

STATE OF MICHIGAN
COURT OF APPEALS

TCF NATIONAL BANK,

Plaintiff/Counter-Defendant-
Appellee,

v

ADOBE LIQUIDATIONS, LLC and ROBERT R.
HOATLIN,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED
November 24, 2009

No. 286335
Washtenaw Circuit Court
LC No. 07-000783-CB

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendants/counter-plaintiffs Adobe Liquidations, LLC, and Robert R. Hoatlin appeal as of right the trial court's order granting plaintiff/counter-defendant TCF National Bank summary disposition. We affirm.

I. Basic Facts And Procedural History

In 2003, Robert Hoatlin retired from his position as controller for a private company, for which he handled "all things financial," such as accepting cash receipts and checks, issuing checks, preparing financial statements, filing tax returns, and preparing cash flow statements. That same year, Hoatlin formed Adobe Liquidations, LLC, of which he was the sole owner, operator, and member. Hoatlin explained that he formed Adobe to serve as a conduit to start buying foreclosed homes and property. Hoatlin also opened a TCF bank account in the name of Adobe.

In May 2007, Hoatlin received an e-mail purportedly from a Chinese corporation named "Delixi." The e-mail was entitled, "JOB OFFER!!!" and claimed to provide Hoatlin with an opportunity to work with Delixi by acting as a "representative" for the purpose of "establish[ing] a medium of getting our funds from our customers" According to the e-mail, "[R]epresentatives will act as a receiving payment agents [sic] and also placing order [sic] for goods and products from customers." Hoatlin responded to the e-mail and began corresponding with an individual identified as "Alexander West." Hoatlin, through Adobe, then agreed to receive checks from individuals who were allegedly North American customers of Delixi, deposit the checks into his bank account, and then forward a portion of the funds onto other

individuals. Pursuant to their agreement, Hoatlin was entitled to keep 10 percent of each check as his fee.

On or about May 18, 2007, an alleged customer of Delixi sent Hoatlin a \$7,500 check, which was purportedly from Mellon Trust of New England and made payable to Adobe. On May 22, 2007, Hoatlin deposited the check into Adobe's TCF account. On May 29, 2007, the check was returned to TCF as not honored. When the check was returned, Hoatlin had concerns that there might be other invalid checks sent to him in the future: "I was very concerned about it, yes, and my concern was related to the fact that, you know, this was a first check I got from the company; was this gonna be a repeating type of thing." Despite his claimed concerns, however, Hoatlin's only effort to investigate the matter was to inform "Mr. West" of the incident: "he informed me that he was going to make arrangements to collect that money, so at that point in time it was in his ballpark. . . . I was done."

On June 11, 2007, Adobe received another check from an alleged Delixi customer. This check was sent via UPS from Catherine Jacobs of Ontario, Canada. The check was purportedly an "Official Check" issued by Wells Fargo Bank, and made payable to Adobe in the amount of \$87,650. On June 12, 2007, Hoatlin visited TCF's Dexter, Michigan branch and deposited the check into Adobe's account. Hoatlin did not tell TCF personnel about his concerns about the previous check and assumed that TCF would tell him if this second check was bad: "I had no concerns about it because, you know, it was gonna be up to the bank to tell me whether it was good or not. I make the deposit and, you know, if everything is good, they'll tell me. If it's not good, they'll also tell me."

West gave Hoatlin instructions that, once the check cleared, he was to wire transfer \$71,815 to a Florida company named "Jim Mainey, Inc.", and he was to send \$6,700 via Western Union to someone named "Beth Heynen" in San Jose, California. However, by June 15, 2007, the Wells Fargo check had still not cleared. So, Hoatlin returned to the Dexter TCF branch and met with Tanya Piazza, the branch manager at that time, who volunteered to expedite the availability of the deposited funds by "verifying" the check in question. Piazza noted that TCF's loss prevention department had placed a "hard hold" on the funds, which prevented the funds from being made available for use. Piazza secured a photocopy of the deposited check and called the Wells Fargo phone number printed on the face of the check. Piazza testified that the check "looked like an official check that we see all the time." According to Piazza, a woman who identified herself as a Wells Fargo employee named "Carol" answered the phone and indicated that the check had cleared on June 14, 2007, and that no stop payment requests were associated with it. Piazza took down notes of that conversation on the photocopy of the check.

