Sullivan v. Bank of America

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

Mildred Sullivan, as personal representative of the estate of Omega Cole (hereafter appellant), appeals a summary judgment dismissing her action against the Bank of America N.A. (hereafter BofA) to recover damages for alleged breach of contract and negligence in the handling of the decedent's bank accounts. We conclude that the court erred in granting the summary judgment with respect to the cause of action for breach of contract.

PROCEDURAL BACKGROUND

Shortly after the death of Omega Cole, her stepdaughter, Myrtleen Champion, withdrew approximately $480,000, representing the life savings of Omega and her husband Willie, from several accounts at BofA. The effect of these withdrawals was first litigated in the probate proceeding. In a decision entered November 15, 1999, the probate court found that "no joint tenancy was created in . . . four accounts," [1] in which Myrtleen claimed to hold the sum of $447,000 jointly with Omega and therefore Myrtleen had no authority to withdraw those funds as a surviving joint tenant after Omega's death. A judgment for $447,438 in favor of the estate and against Myrtleen was subsequently entered on December 8, 1999. On August 21, 2000, appellant filed a complaint for this sum against BofA, alleging that Myrtleen was insolvent and could not satisfy the judgment against her for the return of the funds.

Appellant filed a first amended complaint following an order sustaining BofA's demurrer to the original complaint with leave to amend and later filed a further complaint mistakenly designated "third amended complaint." This latter complaint alleged causes of action for breach of contract and negligence and again sought judgment in the amount of approximately $447,000. BofA responded by filing a motion for summary judgment and a request for attorney fees and costs. The motion was supported by declarations of BofA employees and evidence secured in discovery proceedings in this action. In opposition, appellant filed declarations that relied in significant part on testimony of two bank employees, Jean Miller and Darlene McGahey, [2] in the prior probate proceedings and a deposition of Myrtleen in this earlier proceeding. [3]

On March 14, 2003, the trial court entered an order for summary judgment on both breach of contract and negligence causes of action. The court found that the undisputed facts established that "the accounts in question [were] held in joint tenancy"; BofA "violated no duties imposed . . . by law or contract" by permitting the transfer of assets from these accounts; Myrtleen "as a signer of those joint tenancy accounts had the right to withdraw any or all funds from those accounts on her own signature at any time"; and appellant could not establish "any damages recoverable against [BofA] for permitting the . . . withdrawals." A judgment entered on this order gave BofA leave to seek costs and attorney fees in postjudgment proceedings.

Appellant filed a motion for reconsideration, and upon denial of that motion, filed a notice of appeal from the judgment and order denying the motion for reconsideration. In this appeal, appellant addresses all her arguments to the breach of contract cause of action. We therefore hold that appellant has waived any assignment of error relating to the summary adjudication dismissing the negligence cause of action. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.)

FACTUAL BACKGROUND

Willie and Omega Cole had been married for almost 40 years and lived together in a home in Vallejo, California, when Willie died on May 11, 1997. Willie had children from a prior marriage, including Myrtleen who lived in a separate residence in the area. By all accounts, Omega was then in very frail health. A few weeks after the death, Myrtleen began staying regularly at her stepmother's residence to care for her; later she adopted a routine of living at the residence four days a week. During this period, Omega asked Myrtleen "to help her with her financial affairs" in addition to her medical needs.

On July 3, 1997, Omega and Myrtleen met with a banker, Marites Policarpio, at the Vallejo Plaza branch of BofA. According to Policarpio, Omega informed her that she wished to add Myrtleen to her two accounts at the bank. Omega and Myrtleen also asked Policarpio to open a new time deposit account in their names. As documentation for this transaction, both Omega and Myrtleen signed a form, printed on both sides and entitled "Master Agreement," which we will call the signature card. Above their signatures, the front side of the signature card stated: "If more than one person signs below, all accounts are held in joint tenancy with right of survivorship unless you specify another type of ownership." The signature card further stated: "we may pay out funds on any one of the signatures below (unless you specify another number here ___)." Omega and Myrtleen did not specify another type of ownership and left blank the space specifying the need for more than one signature. On the reverse side of the signature card, Policarpio wrote the numbers of the three accounts in a column calling for account information. [4]

In her response to BofA's separate statement of undisputed facts, appellant admitted that the signature card incorporated by reference the terms contained in a pamphlet entitled "Facts about Personal Deposit Account Programs, Disclosure and Agreement, effective January 1997," which we

will call the Deposit Agreement. As we will discuss later, a provision in the Deposit Agreement authorized the opening of additional accounts, in the same form as those on the signature card, on the instruction of any signer.

