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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-783

Filed: 5 June 2018

Henderson County, No. 16 CVS 1771

MARIE NAPOLI, AS SUCCESSOR TRUSTEE OF THE JOHN E. KAISER FAMILY TRUST DATED MARCH 9, 1993; MARIE NAPOLI, AS SUCCESSOR TRUSTEE OF THE DOLORES C. KAISER LIVING TRUST DATED MARCH 9, 1993; AND MARIE NAPOLI, as the General Guardian of DOLORES C. KAISER, Plaintiff,

v.

SCOTTRADE, INC. and HOMETRUST BANK, Defendants.

Appeal by plaintiff from order filed 9 March 2017 by Judge Alan Z. Thornburg in Henderson County Superior Court. Heard in the Court of Appeals 9 January 2018.

Prince, Youngblood & Massagee, PLLC, by Cynthia L. Schirmer, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith and J. Benjamin Davis, for defendant-appellee HomeTrust Bank.

BERGER, Judge.

Marie Napoli ("Plaintiff") appeals from an order dismissing her negligence claim against HomeTrust Bank ("Defendant"). Because Plaintiff did not allege a duty owed Dolores Kaiser and breached by Defendant that is recognized by North Carolina

law, her negligence claim must fail as a matter of law. Therefore, we affirm the order of the trial court dismissing her complaint.

Factual and Procedural Background

Plaintiff filed this lawsuit as Successor Trustee and General Guardian for her mother, Ms. Dolores Kaiser ("Kaiser"). Plaintiff contends that Defendant negligently breached a bank-customer fiduciary duty to stop Kaiser from executing "suspicious" transactions and to notify the proper authorities who would allegedly protect Kaiser from financial fraud. The trial court dismissed Plaintiff's complaint for failure to state a claim upon which relief may be granted. The issue is whether a bank has a fiduciary duty to deny a depositor access to funds or to report "suspicious" transactions involving an elderly customer who has not been adjudicated incompetent but may be showing symptoms of mental incompetency. Because we find that no such fiduciary duty exists under North Carolina law, we affirm the trial court's order granting Defendant's motion to dismiss.

The transactions at issue took place over a two-week period from August 29 until September 11, 2013. During that time frame, Kaiser was an eighty-one-year-old customer at Defendant's Hendersonville, North Carolina branch. While Kaiser had allegedly shown signs of dementia, she had not been adjudicated incompetent. Over the two-week period, Kaiser entered into multiple allegedly "suspicious" bank transactions involving cash withdrawals, wire transfers, and checks payable to

various individuals. As a result of these transactions, $81,300.00 was either withdrawn, cashed, or transferred from Kaiser's account.

On or around September 28, 2013, Plaintiff became aware of the multiple transactions engaged in by Kaiser. Shortly afterward, Plaintiff spoke with an employee of Defendant who had assisted Kaiser in some of the allegedly-suspicious transactions. This agent allegedly told Plaintiff that she "was worried about the suspicious nature of the transactions at issue but didn't know what to do" at the time.

In early 2014, following the suspicious transactions, Kaiser was diagnosed with dementia and adjudicated incompetent by the Henderson County Clerk of Superior Court. Plaintiff was then appointed General Guardian of Kaiser.

Plaintiff filed a complaint in Henderson County Superior Court, seeking to recover losses incurred by the bank's alleged negligence in failing to stop the transactions or alert proper authorities. In response, Defendant filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff filed an amended complaint, which brought a common law negligence claim and two statutory violations under N.C. Gen. Stat. §§ 108A-102 and 108A-115. Plaintiff, however, voluntarily dismissed the statutory claims. The trial court granted Defendant's 12(b)(6) motion to dismiss on the remaining negligence claim. It is from this order that Plaintiff appeals.

Analysis

Plaintiff appeals, alleging that Defendant negligently breached its duty to Kaiser by failing to stop Kaiser's transactions or alert the proper authorities. Defendant argues that it owed no legal duty to Kaiser, that Plaintiff's claims were barred by the "economic loss rule," and that Plaintiff's claims were untimely.