Feeling "confident that everything was fine with the check," Piazza then requested a hold removal. She did so by completing an internal TCF form entitled, "Hard Hold Removal Request," and forwarding it to the regional manager, Brian Herzog, for his approval. Herzog then authorized and executed the hard hold removal request. Herzog testified that he approved the hard hold removal request even though TCF's loss prevention department had reported that it could not locate a Wells Fargo account associated with the deposited check. He further testified that he based his authorization primarily on Piazza's "verification" of the check.

Immediately after facilitating the removal of the hard hold, Piazza then assisted Hoatlin in wire transferring \$71,815 from the Adobe account to a Bank Atlantic account in the name of

Jim Mainey, Inc. Other bank personnel then assisted Hoatlin in transferring \$7,069.67 (\$6,700 plus fees) via Western Union from the Adobe account to Beth Heynen.

On June 18, 2007, Wells Fargo returned the \$87,650 check to TCF, indicating that it was fraudulent. On the same day, TCF sent Adobe written notice to that effect. TCF also contacted Bank Atlantic in an attempt to recover the funds transferred by Hoatlin to Jim Mainey, Inc.

On August 10, 2007, TCF was able to recoup \$22,140.16 from Bank Atlantic. TCF then closed the Adobe account. But this still left TCF with a shortfall of \$56,664.67 on the Adobe account.

TCF filed a complaint against Adobe and Hoatlin to recover the \$56,664.67 shortfall, alleging that they (1) violated the warranties set forth in MCL 440.4207 by depositing a fraudulent check into a TCF account, (2) fraudulently misrepresented the nature of the check, (3) committed common law conversion by asserting wrongful dominion over TCF funds, and (4) committed statutory conversion by violating MCL 660.2919a. Adobe and Hoatlin responded, denying knowledge of the fraudulent nature of the check and alleging that “nothing about the facts and circumstances surrounding the receipt of the check or the appearance of the check put [them] on notice that the check was defective in any manner.” Adobe and Hoatlin also filed a counter-complaint against TCF, ostensibly alleging that TCF, through its agent Piazza, was negligent in verifying that the check had cleared and making the funds available to Adobe and Hoatlin for use. Adobe and Hoatlin further asserted a claim of breach of contract.

TCF moved for partial summary disposition, arguing that Adobe and Hoatlin violated the warranty that “all signatures on the item are authentic and authorized”¹ by depositing the fraudulent check. TCF added that the terms and conditions of its accounts similarly provided that its customers were responsible for ensuring the validity of any deposited item. TCF also sought dismissal of Adobe and Hoatlin’s counterclaims, arguing that they lacked all legal and factual merit and that, regardless, MCL 440.4207 provided for strict liability. Additionally, TCF argued that the trial court should pierce the corporate veil and hold Hoatlin personally liable for whatever improper actions he did in the name of Adobe. TCF explained that Hoatlin improperly used Adobe to pay for his personal expenses, including using the Adobe account to make his personal car payments and allowing his wife to write checks on the account.

Adobe and Hoatlin responded, arguing that MCL 440.4103 allows parties to vary the provisions of the UCC and that Piazza’s actions in calling Wells Fargo (or what purported to be Wells Fargo) and then releasing the funds, waived the UCC terms. Adobe and Hoatlin also argued that it would be improper to grant summary disposition on TCF’s “contractual warranty” claim. Adobe and Hoatlin further argued that summary disposition of their counterclaims was inappropriate because questions of fact remained regarding whether Piazza’s actions breached the contract and regarding whether her actions were negligent. Last, Adobe and Hoatlin argued that the trial court should not pierce the corporate veil because a “few checks” written by his wife did not rise to a level necessary to disregard the LLC protections and because Adobe was the registered owner of the vehicle for which car payments were made out of the account.