On August 4, 1997, Omega signed a "Durable General Power of Attorney" giving Myrtleen certain powers to act on her behalf in the handling of money and property. The power of attorney, however, did not contain an express authorization, as required by Probate Code section 4264, subdivisions (a), (e) and (f), granting Myrtleen the power to "(a) Create, modify, or revoke a trust . . . (e) Create or change survivorship interests in the principal's property . . . [or] (f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death." Moreover, it was not in either of the two preferred forms identified in the Deposit Agreement BofA s own form or the Uniform Statutory Form Power of Attorney. [5] When shown the form in the probate proceedings, Darlene McGahey, a BofA assistant vice-president, stated that she would not honor it. The limited record on summary judgment does not affirmatively reveal whether or not the power of attorney was ever shown to a BofA employee.

The record discloses that Myrtleen opened four additional accounts that are at issue in this litigation. She opened two accounts on September 19, 1997, [6] and a third account on November 10, 1997. [7] The date on which the fourth account [8] was opened is disputed; BofA contends that it was opened on July 3, 1997, the same date as the original three accounts, but appellant offers evidence from which she infers that it was opened at a later time.

The only documentation for the creation of the four additional accounts consisted of the listing of the account numbers on the reverse side of the signature card in the account information column. A bank officer, Jean Miller, testified in the probate proceedings that she recognized the account numbers to be in her handwriting, but she could not recall the circumstances of the transactions. The reverse side of the signature card contained spaces, opposite the account information column, for recording the date on which an account is opened and "client(s) authorization to add new account," but these spaces were not filled out.

Though the motion for summary judgment provides an incomplete record, it is clear that most, if not all, of the funds deposited in the four additional accounts were transferred from other banks. [9] In particular, McGahey recalled that approximately $250,000 was transferred from American Savings. On November 10, 1997, the sum of $65,000, which had been recently deposited in one of the three original accounts, was transferred to the additional account opened on that date.

The lower section of the reverse side of the signature card contains spaces aligned in columns under the heading "trustee account/beneficiary information." The record discloses the names of Myrtleen's brothers, Willie Cole Jr. and Richard Cole, were written in the column for "beneficiary name" and all seven account numbers were written in the "account" column. There were no entries in the column reserved for "client's initials," and the record is devoid of any evidence regarding the time and

manner in which the beneficiary designations were made. It may be inferred only from the fact that all seven accounts were listed that the designation was made, or at least completed, after November 10, 1997. The Deposit Agreement provides that the bank "consider[s] any account that names a beneficiary an informal trust account," an obvious reference to a Totten trust account recognized by Probate Code sections 5132 and 5136.

Later in November 1997, Myrtleen executed a declaration of trust on behalf of Omega in reliance on her power of attorney. McGahey testified that she advised Myrtleen to consult with a BofA investment advisor about a trust and, the advisor referred Myrtleen to "various lawyers." In opposition to summary judgment, appellant submitted a document entitled "The Omega Cole Family Trust, Declaration of Trust," dated November 20, 1998. The trust agreement names Myrtleen "attorney in fact for Omega Cole, settlor" and designates Myrtleen as the sole trustee. The trust estate is described as "[a]ll property hereafter transferred or conveyed to and received by the Trustee." The beneficiaries of the trust were the heirs designated in Omega's will: Myrtleen herself and three of Omega's nieces, Patricia Williams, Mildred Sullivan, and Omega Carter.

In her testimony in the probate proceedings, McGahey recalled that she changed the bank accounts into the name of the trust and required Myrtleen to bring "the documentation" to her before making the change. She could not identify "The Omega Cole Family Trust" as the document she had seen, but she thought November 20, 1998, was the approximate time when she had changed the accounts.

The record on summary judgment does not include any documentation accompanying the change in the name of the bank accounts and does not reveal whether the existing bank accounts were closed [10] or whether the account beneficiaries named on the signature card were changed to avoid possible conflict with the trust document. [11] But Debra Brown, a BofA paralegal, submitted a declaration stating that she had examined BofA records relating to the four additional accounts (i.e., 01036-04547, 01035-04897, 01033-05521, and 018130-00072) and "determined that in November 1998 the name on each of [these] accounts . . . was changed to the Omega Cole Family Trust (`Trust')." Brown declared that, in a manner apparently conflicting with the actual trust document, "Myrtleen Champion and Omega Cole were listed as the sole trustees of the trust." In the third amended complaint, appellant concedes that "the account numbers stayed the same."

