Siler v. Richfield Bank & Trust Company Inc.

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MEMORANDUM OPINION AND ORDER ON DEFENDANT RICHFIELD BANK & TRUST COMPANY'S SUMMARY JUDGMENT MOTION

Plaintiff Elizabeth Siler, as personal representative and trustee of the Estate of Donald Siverling, brings this lawsuit against Richfield Bank and Trust Company, Inc. ("Richfield Bank") asserting claims for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., preferential transfer, conversion, and money had and received. In her capacity as representative and trustee of the Siverling Estate, Siler was represented by attorney Peter I. Orlins, who maintained a client trust account at Richfield Bank. During 1997 and 1998, Orlins embezzled more than $153,000 from Siler and the Siverling Estate, depositing the bulk of that money in Richfield Bank. Siler is pursuing these claims on behalf of the Siverling Estate in an attempt to recoup funds that she has been unable to collect from Orlins. This matter is now before the Court on defendant's motion for summary judgment on all claims.

Because Siler does not contest defendant's motion as to the RICO claims and the preferential transfer claim, summary judgment is granted in favor of defendant on those claims. Summary judgment is also granted in favor of defendant with respect to plaintiff's claim for money had and received. However, Richfield Bank's motion for summary judgment as to plaintiff's claim for conversion is denied. The rationale for the Court's decision is set forth more fully below.

FACTUAL BACKGROUND

In October 1997, Elizabeth Siler retained Peter I. Orlins to represent her in matters related to the administration of her father's estate ("Siverling Estate"). Orlins was to assist Siler in closing out Siverling's bank account at Richfield Bank. On December 10,1997, Orlins and Siler met with Richfield Bank representative Mark Wysong. The two told Wysong that they were there to close out Siverling's bank account and to open an account for the Siverling Estate. During the course of the meeting, Siler signed paperwork directing that Siverling's account be closed. She was then issued a cashier's check for the balance of the account, $75,965.89, made payable to the "estate of Donald John Siverling." Siler endorsed the check and gave it to Orlins. Siler maintains that she told Wysong and Orlins that the cashier's check was to be deposited into an account for her father's estate.

Although Siler understood that she and Orlins were at the bank to open an account for the Siverling Estate, no such account was opened. Wysong contends that he never mentioned or discussed any specifics about opening an account with Siler and Orlins, but admits that at the beginning of the

meeting Siler said she was there to close her father's account and to open an estate account. Richfield Bank maintains that Siler's impression that an estate account was to be opened was based solely on the representations of Orlins, which were allegedly made both in and out of the presence of Wysong.

Orlins later deposited the cashier's check from Siverling's account ($75,965.89), along with three other checks totaling $13,263.90, which were made payable to Siverling's estate or trust, into his personal trust account at Richfield Bank. Siler does not recall endorsing the other three checks. However, she has not been able to state with certainty, after looking at the checks, that the signatures are forgeries. The bank accepted all of the checks and deposited the money into Orlins' account. Each of the checks included a signature of "Elizabeth Siler P.R." and a stamped endorsement for the Orlins Law Office.

Orlins later deposited two additional checks made payable to Siverling's estate or trust, totaling $64,213.01, into his lawyer trust account. Siler maintains that she does not recall endorsing those two checks either. Again, Siler cannot state with certainty whether the signatures are forgeries.

During 1997 and 1998, Orlins also made disbursements from his personal account to beneficiaries of the Siverling Estate totaling at least $62,729.36. He also deposited other funds into his personal account at Richfield Bank and made other disbursements from the account. In addition to the money at Richfield Bank, Orlins misappropriated approximately $210,000 of Siler's money from accounts at other banks.

In February 1998, Richfield Bank was informed by letter that authority over Orlins' account was being transferred to the Minnesota Office of Lawyers Professional Responsibility. [1] At about the same time, Siler was first informed of Orlins' alleged illegal activities. Later in February, the Minnesota Supreme Court appointed a trustee for the funds of Orlins' clients and all of the money in Orlins' account at Richfield Bank was transferred to the trustee.

After learning of the misappropriation of funds, Siler filed suit in Hennepin County and obtained a judgment in the amount of $930,309.31, a figure representing three times her loss. She has been unsuccessful in satisfying the judgment and apparently has brought suit against a number of financial institutions where Orlins maintained accounts through which he embezzled money. Orlins eventually pled guilty to fraud charges, was disbarred, and is currently serving a prison sentence.

DISCUSSION

As noted above, Siler does not contest Richfield Bank's motion for summary judgment with respect to her RICO claims or her preferential transfer claims. Defendant's motion on those claims is therefore granted. Siler's remaining claims are for conversion and for money had and received. Plaintiff alleges that Richfield Bank paid at least five checks over forged endorsements, making it liable as a depository bank for conversion. Plaintiff also alleges that Richfield Bank should be

required to repay Siler the money that Orlins improperly deposited in the bank. Because Richfield Bank was not unjustly enriched in this case, Siler's money had and received claim fails and must be dismissed. However, because there remains material issues of fact on Siler's conversion claim, defendant's motion for summary judgment with respect to that claim is denied.

I. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.@ Fed. R. Civ. P. 56. Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Summary judgment is not appropriate if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. Id.

The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The nonmoving party is entitled to the benefit of all reasonable inferences to be drawn from the underlying facts in the record. Vette Co. v. Aetna Casualty & Surety Co., 612 F.2d 1076 (8th Cir. 1980). However, the nonmoving party may not merely rest upon allegations or denials in its pleadings, but it must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial. Burst v. Adolph Coors Co., 650 F.2d 930, 932 (8th Cir. 1981).

II. Money Had and Received Claim

Plaintiff asserts a claim for money had and received, arguing that Richfield Bank must return to Siler all funds that Orlins improperly deposited into his trust account at Richfield Bank. However, Soderlin v. Marquette Nat'l Bank of Minneapolis, 8 N.W.2d 331 (Minn. 1943), squarely forecloses this cause of action under these factual circumstances. [2] In Soderlin, the plaintiff, a plumbing and heating company, brought suit against an employee who had, without authority, placed plaintiff's rubber-stamp endorsement on a check and then forged plaintiff's signature on the check before bringing it to defendant bank. Id. at 331-32. The employee cashed the check and received the proceeds, less an amount which he owed the bank. Id. at 332. The court in that case addressed the issue of whether an action for money had and received could be properly brought when the bank had not been unjustly enriched. The court concluded as follows:

In the instant case, the bank paid out the entire proceeds of the check by cash and credit. It received from the drawee bank only the amount it had disbursed. It was not unjustly enriched. Under the above decisions, therefore, there can be no recovery against the bank under the theory of an action in money had and received. Id. at 332-33.

In this case, the record shows that the Minnesota Supreme Court appointed a trustee for the funds of Orlins' clients and that all of the money in Orlins' account at Richfield Bank was transferred to the trustee. Just as in Soderlin, the proceeds from the forged checks were entirely paid out and the bank was not unjustly enriched. Because Richfield Bank was not unjustly enriched, plaintiff cannot recover against the bank on a claim for money had and received. Summary judgment is therefore granted in favor of defendant on this claim.

III. Conversion Claim

Plaintiff also asserts a claim for conversion against Richfield Bank because it paid checks made out to the Siverling Estate and presented by Orlins over alleged forged endorsements. Minnesota no longer recognizes a common law claim for conversion in the context of negotiable instruments. Halla v. Norwest Bank, 601 N.W.2d 449, 451 (Minn. Ct. App. 1999) ("we read the language changes in Minn. Stat. § 336.3-420(a) to broaden the definition of conversion, but not to allow a separate common law claim for conversion of negotiable instruments"). Accordingly, the Court will analyze plaintiff's conversion claim pursuant to Minn. Stat. § 336.3-420(a).

The Court notes at the outset that there is a genuine issue of material fact as to whether Orlins forged Siler's endorsements on the checks at issue here. [3] Siler testified in her deposition that she does not remember signing the checks in question, but that she cannot say for sure whether the signatures are forgeries. The issue of whether or not there is an actual forgery is a fact question to be resolved by the jury. Hillmeyer v. Watz, 415 N.W.2d 89, 92 (Minn. Ct. App. 1987). For the purposes of this motion, however, the Court views the facts in a light most favorable to the non-moving party, Siler. Accordingly, the Court assumes, for the purposes of its analysis, that the endorsements on the checks were forgeries. [4]

Minn. Stat. § 336.3-420, governing the conversion of checks, provides that:

The law applicable to conversion of personal property also applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.

Based on the language of the statute, the initial question that the Court must address is whether Orlins was a person "entitled to enforce" the checks. If Orlins was entitled to enforce the checks, then Richfield Bank clearly cannot be held liable for conversion. Minn. Stat. § 336.3-301 contains the

definition of the phrase "person entitled to enforce." It explains that a:

"[p]erson entitled to enforce" an instrument means the (i) holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder; or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 336.3-309 or 336.3-418(d). A person may be entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Orlins was not a "holder" of the checks. Holder is also a term of art defined in the UCC. A holder is "the person in possession if the instrument is payable to bearer, or, in the case of an instrument made payable to an identified person, if the identified person is in possession." Minn. Stat. § 336.1-201(20). Here, the checks were not made out to Orlins, but to the Estate of Donald Siverling. Because Orlins was not the person to whom the check was made payable he was not a "holder" of the checks. [5] Further, Orlins did not become a "holder" of the checks through "negotiation." [6] A valid negotiation of an instrument payable to an identified person requires transfer of possession of the instrument and its endorsement by the holder. Minn. Stat. § 336.3-201(b). Because there is at least a disputed issue of fact as to the authenticity of plaintiff's endorsements on the checks, Orlins cannot be said to be a holder through negotiation. Accordingly, Orlins was not a holder of the checks who was entitled to enforce them.