"The motion to dismiss under [Rule] 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion[,] the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "In general, a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim*." *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001) (citation and quotation marks omitted). "[T]he trial court should not allow a motion to dismiss unless it is clear that a plaintiff cannot present any set of facts which would entitle him to relief." *Id.* (citation omitted).

Plaintiff argues that Defendant negligently breached its duty to Kaiser by failing to stop Kaiser's transactions or alert the proper authorities. Plaintiff asserts that a fiduciary relationship exists between a bank and an ordinary, elderly individual who exhibits feeble-minded behavior and engages in multiple "suspicious transactions" over a short period of time, and that this relationship gives rise to both a common-law duty and a duty imposed by North Carolina public policy. We disagree.

First, in North Carolina, the relationship between a bank and its customer is governed by the Uniform Commercial Code ("U.C.C."). The U.C.C. creates statutory duties owed a customer by a bank, but these duties are contrary to those asserted by Plaintiff. Second, no duty arose under North Carolina public policy, as a not-yet-effective statute cannot be applied to conduct that occurred before its effective date. Because Plaintiff's complaint failed to establish any duty owed to Kaiser by Defendant that was breached, her negligence claim must fail as a matter of law.

"Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." *Coulter v. Catawba Cty. Bd. of Educ.*, 189 N.C. App. 183, 185, 657 S.E.2d 428, 430 (2008) (citation and quotation marks omitted).

> In order to establish actionable negligence, a plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury. A duty is defined as an obligation, recognized by the law, requiring the person

> to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

Whisnant v. Carolina Farm Credit, ACA, 204 N.C. App. 84, 93-94, 693 S.E.2d 149, 156 (2010) (citation omitted), *disc. review denied*, 365 N.C. 73, 705 S.E.2d 745 (2011).

Plaintiff has asserted that, essentially, a fiduciary duty arose from a " 'particular bank-customer transaction' that gave rise to a special relationship between [Kaiser] and [Defendant]." "A fiduciary duty arises when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 60, 418 S.E.2d 694, 699 (citation and quotation marks omitted), *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). However, "an ordinary debtor-creditor relationship," as is the bank-customer relationship between Plaintiff and Defendant here, "does not create a fiduciary relationship." *Id.* at 61, 418 S.E.2d at 699 (citations and brackets omitted).

There are times, however, that a bank-customer relationship might give rise to a fiduciary relationship, if "given the proper circumstances." *Id.* The "proper circumstances" that give rise to a special duty are typically found in "the terms of the contract and the duties set forth in the U.C.C." *Id.* (citations omitted) (finding no fiduciary relationship between a couple and their bank when the couple put no "special confidence" in the bank). Therefore, Plaintiff must show that some "proper circumstance" exists that creates a fiduciary relationship between Kaiser and

Defendant from either the terms of a contract or set forth in the U.C.C. Plaintiff has alleged no breach of any duty set forth in a contract.

North Carolina has enacted the U.C.C. as Chapter 25 of the North Carolina General Statutes, and it encompasses the bank transactions at issue. *See* N.C. Gen. Stat. §§ 25-4 and 25-4A. The U.C.C. makes clear that the common law only supplements the U.C.C., if not "displaced by the particular provisions of [the U.C.C.]." N.C. Gen. Stat. § 25-1-103(b) (2017).[1] "[B]y its own terms[, the U.C.C. is] complementary to the common law except where there is a conflict." *Bank v. McCarley & Co.*, 34 N.C. App. 689, 691, 239 S.E.2d 583, 585 (1977) (citation omitted).

The relationship between a depositor and her bank is "ordinarily, if not universally, that of a creditor and debtor. This relation arises out of the contract, express or implied, that the bank will, from time to time, pay to the depositor or to his order, upon his demand, amounts not exceeding his deposit or balance." *Woody v. Bank*, 194 N.C. 549, 551-52, 140 S.E. 150, 152 (1927). "Upon the refusal or failure

[1] "The Uniform Commercial Code was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions in many important ways. At the same time, the Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to supplant its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies." N.C. Gen. Stat. § 25-1-103, Official Comment 2.

of the bank to pay the check of its depositor, the bank is liable for a breach of its contract." *Id*. at 552, 140 S.E. at 152.

