforce the item.

(b) That all signatures on the item are authentic and authorized.

(c) That the item has not been altered.

(d) That the item is not subject to a defense or claim in recoupment (section 3305(1)) of any party that can be asserted against the warrantor.

(e) That the warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

(2) If an item is dishonored, a customer or collecting bank transferring the item and **receiving settlement or other consideration** is obliged to pay the amount due on the item (I) according to the terms of the item at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in sections 3115 and 3407. **The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith.** A transferor cannot disclaim its obligation under this subsection by an endorsement stating that it is made "without recourse" or otherwise disclaiming liability.

(3) A person to whom the warranties under subsection (1) are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(4) The warranties stated in subsection (1) cannot be disclaimed with respect to checks. **Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.**

(5) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach. [Emphasis added].

THE MOTION

The Plaintiff Bank contends that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, pursuant to MCR 2.116(C)(10), because the Defendant breached the transfer warranties by transferring a counterfeit cashier's check [the signatures were not authentic and authorized] to the Plaintiff Bank for deposit and using the funds. Therefore, the Defendant is liable for "an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses [including attorney fees] and loss of interest incurred as a result of the breach."

The Defendant counters that there are genuine issues of material fact regarding whether the Plaintiff Bank "took the item in good faiPth" and acted with commercial reasonableness. The Defendant also claims that there is a genuine issue of material fact regarding whether the Plaintiff gave the Defendant notice of a claim of breach of warranty "within 30 days after the claimant ha[d]

reason to know of the breach and the identity of the warrantor." The Defendant also claims that, even if the Plaintiff is entitled to a judgment, there are factual issues regarding the "amount of the item plus expenses and loss of interest"and the Plaintiff Bank is, in any event, not entitled to attorney fees.

ANALYSIS

In order to recover for a breach of transfer warranties, the Plaintiff Bank must show that the Defendant, a customer of the Plaintiff Bank, transferred the cashier's check and received consideration; that Plaintiff Bank took the check in good faith; that the check was counterfeit; that it gave the Defendant notice of a claim of breach of warranty within thirty (30) days after it knew of the breach; and that it suffered a loss as a result of the breach. The Defendant has attempted, unsuccessfully, to create several issues of material fact. Each will now be addressed.

I.

It is undisputed that the Defendant presented the counterfeit check to the Plaintiff Bank for deposit. The Defendant makes a feeble argument that this may not constitute a "transfer" within the meaning of the statute. The Defendant does not, however, offer any authority to support a finding that "presenting a check for deposit" is not a "transfer." The Defendant is wrong and a transfer occurred as that term is used in MCL § 440.4207.

II.

The Defendant also received substantial consideration. He paid off his boat loan and wire transferred $51,500 to an account in England. The Bank could not dishonor the check to pay off the boat loan as it did not learn the cashier's check was counterfeit until after the midnight deadline to dishonor checks. The wire transfer to England was also successful. The Defendant still has his boat, paid in full, and seeks to avoid reimbursing the Bank on his transfer warranty. On the undisputed facts, he may not do so.

III.

The Defendant contends that there are genuine issues of material fact regarding whether the Plaintiff Bank took the check "in good faith" (MCL § 440.4207(3)) or acted with commercial reasonableness. The Defendant points to several examples of how he believes the Plaintiff Bank may not have acted in good faith or with commercial reasonableness, to-wit: (1) advising the Defendant that the funds from the cashier's check were available immediately; (2) violating its funds availability (provisional deposit) policy by allowing the Defendant to use the funds before the check cleared; (3) not sending a timely service message to cancel the wire transfer; (4) not advising the banks in the chain of banks involved in the wire transfer that the return of the wire was necessary because of criminal activity, i.e., counterfeiting; and (5) not taking action for 20 hours after receiving notice that the check was counterfeit.

The documents and deposition excerpts submitted with the motion, response and reply contain evidence that the Plaintiff Bank had a policy that cash from a check deposited to an account is not immediately available. The policy is inapplicable to this transaction where no cash was received. Further, the *Defendant has not offered any expert testimony* by way of deposition or affidavit to establish what is commercially reasonable or to counter Plaintiff's affidavit. MCR 2.116(C)(10) requires more than mere allegations and argument to refute a properly supported summary disposition motion.