However, the fact that Orlins was not a holder does not end the Court's inquiry with respect to the question of whether Orlins was "entitled to enforce" the checks. Orlins would also be considered a "person entitled to enforce" the checks if he was a "nonholder . . . who has the rights of a holder." [7] In order to determine whether Orlins was a "nonholder . . . who has the rights of a holder," the Court looks to whether Orlins had either express authority or apparent authority to endorse plaintiff's name to the checks and deposit them in his lawyer's trust account. American Parkinson Disease Ass'n v. First Nat'l Bank of Northfield, 584 N.W.2d 437, 440 (Minn. Ct. App. 1998).

Richfield Bank argues that simply by his status as plaintiff's agent, Orlins was entitled to enforce the checks. Neither party disputes that Orlins, as plaintiff's attorney, was her agent. Plaintiff even acknowledged in her deposition that she expected Orlins, in his capacity as an attorney assisting in the administration of the Siverling Estate, to deposit checks into an estate account at Richfield Bank. Orlins status as Siler's agent did not, however, confer upon him the authority to cash checks without her endorsement, or with a forged endorsement purporting to be hers. Kenerson v. FDIC, 44 F.3d 19, 33-34 (1st Cir. 1995).

Express authority is only that authority which the principle directly grants to the agent. Hockemeyer v. Pooler, 130 N.W.2d 367, 377 (Minn. 1964). Orlins status as Siler's agent does not therefore make him a nonholder with the rights of a holder. Further, the Court cannot resolve at this stage of the proceedings, whether Orlins had the apparent authority to deposit estate checks into his trust account without Siler's endorsement or with a forged endorsement purporting to be hers. Apparent

authority is a question of fact for the jury, not a question of law for the Court. Hagedorn v. Aid Ass'n for Lutherans, 211 N.W.2d 154, 157 (Minn. 1973).

Accordingly, the issue of whether Orlins was "entitled to enforce" the checks cannot be finally resolved at this stage of the litigation.

Despite the fact that the Court cannot resolve whether Orlins was "entitled to enforce the checks," Richfield Bank would be insulated from plaintiff's conversion claim if it was a "holder in due course" of the alleged forged checks. [8] A holder in due course: means the holder of an instrument if: the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or had been dishonored or that there is an uncured defect with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in section 336.3-306, and (vi) without notice that any party has a defense or claim in recoupment described in section 3363-305(a). Minn. Stat. § 336.3-301.

An obvious prerequisite for becoming a "holder in due course" is that the party must first be a "holder" of the instrument. See, e.g., James J. White & Robert S. Summers, Uniform Commercial Code § 17-3, at 152 (4th ed. 1995) ("[o]bviously only a holder can be a holder in due course"). In this case, as noted above, Orlins was not a "holder" of the checks because the checks were not made payable to him and were not properly negotiated to him. Richfield Bank cannot therefore become a holder either. See, e.g., Kenerson, 44 F.3d at 25 ("[s]imilarly, because the checks were not properly negotiated by Fairbanks, the depository bank did not become a holder of the checks when Fairbanks delivered them to the bank). Because the bank was not a "holder" of the checks it cannot be a "holder in due course." Richfield Bank is therefore not insulated from liability for conversion. [9]

Richfield Bank also asserts that the Uniform Fiduciaries Act ("UFA") precludes Siler from recovering against it for conversion. Defendant relies on Minn. Stat. §§ 520.07 and 520.09 in arguing that the UFA disposes of Siler's conversion claim. The UFA relieves banks of their common law duty to inquire into the propriety of each transaction conducted by a fiduciary. In re Lauer, 98 F.3d 378, 383 (8th Cir. 1996).

Under the UFA, banks and others who deal with fiduciaries may not be held liable for a fiduciary's breach of duty absent either (1) actual knowledge of the breach or (2) knowledge of sufficient facts to constitute bad faith. Id. In this case, Orlins deposited the checks made out to the Siverling Estate into his lawyer trust account rather than into an account specifically maintained for the Siverling Estate. As a result, Minn. Stat. § 520.09 (deposit in a fiduciary's personal account) is the operative provision of the UFA here. That section provides that:

If a fiduciary makes a deposit in a bank to the person's personal credit . . . of checks payable to the principal and endorsed by the person, if empowered to endorse such checks . . . the bank receiving

such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of an obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of an obligation as a fiduciary in making such a deposit or in drawing such a check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith. Minn. Stat. § 520.09 (emphasis added).