In the probate proceedings, McGahey was shown a bank statement dated December 14, 1998, and asked to read the name on the statement. The following dialogue ensued: "A [McGahey]. . . . Omega Cole Trustee Myrtleen Champion Trustee/Omega Cole family trusts. That's not what I remember. Q. What do you remember? A. I had a copy of Omega Cole family trust Myrtleen Champion trustee. Q. The bank statement appears to be different from the way you set up the account, is that what you're telling us? A. You know it looks like it."

Omega died on January 12, 1999. McGahey testified that she received a copy of the death certificate "a little later than that," apparently referring to the date of death. In a declaration submitted in

support of summary judgment, McGahey states that in January 1999 Myrtleen "told me that she thought the trust was invalid and that the accounts held in the trust should be changed back to joint tenancy. I asked [Myrtleen] to prepare a letter explaining why the trust was invalid. On or about January 21, 1999, [Myrtleen] returned to the Bank with a letter explaining why the trust she had created (and as to which she and Mrs. Cole were the sole co-trustees) was invalid and a copy of Omega Cole's death certificate."

In a letter addressed to McGahey dated January 21, 1999, Myrtleen states, "After speaking with my attorney, it has come to my attention that I did not have authority to create a trust for Omega Cole under the Durable General Power of Attorney form signed by Mrs. Cole on August 4, 1997. Therefore, please change the names of all bank accounts into my name alone. [¶] The accounts were held in joint tenancy until November, 1998, when I tried to create a trust. The accounts were placed in the name of the trust. Because that trust was invalid, the accounts would revert to their previous joint tenancy. However, Omega Cole died on January 12, 1999, which leaves these accounts solely to me."

McGahey states in her declaration that, after receiving the letter and death certificate, she "changed the accounts that were previously in the name of the trust back to Mrs. Cole and [Myrtleen's] names." In the probate proceedings, she explained that she put the accounts "into joint tenancy . . . because that's the way they were set up." The declaration of BofA paralegal, Debra Brown, confirms that "[i]n January 1999, the names on these accounts was [sic] changed back to Omega Cole and Myrtleen Champion as joint tenants." The record contains no further evidence or documentation on the point.

The McGahey declaration continues: "Soon afterward, [Myrtleen] withdrew all funds from the various joint tenancy accounts that she had held with Mrs. Cole and closed them." Again, the record contains no other relevant evidence.

DISCUSSION

A. Creation of joint tenancy accounts

In related assignments of error, appellant maintains that the four additional accounts (i.e., 01036-04547, 01035-04897, 01033-05521, and 018130-00072) were not validly established in joint tenancy. In this appeal from a summary judgment, the material facts regarding the creation of the four accounts are undisputed. The question whether BofA was entitled to judgment as a matter of law turns on the interpretation and enforceability of a provision in the Deposit Agreement allowing "any signer" of a signature card to open additional accounts for the same signer or signers. (See Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.) We review the effect of this provision de novo on appeal. (Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476; Artiglio v. Corning Inc. (1998) 18 Cal.4th 604, 612.)

The pertinent provision of the Deposit Agreement states: "We may open additional accounts under the same Master Agreement on the instructions of any signer. . . . The signer(s) on the new account must be the same as those on the Master Agreement [i.e., the signature card], and only the same number of signers may withdraw funds from the account. If you want different signers on the new account, you must complete and sign a new Master Agreement." Appellant concedes that the provision allowed Myrtleen, as the signer of a signature card (or "Master Agreement") giving her full power of withdrawal from a joint account, to open additional joint accounts conferring the same power of withdrawal. However, she challenges the provision as being invalid under the doctrine of contracts of adhesion and maintains that the manner of opening the account conflicted with Probate Code section 5203.

1. Contract of Adhesion

In Neal v. State Farm Ins. Cos. (1961) 188 Cal.App.2d 690, 694, the court provided a frequently quoted and authoritative definition of a contract of adhesion: "The term signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (See Badie v. Bank of America (1998) 67 Cal.App.4th 779, 786; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 23, p. 53.) Ordinarily, "a contract of adhesion is fully enforceable according to its terms . . . ." (Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 819, fn. omitted; Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 925.) Contracts of adhesion are indeed a familiar part of the modern legal landscape and an inevitable fact of life for all citizens businessman and consumer alike. (Graham v. Scissor-Tail, Inc, supra, at pp. 817-818, fns. omitted.)

However, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or `adhering' party will not be enforced against him. [Citations.] The second . . . is that a contract or provision . . . will be denied enforcement if . . . it is unduly oppressive or `unconscionable.' " (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d 807, 820.)

In this appeal, appellant questions whether the Deposit Agreement was ever given to Myrtleen or Omega when they opened the account on July 3, 1997, and she argues that the signature card did not clearly refer to the Deposit Agreement, citing Baker v. Aubry (1989) 216 Cal.App.3d 1259, 1264. But we consider that, for purposes of the summary judgment motion, appellant is bound by her admission in response to BofA's undisputed statement of fact that the signature card signed by Myrtleen and Omega expressly incorporated by reference the terms of the Deposit Agreement. As so incorporated by reference, the Deposit Agreement comes within the meaning of the term contract of adhesion. Indeed, in California Grocers Assn. v. Bank of America (1994) 22 Cal.App.4th 205, 215, the court reviewed a pamphlet given to depositors, which was apparently a predecessor of the Deposit Agreement, and found it to be " `a classic example of a contract of adhesion.' [Citation.]"

Since appellant does not claim that the provision in question is unconscionable, the question whether it is enforceable as part of a contract of adhesion depends on the issue of the reasonable expectations of a depositor. We conclude that the provision lies within the reasonable expectations of the joint depositors. If one signer can withdraw all funds from the joint account, it is reasonable to expect that the signer can take the much less drastic step of opening a new joint account with different, and possibly more advantageous, terms. Without such a power, a signer would be encumbered in opening new joint accounts, with a view to a continued and evolving depositor relationship, while enjoying unrestricted right of full withdrawal from the existing joint account.

Appellant suggests that we distinguish between the transfer of funds between an existing joint account and a newly created joint account and the deposit of funds from another bank or depositary into a new joint account. She argues that it lies beyond the reasonable expectations of the parties to allow one signatory to open a joint account for the purpose of depositing funds transferred from outside the bank. But we do not think a depositor could reasonably expect such a distinction. If the depositor can place funds in a joint account and then transfer the funds to a newly created joint account, the depositor might expect to be able to put the funds directly into the new joint account.

2. Probate Code section 5203

Alternatively, appellant maintains that Probate Code section 5203 requires the creation of a joint bank account to be accompanied by a writing signed by a party. Since the space for client's authorization on the reverse side of the signature card was left blank, the only executed document relating to the additional four accounts was the original signature card. Appellant argues that this is not enough to satisfy section 5203.

Probate Code section 5203 addresses the language needed to create various bank accounts, including a joint account. (Prob. Code, § 5203, subd. (b).) Subdivision (a) provides that "[w]ords in substantially the following form in a signature card . . . or instrument evidencing an account, or words to the same effect, executed before, on, or after July 1, 1990, create the following accounts: [¶] (1) Joint account: `This account . . . is owned by the named parties. Upon the death of any of them, ownership passes to the survivor(s).' "

The statute appears to assume that the creation of a joint account will be evidenced by the prescribed written language on an executed signature card or other document. This interpretation is consistent with the broader statutory context. Though Civil Code section 683 does not apply to a joint account in a financial institution, it requires a "written transfer, instrument, or agreement" to create a joint tenancy in other forms of personal property. Such an interpretation is also consistent with the judicial interpretation of former law. The predecessor of Financial Code section 852, which now incorporates by reference section 5203 and other related provisions of the Probate Code, contained language that was construed in Crocker-Anglo Nat. Bk. v. American Tr. Co. (1959) 170 Cal.App.2d 289, 295-296, as requiring a writing for the creation of a joint bank account. Finally, the traditional

common law concept of a joint tenancy as reflecting four "unities" presupposes appropriate written documentation. (Estate of Propst (1990) 50 Cal.3d 448, 455.)

While Probate Code section 5203 does appear to require an executed writing for creation of a joint account, it is quite a different matter to conclude that it requires a writing executed contemporaneously with the creation of the joint accounts. BofA argues persuasively that the statute should be interpreted in a manner consistent with contemporary banking practices. A need to execute a contemporaneous writing, in its view, would be "contrary to the expectations of banking customers in today's world. Banking customers expect the flexibility to conduct banking business over the telephone."