¹ MCL 440.4207(1)(b).

After hearing oral arguments on the motion, the trial court issued a written opinion and order, granting TCF's motion. The trial court first found that Adobe and Hoatlin violated the warranties provided by MCL 440.4207(1) by depositing a fraudulent check in the TCF account. The trial court then explained that, contrary to Adobe and Hoatlin's contentions, there was no agreement between the parties to vary the provisions of the UCC:

A necessary element for the formation of a contract is a meeting of the minds, and it is clear from the record that the parties were not even thinking about any warranties at the time of the subject transactions. Hoatlin (whether in his capacity as principal of Adobe or otherwise) obviously *never* thought about whether Adobe was warranting that the signatures were authentic and authorized, because he assumed that the bank would tell him if the check was bad. There certainly is no evidence and no reason to believe the TCF personnel were contemplating waiving the warranty provision or altering the agreement as to who bore the risk that the check might be bad.

The trial court also noted that, even if there were a meeting of the minds, it would have been based on a mutual mistake of fact, namely that the "Official Check" had cleared. The trial court also noted that the UCC placed the burden for authenticating the check on Adobe and Hoatlin, not TCF:

The UCC clearly places the burden of determining the authenticity of a check on the person depositing it, which, as TCF points out, is logical in light of the depositor's greater access to information concerning the origin of the check. In the present case, that burden—and the risk of failing to carry it—was on the customer, Adobe.

The trial court further found that piercing the corporate veil was appropriate:

Hoatlin formed, and did in fact use, Adobe as a conduit for purchasing foreclosed property, a legitimate business purpose. Mr. Hoatlin, however, is the only individual involved with Adobe: he created it and he is the only officer. Adobe's address as given on the Wells Fargo check is different from Hoatlin's personal address, but Adobe's address as stated on the TCF bank statements is the same. Most telling, the Adobe account was the only checking account Hoatlin *as an individual* had until September 2007 (he opened an account with a different bank after TCF closed the Adobe account) and his wife wrote checks on the account, so he was clearly co-mingling corporate and personal funds.

Mr. Hoatlin, moreover, used Adobe in what he should have known was a scam. He may have believed the deal was risk-free because the bank would tell him if the checks that came in were bad for some reason, but to proceed with the scheme in the first place, even before the first check was dishonored, was reckless to a degree equivalent to intent to defraud.

Last, the trial court found no negligence or breach of contract on the part of TCF and dismissed the counterclaims.

The trial court then entered judgment against Adobe and Hoatlin. Adobe and Hoatlin now appeal.

II. Motion For Summary Disposition

A. Standard Of Review

Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(9) provides that a motion for summary disposition may be raised on the ground that the opposing party has failed to state a valid defense to the claim asserted against him. Under both MCR 2.116(C)(8) and (C)(9), all factual allegations are taken as true, and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party.²

Ordinarily, when assessing motions brought under MCR 2.116(C)(8) and (C)(9), the trial court is limited to reviewing the pleadings alone.³ However, where, as here, the party also asserts that summary disposition is proper under MCR 2.116(C)(10), and it is clear that the trial court looked beyond the pleadings, this Court “will treat the motion[] as having been granted pursuant to MCR 2.116(C)(10)[.]”⁴

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.⁵ The motion tests whether there is factual support for a claim, and the trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁶

We review de novo the trial court’s ruling on a motion for summary disposition.⁷ The proper interpretation of a statute is a question of law also subject to our de novo review.⁸

B. Statutory Warranty

Adobe and Hoatlin argue that the trial court erred in granting TCF summary disposition on its statutory warranty claim because TCF modified or waived any statutory warranties when

² *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Hazel Park v Potter*, 169 Mich App 714, 718; 426 NW2d 789 (1988).

³ *Maiden*, *supra* at 119; *Hazel Park*, *supra* at 718.

⁴ *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

⁵ MCR 2.116(G)(3)(b) and (4); *Maiden*, *supra* at 120.

