2012 WL 2598911 (Okl.Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Oklahoma.
Oklahoma County

Danny L. SELLERS et al., Plaintiff,

v.

FIRST ENTERPRISE BANK et al., Defendant.

No. CJ20103030.
January 9, 2012.

Plaintiff's Response and Objection to Defendant's Motion for Summary Judgment

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Judge Bryan C. Dixon.

Danny L. Sellers, Successor Death Co-Trustee of the Imogene W. Sellers Trust (hereinafter "Plaintiff"), submits this response and objection to the motion of First Enterprise Bank (hereinafter "Defendant") for summary judgment (hereinafter "Defendant's Motion"). [1]

First, Defendant's Motion fails to address the allegations of negligence in the First Amended Petition relating to Defendant's payment of the three $10,000 CDs over forged indorsements. Imogene Seller's care taker forged her indorsement on three CDs and converted the proceeds to her own use. The care taker removed the funds from the Trust accounts into which the proceeds were deposited. The Uniform Commercial Code (the "UCC") differentiates a time certificate of deposit from a regular withdrawal bank account. The certificates of deposit are not "items" for collection or payment under Article 4. A certificate of deposit is a note of the Bank. *12A O.S. § 3-104(j)*.

Second, Defendant's Motion fails to address the allegations of negligence in the First Amended Petition against the Individual Defendants (Board Members and President of Defendant) to recover the amounts paid out of the Trust accounts and CDs on forged checks and indorsements.

Third, Defendant's Motion implies that, because Imogene Sellers' care taker intercepted, examined and concealed bank statements and Imogene Sellers failed to report unauthorized signatures, the one-year statute of repose under Section 4-406(f) applies and the Plaintiff loses his right to assert any claims against the Defendant based on an unauthorized signature. Such contention is wrong. This case involves a double forgery situation, and Section 4-406 imposes no duties on the drawer (Imogene Sellers) to look for forged indorsements, as opposed to forged maker's signature. Plaintiff sued Defendant within the three-year time limit imposed by 12A O.S. § 4-111 for all actions under Article 4. Even assuming that the Defendant properly made available to Imogene Sellers bank statements showing payment of checks forged by the care taker (which it did not), Defendant's Motion does not address that the Plaintiff is not, however, precluded from asserting an unauthorized payment against Defendant if he can establish a lack of ordinary care on the part of the Defendant's bank paying the items, and that the lack of ordinary care substantially contributed to the loss. *12A O.S. § 4-406(e)*. The deposition testimony of the five bank tellers is replete with such evidence.

RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

1. With respect to the allegations contained in Paragraph 1, Plaintiff admits that Imogene Sellers signed signature cards used to open the Trust accounts, numbered XXXXXXXX and XXXXXXXX. During this same time, Imogene Sellers transferred her checking account, money market account, and three $10,000 certificates of deposit to the Trust, which were placed by Defendant in the name of the Imogene Sellers Trust. [Signature Cards, Exh. 6; May 26, 2004 Letter, Exh. 4.]

2. With respect to the allegations contained in Paragraph 2, Plaintiff admits that Imogene Sellers' care takers stole a number of blank checks from Imogene Sellers' home that were drawn on the Trust accounts maintained at Defendant's bank, and engaged in a “double forgery” scheme. [Imogene Dep., Exh. 2, p. 20; Affidavit of Lt. Shawn Milligan, Exh. 23.]

3. For the purpose of this Response, Plaintiff does not dispute the allegations contained in Paragraph 3 of the Statement of Undisputed Facts. [First Amended Petition, Exh. 1.]

4. Plaintiff controverts the allegations contained in Paragraph 4 of the Statement of Undisputed Facts. Contrary to Defendant's assertion, Imogene Sellers testified that she did not balance her check book from 2004 through mid-2008 because she was not receiving her bank statements from Defendant. [Imogene Sellers Dep., Exh. 2, p. 21, 42, 43, and 64.]

5. Plaintiff controverts the allegations contained in Paragraph 5 of the Statement of Undisputed Facts. Contrary to Defendant's assertion, on May 1, 2008, the Investigation Division of the police department interviewed Imogene Sellers, Lonnie Sellers and Betty Hammond (Imogene Sellers' nurse). The investigation revealed that Imogene Seller's care taker was over-medicating Imogene Sellers with prescription drugs such that she was unable to manage her **financial** affairs. [December 10, 2008 Police Report, Exh. 24; Adult Protective Services Report, Exh. 13.]