Probate Code section 5203 was enacted only 15 years ago, well within the modern era of banking. (Stats. 1989, ch. 397, § 26.) We are unwilling to attribute to the Legislature an intent to disrupt established practice and alter the common expectations of banking customers without the use of express language. Accordingly, we conclude that the requirement of a writing in Probate Code section 5203 is satisfied by the execution of signature card with appropriate language. A later writing, such as the initialing of the "Client's Authorization" section on the reverse side of the signature card, is not required for the valid creation of additional joint accounts, though it may provide helpful documentation.

B. Breach of Contract

In contrast to the issue of contract interpretation discussed above, the question of breach of contract presents fact-intensive issues, which we are required to consider in the context of a very fragmentary record. BofA bears the burden of showing that "there is no triable issue as to any material fact" and it is "entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "In ruling on the motion, the court must `consider all of the evidence' and `all' of the `inferences' reasonably drawn therefrom [citation] and must view such evidence [citations] and such inferences [citations] in the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th 826, 843.) We again review the trial court's ruling de novo on appeal. (Merrill v. Navegar, Inc., supra, 26 Cal.4th 465, 476.)

We begin with the principle that " `[t]he relationship of bank and depositor is founded on contract,' [citation] which is ordinarily memorialized by a signature card that the depositor signs upon opening the account." (Chazen v. Centennial Bank (1998) 61 Cal.App.4th 532, 537; see Perdue v. Crocker National Bank, supra, 38 Cal.3d 913, 922; Grover v. Bay View Bank (2001) 87 Cal.App.4th 452, 456.) "Custom and usage in the business of banking may be part of a contract of deposit if such custom or usage is reasonable and does not contravene any principle of law." (Barclay Kitchen, Inc. v. California Bank (1962) 208 Cal.App.2d 347, 353; cf. Com. Code § 4103, subd. (c) ["general banking usage"].) "[S]tatutes governing the obligations of banks and their depositors" enter into these customs and usages and are therefore "incorporated into and become part of the contract between a bank and its

depositors . . . ." (Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal.App.3d 964, 969; Shapiro v. United California Bank (1982) 133 Cal.App.3d 256, 262-263.) BofA draws our attention in particular to Probate Code sections 5401 and 5405.

" ` "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." [Citation.] . . .' [Citation.]" (Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 371-372.) [12] In Perdue v. Crocker National Bank, supra, 38 Cal.3d 913, 923-924, our high court specifically held that the contract between a depositor and a bank is subject to the bank's duty of good faith and fair dealing. "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., supra, at p. 372; Perdue v. Crocker National Bank, supra, at pp. 923-924; Cal. Lettuce Growers v. Union Sugar Co. (1955) 45 Cal.2d 474, 484; but see Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 350.)

A basic implication of the contractual nature of the relationship between the depositor and the bank is that the bank can take actions affecting the rights of depositors only with the depositor's authorization. Whatever authority the power of attorney may have earlier conferred on Myrtleen, it clearly ceased to authorize her to act on Omega's behalf after Omega's death. (Civ. Code, § 2356, subd. (a)(2).) The bank's power to take actions affecting Omega's rights must be determined with reference to the form of the account at the time of Omega's death. [13] Omega could no longer authorize any different account terms, and the bank plainly could not retroactively create a joint account between a living depositor, Myrtleen, and the decedent, Omega.

An element of a cause of action for breach of contract is the existence of damages proximately caused by a breach. (Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal.App.3d 887, 913.) BofA argues that appellant cannot establish this necessary element because Myrtleen had the right to withdraw the funds from the joint accounts prior to the creation of the trust or she could have withdrawn the funds as the ostensible trustee of the Omega Cole Family Trust and then deposited them in a personal account. In either event and as conceded by appellant at oral argument, she would have obtained control over all of the funds without any control by BofA. But that is not what she did, and the question of whether or not the alleged damages were proximately caused by the alleged breach of contract simply cannot be determined from the record before us.