Although the UFA is clearly intended to relieve banks of the duty to inquire about whether a fiduciary is committing a breach of his or her duty, the plain language of the statute requires that the fiduciary be one "empowered to endorse" the checks. Given the factual circumstances present here, there is a genuine issue of material fact concerning whether Orlins was, in fact, empowered to endorse the checks for the Siverling Estate. [10] That issue, again, turns on the question of whether Orlins had apparent authority to endorse the checks, a question of fact to be decided by the jury. Hagedorn, 211 N.W.2d at 157.

Because genuine issues of material fact remain on whether the signatures on the checks were forgeries, whether Orlins had apparent authority to endorse the checks, and whether Orlins was empowered to endorse the checks for purposes of the UFA, defendant's motion for summary judgment with respect to plaintiff's conversion claim is denied.

ORDER

Based upon the foregoing, the submissions of the parties, the arguments of counsel and the entire file and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's motion for summary judgment [Docket No. 11] is GRANTED in part and DENIED in part.

2. Defendant Richfield Bank and Trust's summary judgment motion is GRANTED with respect to Counts I (RICO), II (RICO), III (Preferential Transfer), and V (Money Had And Received) of plaintiff's Complaint and these claims are DISMISSED WITH PREJUDICE.

3. Defendant Richfield Bank and Trust's summary judgment motion is DENIED with respect to Count IV (Conversion) of plaintiff's Complaint.

DATED: July 27, 2001 at Minneapolis, Minnesota.

1. This was not the first time Richfield Bank received correspondence from the Minnesota Office of Lawyers Professional Responsibility ("OLPR") concerning Orlins. Between 1993 and 1996, Orlins had overdrafted his client trust account at Richfield Bank on a number of occasions. In June 1997, Richfield Bank received a letter from OLPR informing the bank

that it should have reported those overdrafts to the OLPR. As a result, Richfield Bank corrected its policy, which had previously been to only report overdrafts of Interest on Lawyers Trust Accounts ("IOLTA"). In September 1997, OLPR began to submit written requests to Richfield Bank for various records concerning Orlins' bank accounts, along with written authorization by Orlins to provide such information. Richfield Bank complied with all of these requests, but did not know and was not told the reason for the requests. Richfield Bank later became aware that the requests coincided with an investigation of misappropriation of client funds.

2. Plaintiff relies heavily on Lawyers' Fund for Client Protection v. Gateway State Bank, 692 N.Y.S.2d 583 (N.Y. Sup. Ct. 1999), reversed in part 709 N.Y.S.2d 243 (N.Y. App. Div. 2000). That case, however, is simply inconsistent with Minnesota law on this issue.

3. There is no issue of fact regarding the cashier's check issued to Siler on December 10, 1997. Plaintiff has admitted, in her affidavit, that she endorsed that check and gave it to Orlins.

4. The parties will certainly be permitted at trial to introduce evidence concerning whether or not the endorsements were actually forged.

5. This analysis does not apply to the initial cashier's check that was endorsed by Siler and given to Orlins for deposit. Once Siler endorsed the check in blank, the check became bearer paper and because Orlins was in possession of the bearer paper, he was entitled to enforce that check. Minn. Stat. § 336.3-205(b).

6. For purposes of the UCC, "negotiation" means "a transfer of possession whether involuntary or voluntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." Minn. Stat. § 336.3-201(a).

7. The third category of "person[s] entitled to enforce" refers to situations in which a person is attempting to enforce an instrument that he or she has lost or which has been stolen. Minn. Stat. § 336.3-301 Cmt. Those situations are clearly not implicated in this case.

8. Richfield Bank also argues that it received the checks through negotiation and is therefore insulated from liability here. However, as discussed above, negotiation requires proper endorsement by the holder. Minn. Stat. § 336.3-201(b). The facts, viewed in a light most favorable to Siler, indicate that no such proper endorsement occurred here.

9. The Court notes that this result is consistent with the loss allocation system envisioned by the drafters of the UCC. "[A]bsent negligence or its like on the part of the owner of a check . . . the loss should normally come to rest upon the first solvent party in the stream after the one who forged the endorsement." White & Summers, § 18-1, at 209-210. In this case, that party is clearly Richfield Bank. The rationale for such a rule is that the party that dealt directly with the forger was in the best position to discover the forgery. The UCC, however, provides the depository bank with the defense of contributory negligence. Minn. Stat. § 336.3-406.

10. In addition, the Court notes, without deciding the issue, that it is not at all clear that the UFA controls the outcome of this litigation. In the only case that the Court has found addressing the question, the Illinois Court of Appeals held that

the UFA "does not purport to absolve a bank from liability when it pays a check on an unauthorized endorsement." Bellflower Ag Service, Inc. v. First Nat'l Bank & Trust Co., 473 N.E.2d 998, 1002 (Ill. Ct. App. 1985).