6. Plaintiff controverts the factual allegations contained in Paragraph 6 of the Statement of Undisputed Facts. Contrary to Defendant's assertion, bank statements and check images for the months of October, 2004 through April, 2008 are not attached as Exhibit 6 to Defendant's Motion. Until bank records were produced to Plaintiff by the State prosecutor, Imogene Sellers had not seen the forged cancelled checks by the care taker Davis. [Imogene Seller's Dep., Exh. 2, p. 21, 22.]

7. Plaintiff controverts the factual allegations contained in Paragraph 7 of the Statement of Undisputed Facts. Contrary to Defendant's assertion, the trustees of the Trust never received monthly bank statements from Defendant because Davis intercepted and concealed said statements before they came to the attention of the *impaired* Imogene Sellers. Imogene Sellers testified on December 9, 2010, that when she did not receive her monthly bank statement during this time period, she called Defendant “several times” and spoke to a woman from the Defendant's bank, but never received any replacement bank statements from Defendant. [Imogene Seller's Dep., Exh. 2, p. 21, 22 and 64; First Amended Petition, Exh. 1.]

8. For the purpose of this Response, Plaintiff does not dispute the factual allegations contained in Paragraph 3 of the Statement of Undisputed Facts, but would add that Imogene Sellers testified that she moved to Texas to live with her son, Lonnie Sellers, in 2008 because she could not take care of herself. [Imogene Seller's Dep., Exh. 2, p. 8.]

9. Plaintiff controverts the factual allegations contained in Paragraph 9 of the Statement of Undisputed Facts. Contrary to Defendant's assertion, only after all funds were depleted from the Trust accounts, the Defendant became suspicious of irregularities in said accounts and contacted Adult Protective Services regarding Imogene Sellers on April 22, 2008. On or about April 29, 2008, Adult Protective Services contacted Lonnie Sellers and advised him of forgery and **financial exploitation** of Imogene Sellers by care taker Davis. As soon as knowledge of the forgery came to the Trust's attention, Lonnie Sellers and Danny Sellers reported to Defendant the irregularities found by Adult Protective Services. Lonnie Sellers and Danny Sellers demanded that Defendant exhibit the cancelled checks to the Trustee of the Trust. In response, Defendant informed Lonnie Sellers and Danny Sellers that the Trust certificates of deposit had been surrendered for payment, and began the process of

compiling bank records. [Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Lt. Shawn Milligan, Exh. 23; Adult Protective Services Report, Exh. 13.]

10. Plaintiff controverts the allegations contained in Paragraph 10 of the Statement of Undisputed Facts. [Imogene Sellers Dep., Exh. 2, p. 21 and 64.]

11. For the purpose of this Response, Plaintiff does not dispute the factual allegations contained in Paragraph 11 of the Statement of Undisputed Facts.

12. Plaintiff controverts the allegations contained in Paragraphs 12 and 13 of the Statement of Undisputed Facts. [Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Lt. Shawn Milligan, Exh. 23; Adult Protective Services Report, Exh. 13; Signature Cards, Exh. 6.]

13. With respect to the allegations contained in Paragraphs 14 and 15 of the Statement of Undisputed Facts, Plaintiff admits that on March 29, 2010, Plaintiff made demand on Defendant for payment. Receiving no satisfaction, Plaintiff sued on April 12, 2010. [Petition, Exh. 1.]

14. Plaintiff does not dispute the factual allegations contained in Paragraph 16 of the Statement of Undisputed Facts. [Imogene Sellers Dep., Exh. 2, p. 21 and 64.]

15. For the purpose of this Response, Plaintiff does not dispute the factual allegations contained in Paragraph 17 of the Statement of Undisputed Facts but would add that the Deposit Agreement also states at Paragraph 22: "**FINANCIAL** INSTITUTION'S LIABILITY. **Financial** Institution agrees to use ordinary care in handling your Account". [Deposit Agreement, Exh. 2 to Defendant's Motion.]

PLAINTIFF'S STATEMENT OF DISPUTED FACTS

1. Imogene W. Sellers ("Imogene Sellers"), now Deceased, was an **elderly** women, age 85. Plaintiff, Danny Sellers, is one of her two sons. Due to a stroke, Imogene Sellers had difficulty writing and thus had a distinctive signature. [Imogene Sellers, Dep., Exh. 2, p. 7 -10; Affidavit of Imogene Sellers, Exh. 3; Affidavit of Lt. Shawn Milligan, Exh. 23.]