These observations take us finally to the order for summary judgment on appeal. In our view, BofA's extremely limited factual showing on the summary judgment motion was inadequate to show that there was "no triable issue as to any material fact" and that it was entitled to judgment as a matter of law. Appellant sees a fundamental discontinuity between the original joint nature of the four additional accounts and their placement in the name of the Omega Cole Family Trust and views the bank's attempt to restore the joint nature of the accounts as being ineffective and contrary to the terms of the banking agreement. BofA maintains that the joint nature of the four additional accounts

was never effectively altered. The record of the motion for summary judgment provides fragmentary evidence on this point. In the absence of further documentation, we consider that the terms of the trust document, the testimony of McGahey in the probate proceeding, her allusion to the bank statement dated December 14, 1999, her later declaration, and the accompanying declaration of Brown reasonably could be construed as supporting entirely different interpretations of the facts.

We do not wish to speculate on what legal and factual issues might emerge from a more complete development of the facts or whether appellant in fact can prove a causal connection between any breach and her claimed damages. We also do not wish to speculate on the significance of the Deposit Agreement provisions giving BofA discretionary power to put a hold on a depositor's account in the event of the depositor's death [14] or a dispute over ownership and control of the account. [15] In our opinion, the record does not provide sufficient evidence to allow us to determine the applicability of these provisions or to properly consider appellant's claim that the provisions should be applied consistently with the implied covenant of good faith and fair dealing.

In this very close case in which we are required to view the evidence and reasonable inferences in the light most favorable to appellant, we conclude that the trial court erred in granting the motion for summary judgment with respect to the first cause of action for breach of contract and therefore reverse the judgment dismissing appellant's action against BofA. Our decision does not affect the order granting a summary adjudication in favor of BofA on the second cause of action for negligence, which appellant has not challenged on appeal.

We concur:

Marchiano, P. J.

Stein, J.

1. The account numbers were: 01033- 05521, 01036- 04547, 01035-04897, 018130- 00072.

2. The pertinent declaration appears to merge the testimony of Miller and McGahey so that we cannot determine confidently whose testimony is on a particular page. The probate court decision and the response to separate statement of undisputed facts appear to give contradictory indications. We will refer in this opinion to witnesses as McGahey or Miller according to our best inference without intending to make an identification that is not warranted by the record.

3. In this appeal, BofA questions the admissibility of this testimony from a prior proceeding, but we find that it waived any claim of error by failing to raise the objection in the trial court. (Code Civ. Proc. § 437c, subd. (b)(5); 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444.) We note, moreover, that the testimony would be admissible, upon a proper showing, as former testimony. (Evid. Code, § 1292.)

4. The numbers were 00553- 61656, 00550- 05843, and 00556- 02016.

5. The Deposit Agreement states: "If you want to grant someone power of attorney over your account, we may require you to complete our power of attorney form, which is available at any branch. Under most circumstances, we also accept the Uniform Statutory Form Power of Attorney contained in the California Civil Code." See Civil Code section 2400 and Probate Code section 4401.

6. The account numbers are 01035- 04897 and 01033- 05521.

7. The account number is 018130- 00072.

8. The account number is 01036- 04547.

9. We deny appellant's request for judicial notice filed January 8, 2004, seeking to augment the record relating to these deposits since the additional documents were not before the trial court.

10. Appellant draws our attention to a provision in the Deposit Agreement that requires the closing of an existing account with the "transfer of ownership," such as would occur when an account in two person's names is put in the name of one person. The provision states: "You may not transfer ownership of an interest- bearing deposit account to another party unless we close the account and open a new account in the name of the new account owner."

11. The signature card submitted in support of summary judgment continues to list Willie Cole and Richard Cole as the beneficiaries of the seven accounts.

12. BofA objects that appellant attempts to raise the issue of an implied covenant for the first time on appeal, but we consider that the issue was implicit in the allegations of the complaint and the evidence submitted in opposition to summary judgment.

13. We note that Probate Code section 5303 applies this principle to controversies between depositors, or among depositors and their creditors or successors in interest: "The provisions of Section 5302 as to rights of survivorship are determined by the form of the account at the death of a party." (Subd. (a).) Although the statute does not apply to the liability of a bank, we cite it as reflecting a principle of broad application. (Prob. Code § 5201.)

14. The Deposit Agreement provides: "We may place a hold on your account and refuse to accept deposits when an owner dies or is declared incompetent. We may retain any funds in your account until we know the identity of the successor."

15. In addition, the Deposit Agreement provides: "If we believe there is a dispute about ownership or control of your account, we may place a hold on it and not release funds until we receive either a court order or an instruction signed by all persons claiming an interest in the account."