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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002545-MR

RAY SPEICHER AND
WHITLEY COUNTY OIL, INC. APPELLANTS

APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 86-CI-000431

FIRST NATIONAL BANK & TRUST
COMPANY OF CORBIN, KENTUCKY;
DENNIS R. PATRICK; AND
DIANE PATRICK APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND MCANULTY, JUDGES.

GUIDUGLI, JUDGE. Whitley Circuit Court granted summary judgment to appellee First National Bank & Trust Company of Corbin ("the Bank") based on a third-party complaint appellants brought. Appellants allege the Bank violated KRS § 335.4-401 for paying checks out of appellant corporation's account that were not properly authorized. The lower court granted summary judgment finding the appellants failed to notify the Bank within one (1) year of the unauthorized withdrawals pursuant to KRS 355.4-406(4). We agree, and hereby affirm.

On or about March 23, 1982, Whitley County Oil, Inc. ("Whitley Oil") was incorporated under the laws of the Commonwealth of Kentucky. The sole shareholders were Dennis R. Patrick and Raymond Speicher, each owning one half (½) of the outstanding shares of stock. The Board of Directors was comprised of the shareholders and their spouses: Dennis R. Patrick was President; Raymond Speicher was Vice-President; Elizabeth Speicher was Secretary; and Diane H. Patrick was Treasurer. The Board adopted a corporate resolution requiring that any checks written in excess of five hundred dollars ($500) be signed by any three of the four corporate officers. Whitley Oil opened an account with the Bank and filed the aforementioned corporate resolution with it, which became part of the signature card contract with the Bank. Although the signature card contract is not included in the record, the terms appellants allege are included in it will be taken as true under the summary judgment standard.

In spite of the requirement for three (3) signatures, the Bank paid approximately ninety-three (93) checks in excess of $500 without the requisite three (3) signatures over a period from November 24, 1982 until September 25, 1985. These checks amounted to approximately $302,675.00. The improperly signed checks were signed by either Dennis Patrick or Diane Patrick, or both of them.

It is undisputed that monthly statements and canceled checks were mailed by the Bank to the Whitley Oil's principal place of business in Williamsburg, Kentucky. However, Whitley

Oil failed to notify the Bank of the unauthorized transactions until 1990. According to appellants, neither Raymond Speicher or Elizabeth Speicher were aware of the transactions because Dennis Patrick and Diane Patrick willfully withheld and/or concealed them despite repeated attempts by the Speichers to gain access to the records.

This case is governed by KRS §355.4-406 which reads in relevant part:

> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instruction of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
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> ...
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> (4) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year from the time the statement or items are made available to the customer...discover and report his unauthorized signature on or any alteration on the face or

> back of the item or does not within three (3) years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

The Supreme Court of Kentucky recently reviewed KRS §355.4-406 in Concrete Materials Corp. v. Bank of Danville & Trust Co., Ky., 938 S.W.2d 24 (1997). In Concrete Materials, the Court did an in-depth analysis of the statutory provision at issue. Unequivocally and in contradiction of the argument advanced by appellants, the Court held that "KRS 355.406(4) limits the customer's opportunity for redress where bank statements have not been reviewed in a timely fashion without regard to the negligence of the bank or the failure to adhere to normal banking procedures....[Thus, KRS 355.4-406(4) is an] absolute prohibition...to those claims that are more than a year old... ." Id. at 257-258. The Court noted that "[t]he fundamental purpose of KRS 355.4-406(4) is to place the burden of prompt and reasonable inspection of bank statements on the bank customer so that upon a discovery of an alteration or irregularity, the customer and the bank could be on the alert for future problems." Id.

Notwithstanding the Supreme Court's unqualified holding in Concrete Materials, appellants creatively argue that neither it nor KRS 355.4-406 are applicable to the present case. However, this Court does not find merit in any of the arguments.

Among the arguments advanced by appellants is that the items were not "properly payable from that account" and thus, were not made in "good faith." Appellants ask this Court to take these phrases out of context and not interpret them along with the remaining provisions of KRS §355.4-406. However, the Court cannot do so as KRS §355.4-406(4) mandates that one year is the limit for bringing such actions regardless of the actions by the Bank.

Appellants also argue that the aforestated authority only governs situations in which a person not specifically authorized to sign checks is involved, not where the required number of signatures are not on the checks. Thus, appellants contend that KRS 355.4-406 and Concrete Materials do not govern this situation.