IV.

The Defendant claims that the Plaintiff Bank did not give him notice of its claim for breach of warranty as required by MCL § 440.4207(4). The statute provides that the Plaintiff Bank give "notice of a claim for breach of warranty" "within 30 days after the claimant has reason to know of the breach and the identity of the warrantor." The Plaintiff Bank submitted deposition excerpts in which the deponents testified that they gave the Defendant notice by telephone the day after the Bank received notice. In addition, the Plaintiff Bank submitted as Exhibit B to its Reply in Support of Its Motion for Summary Disposition, a copy of a notice letter dated March 15, 2004.

There is case law that would support an argument that oral notice is not sufficient. *Mutual Savings and Loan v National Bank of Detroit*, 185 Mich App 591; 462 NW2d 797; 13 UCC Rep

Serv2d 463 (1990). And, it cannot be disputed that the written notice was not given within 30 days. Inadequate or untimely notice does not, however, defeat the Plaintiff Bank's claims. It merely relieves the Defendant of liability "to the extent of any loss caused by the delay in giving notice." MCL 440.4207(4). In this case, there was no loss caused by the delay in giving notice.

V.

The Defendant claims that there are factual issues regarding the loss suffered by the Plaintiff Bank. Yet the Defendant admits he paid off the boat loan and that the check was not dishonored. And, it is evident that the wire transfer was not successfully recalled. Plaintiff's loss equals $244,561.31.

VI.

Finally, the Defendant claims that the Plaintiff Bank is not entitled to attorney fees. The statute provides for recovery of "an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach." MCL 440.4207 (3). The Plaintiff Bank argues that "expenses" includes reasonable attorney fees. The Plaintiff Bank relies upon *Bagby v Merrill Lynch*, 491 F2d 192 (CA 8 1974) - apparently the only known case that has interpreted this provision of the UCC and held that "expenses" includes reasonable attorney fees.[2]

The Defendant, on the other hand, cites 2 *White & Summers*, UCC § 18-8 (4th Ed) [2004 Pocket Part] where the authors state that the intent of the framers of the Uniform Commercial Code was to leave to state law whether attorney fees are recoverable. Under the American Rule, which has long been the law in Michigan, attorney fees are not ordinarily recoverable as costs or damages unless a statute, court rule, or common-law exception provides the contrary. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998); *McCausey v Oliver*, 253 Mich App 703; 660 NW2d 337 (2003).

---

[2]The Michigan Supreme Court recently held that the term "costs" ordinarily does not encompass attorney fees unless the statute or court rule specifically defines "costs" as including attorney fees. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004).

MCL § 440.4207 does not specifically provide for the recovery of attorney fees. Therefore, the Plaintiff Bank is not entitled to attorney fees. See, *Webco Industries, Inc v Thermatool Corp,* 278 F3d 1120 (C.A.10 (Okla.) 2002) wherein the Court held that "[u]nder Michigan law, attorney fees can not be awarded on a breach of warranty claim as an element of incidental damages authorized by Uniform Commercial Code (UCC), inasmuch as there is no statutory authority for such an award."

CONCLUSION

The Defendant violated MCL 440.4207. He transferred a counterfeit cashier's check to the Plaintiff Bank and received consideration in the amount of $244,561.31. In response to the Plaintiff Bank's Motion for Summary Disposition brought pursuant to MCR 2.116 (C)(10), he failed to offer an expert affidavit or deposition testimony to create a genuine issue of material fact regarding the good faith and commercial reasonableness of the Plaintiff Bank's conduct. There is no genuine issue of material fact regarding whether the Plaintiff Bank gave the Defendant requisite notice of the breach of warranty or regarding the loss suffered by Plaintiff Bank. The Plaintiff Bank is not entitled to attorney fees but may tax costs.

The Plaintiff Bank's counsel shall prepare and submit a proposed judgment consistent with this decision and order, pursuant to MCR 2.602(B)(3).

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 2/09/05