> Since a deposit is a matter of contract between a depositor and the bank, the depositor may stipulate at the time of deposit as to how or by whom the money may be drawn out . . . . A high standard of contractual responsibility has been imposed on banks in paying money chargeable against their depositors' accounts. The bank must, in paying out a deposit, comply with its agreement with the depositor.

Insurance Co. v. Bank, 39 N.C. App. 420, 427, 250 S.E.2d 699, 704 (1979) (citation omitted).

The sections of the U.C.C. governing the transactions at issue here establish the duties owed customers by their depository bank if not established by contract. Article 4, governing cash withdrawals and checks, states that "[a]ction or nonaction approved by this Article or pursuant to federal reserve regulations or operating circulars is the exercise of ordinary care." N.C. Gen. Stat. § 25-4-103(c) (2017). Likewise, Article 4A, governing wire transfers, states that "resort[ing] to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article." N.C. Gen. Stat. § 25-4A-102, Official Comment (2017).

Both Articles 4 and 4A provide the bright line rule that there must be an actual *adjudication* of incompetency for a bank to refuse a customer's instructions. For cash withdrawal or check instructions given by a depositor, "[n]either death nor incompetence of a customer revokes the authority to accept, pay, collect, or account

until the bank knows of the fact of death or of an *adjudication* of incompetence and has reasonable opportunity to act on it." N.C. Gen. Stat. § 25-4-405(a) (emphasis added). Additionally, for wire transfer instructions, "[a] payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an *adjudication* of incapacity." N.C. Gen. Stat. § 25-4A-211(g) (emphasis added).

Here, Defendant had an affirmative duty to obey Kaiser's instructions unless it had knowledge of an adjudication of incompetence, regardless of whether it was suspicious of the transactions and Kaiser's competence. Kaiser was adjudicated incompetent several months after her final suspicious transaction involving Defendant. The plain language of the North Carolina U.C.C. statutes required that Kaiser be adjudicated incompetent and that Defendant have knowledge of that adjudication of incompetence. As neither of these had happened, neither were pleaded in Plaintiff's complaint. Therefore, Plaintiff is unable to establish a common law duty that Defendant owed Kaiser and was breached.

Plaintiff also argues that North Carolina public policy imposes upon Defendant a special duty owed to Kaiser. Plaintiff argues that there is a stated public policy in favor of the protection of older adults from financial loss caused by fraud, especially when bank employees are suspicious of such fraud. To establish this public policy, Plaintiff points to N.C. Gen. Stat. § 108A-115, entitled the "Duty to report suspected

fraud; content of report; immunity for reporting." Section 108A-115 requires that any financial institution with "reasonable cause" to believe an elderly or disabled individual is the target of financial exploitation must report such information to the appropriate law enforcement agency.

However, "a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation." *Springer-Eubank Co. v. Four Cty. Elec. Membership Corp.*, 142 N.C. App. 496, 499, 543 S.E.2d 197, 200 (2001) (citation and quotation marks omitted). By its own express language, Section 108A-115 did not go into effect until December 1, 2013, which was more than two months after the final transaction at issue here. Even though it is a laudable public policy, Section 108A-115 could not be used to establish a statutory duty, especially in contravention of the stated duties found within the U.C.C.

Because Plaintiff was unable to establish any duty was owed Kaiser by Defendant or that a duty was breached, her negligence claim must fail as a matter of law. Therefore, we affirm the trial court's dismissal of Plaintiff's complaint and need not address other issues raised in her appeal.

Conclusion

Because Plaintiff did not establish any legal duty owed Kaiser that was breached by Defendant, the trial court did not err in dismissing Plaintiff's complaint. Therefore, we affirm the order of the trial court.

AFFIRMED.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).