In examining other courts' decision on this issue, the court refers readers to Knight Communications, Inc. v. Boatmen's National Bank of St. Louis, 805 S.W.2d 199 (Mo. App. 1991). In deciding the issue, the Knight Court agreed with the majority of jurisdictions concluding that when a check requires two or more signatures, the lack of any one of them constitutes an unauthorized signature. The Knight Court noted that "missing signatures are more readily spotted by the customer, and therefore the burden is less." Id. at 202. We agree and follow the majority of courts holding that missing signatures constitute an unauthorized signature.

Another argument advanced by appellants is that the Bank had notice of the unauthorized transactions because the Bank

had possession of the signature card contract. A review of the record does not reveal the signature card in question. However, as this is a summary judgment matter, it will be construed that such is true. Even if the Court believes that the Bank had the signature card contract in its possession, this simply does not relieve appellants of their duty to inspect the corporation's bank statements in a prompt matter and notify the Bank of any irregularities. KRS §355.4-406 clearly places the burden on appellants, not the Bank, to discover irregularities and report such to the Bank within one (1) year from the time the statements are made available to the appellants. "By sending the statements and canceled checks each month, the bank triggered the duty of its customer...to discover and report to the bank any item containing an unauthorized signature within one year." Knight, 805 S.W.2d at 203. Thus, the fact that the Bank had possession of the signature card contract does not excuse appellants' duty to discover and report irregularities within one (1) year.

Furthermore, the reason given for the failure to discover the problems is unavailing. Appellants allege that "[t]he reason the other officers did not receive notice of the wrongdoing was because the corporate financial records were willfully withheld and/or concealed from Ray and Elizabeth Speicher by Dennis and Diane Patrick, despite repeated attempts by the Speichers to gain access to those records." Thus, although the Bank paid checks without the requisite number of signatures from November 24, 1982 until September 25, 1985, appellants allege they did not receive notice of such until 1990.

Whatever problems the corporate officers were having in communicating and working together does not change the duty owed the Bank. The fact that the Patricks received these statements without allowing the Speichers to review them, does not prevent the one (1) year period from running.

Appellants also present an argument that the five (5) year statute of limitations period under KRS §413.120 does not bar the current action against the Bank because Whitley Oil's cause of action against the Bank had not yet accrued when it filed its third-party complaint against the Bank. Alternatively appellants argue that even if the five (5) year statute of limitations bars their claims under KRS §355.4-406, they still have a cause of action pursuant to KRS §413.090 providing for a fifteen (15) year statute of limitations for any actions based on a written contract. Appellants base this argument on the signature card contract. However, neither of these arguments change the outcome of this case. We agree with the line of cases holding that the one (1) year time limit is a condition precedent for filing an action regardless of the theory on which a party brings a cause of action. See e.g. Knight, 805 S.W.2d at 202-03 ("The absolute nature of the time distinguishes it from a statute of limitations. The limitation 'is not merely a statute of limitations, but a rule of substantive law barring absolutely a customer's untimely asserted right to make a claim against the bank.' The statute establishes a condition precedent to an action which, unlike a statute of limitations, may not be tolled."); Edward Fineman Co. v. The Superior Court, 66 Cal. App.

4th 1110, 1119, 78 Cal. Rptr.2d 478, 483 (1998) ("Failure to do so within the prescribed one-year period precluded the filing an action for such unauthorized payment. [The statute] 'is not per se a statute of limitation but instead is an issue-preclusion statute.'"); Euro Motors, Inc. v. Southwest Financial Bank & Trust, 696 N.E.2d 711, 716 (Ill. App. 1998)("The time limit imposed by UCC § 4.406 is applicable without regard to the theory on which the customer brings his or her action."); First Place Computers Inc. v. Security National Bank of Omaha, 558 N.W.2d 57, 61 (Neb. 1997) ("We...hold that §4-406(4) establishes a condition precedent that requires a customer to give notice to a bank within 1 year of the time the statement and items are made available to the customer of any unauthorized or altered signature as a prerequisite to filing suit."). Hence, since it is undisputed that appellants failed to give notice to the Bank of the unauthorized signatures within one (1) year, appellants have not met the condition precedent for filing suit against the Bank regardless of the theory utilized.

For the reasons stated above, we affirm.

JOHNSON, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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