⁶ MCR 2.116(G)(5); *Maiden*, *supra* at 120; *Kefgen*, *supra* at 616.

⁷ *Maiden*, *supra* at 118.

⁸ *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

its personnel verified the Wells Fargo check, authorized the release of the hard hold, and authorized Adobe and Hoatlin's transfers of funds. We disagree.

MCL 440.4207 provides:

(1) A customer . . . 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 . . . transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. . . .

(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.

Here, when Adobe and Hoatlin deposited the \$87,650 check into the TCF account, thereby "transferring the item" to TCF, they made the warranties provided by MCL 440.4207(1). But, because the check was fraudulent, they violated the warranty that "all signatures on the item are authentic and authorized." And, despite Adobe and Hoatlin's claims to the contrary, TCF did

not agree to modify or waive the MCL 440.4207 warranties;⁹ TCF's actions did not absolve Adobe and Hoatlin of their threshold duty to not deposit a fraudulent check. Further, Adobe and Hoatlin's knowledge, or lack thereof, of the fraudulent nature of the check is irrelevant. Therefore, we conclude that the trial court properly granted summary disposition in favor of TCF when Adobe and Hoatlin deposited a fraudulent check into an account opened with TCF in violation of the warranties set forth in MCL 440.4207(1).

C. Contractual Warranty

Adobe and Hoatlin argue that the trial court erred in granting TCF summary disposition on a contractual warranty claim. We disagree. As TCF points out, the trial court did not actually grant summary disposition on a contractual warranty claim because, in fact, *TCF never asserted a contractual warranty claim*. TCF did recite the account terms and conditions in its motion for partial summary disposition and it has reiterated them on appeal; however, it did not assert a claim of breach of contractual warranty. TCF merely included the account terms and conditions as part of its statutory warranty claim to illustrate and reinforce its argument that the burden was on Adobe and Hoatlin to warrant the authenticity of their deposits. Therefore, we find no merit to Adobe and Hoatlin's claim of error on this point.

D. Adobe and Hoatlin's Counterclaims

Adobe and Hoatlin argue that the trial court erred in granting TCF summary disposition and dismissing Adobe and Hoatlin's counterclaims. We disagree.

Adobe and Hoatlin's negligence claim and breach of contract claim both stem from Piazza's conduct in verifying the Wells Fargo check, authorizing the release of the hard hold, and authorizing Adobe and Hoatlin's transfers of funds. However, Adobe and Hoatlin fail to cite any authority in support of their contentions; therefore, we deem this issue abandoned.¹⁰ Regardless, TCF's account terms and conditions clearly stated that it was Adobe and Hoatlin's responsibility to verify the validity of the check, not TCF's. And, pursuant to MCL 440.4207(3), TCF was entitled to recover "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." Therefore, even to the extent that TCF was negligent or breached any contractual provision by relying on the information provided to them on the fraudulent check and by a

⁹ MCL 440.4103(1) provides:

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.

¹⁰ MCR 7.212(C)(7); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

fraudulent Wells Fargo representative, such negligence was irrelevant and does not absolve Hoatlin of his breach of statutory warranty.

E. Piercing The Corporate Veil

Adobe and Hoatlin argue that the trial court erred in piercing the corporate veil to find Hoatlin liable together with Adobe. We disagree.

A court may pierce the corporate veil when it is shown that the corporation is a mere instrumentality of another individual, is used to commit a wrong or fraud, and there is resultant unjust injury or loss to the plaintiff.¹¹ Here, all three requirements are met. The trial court properly “pierced the corporate veil” to hold Hoatlin personally liable for the wrongdoing of Adobe when TCF presented evidence that Adobe was a mere instrumentality for Hoatlin’s personal finances, that Adobe was used to commit a fraud or wrong, and that there was an unjust loss or injury to TCF.

We affirm.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

¹¹ *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996); *Nogueras v Maisel & Assoc of Mich*, 142 Mich App 71, 86; 369 NW2d 492 (1985).