2. On May 26, 2004, Imogene Sellers, as settlor, entered into the Imogene W. Sellers Revocable Trust dated May 26, 2004 (the "Trust"). [Imogene Sellers, Dep., Exh. 2, p. 13.]

3. The Trust owned three certificates of deposit (CD) worth over $30,000.00, representing funds on deposit with Defendant. The certificates were time deposits, with a provision that if the funds were not demanded at maturity, they were automatically redeposited for a terms equal to the original term. Specifically, on September 6, 1988, Imogene Sellers used her funds to purchase a $10,000 CD. In November 9, 2001, Imogene Sellers used her funds to purchase another $10,000 CD. In March 4, 2002, Imogene Sellers used her funds to purchase another $10,000 CD. After multiple redeposits, all three CDs were payable to the Trust. All three CDs had on their face under "Surrender for Payment" the printed terms that the Defendant would pay only upon surrender of this certificate properly endorsed. [Imogene Dep., Exh. 2, p. 11; Certificates of Deposit, Exh. 5.]

4. In addition, the Trust had two accounts at Defendant's bank. One styled "Imogene W. Sellers Trust" was a checking account on which Imogene Sellers Trustee, and subsequently, Lonnie Sellers Co-Trustee and Danny Sellers Co-Trustee, were signers. The other account, styled the same "Imogene W. Sellers Trust", was a money market account on which Imogene Sellers Trustee, and subsequently, Lonnie Sellers Co-Trustee and Danny Sellers Co-Trustee, were signers. [Affidavit of Imogene Sellers, Exh. 3; Imogene Dep., Exh. 2, p. 11; Signature Cards, Exh. 6.]

5. When Imogene's health declined, Lynn Marie Davis (“Davis”) was hired to care for Imogene Sellers. [Imogene Dep., Exh. 2, p. 18 -20; Affidavit of Lt. Shawn Milligan, Exh. 23; Adult Protective Services Report, Exh. 13.]

6. Defendant knew that Davis was not an account signatory on any Trust account at Defendant's bank. [Signature Cards, Exh. 6.] Only Imogene Sellers was identified on the signature card to transact business on the Trust account at Defendant's bank. [Signature Cards, Exh. 6.]

7. Defendant's check cashing *policy* required its tellers to do the following:
Section 2: Check Cashing Limit

The check cashing limit for all tellers is $1,500.00. Any amount over $1,500.00 needs to have the approval of an officer or Teller Supervisor. Checks over $1,500.00 are not cashed in the drive-thru without an officer's approval...

Non-Customer's with On-Us checks

Any non-customer presenting a check for cash must present identification. The check must also meet these requirements:

* Be drawn off First Enterprise Bank

* The check must be completed properly

Must be endorsed by the payee

* Have no holds on the account

* Have no stop payments on the account pertaining to the check presented

* Signature of maker (account owner/signer) must be verified

* Meets all the elements of a negotiable instrument

* Non-customers MUST cash their on-us checks in the lobby

[Teller Policies, Exh. 15.]

8. Defendant's check cashing *procedures* required its tellers to do the following:
* First, you must ask for the person's identification. The only types of identification we accept are: a valid OK ID card, OK drivers' license, military ID, or passport. If they do not have one of these, you must get an officer' s approval before cashing the check...

* ***If the check is over $1.500,00, you must get it approved by an officer prior to processing the transaction. If cash back on a deposit is requested for $1500 or more, you must get it approved by an officer first.*** Any cash out transaction totaling over ***$1,500.00*** may not be processed in the drive-thru.

ON US CHECKS:

* Ask the customer cashing the check for a photo ID. Verify that the picture is your customer, and make sure the ID is authentic. Then stamp the back of the check, below the customer's signature, with the Customer ID Information stamp, and fill in all fields. Make sure that the address you put on the check is their current address.
* Stamp the front of the check with your teller stamp.

* Select option #13 (Cash On Us Check) on TellerPlus.

* Enter the account number on the check.

* Enter the check number.

* Enter the amount of the check.

* Verify the signature on the check with the signature card on TellerPlus (under the ***Identify*** tab). If there is not a signature card there, go over to **EZID** or BancLine and find it ther

. *... Turn the check over & validate the check on the back.

[Teller Procedures, Exh. 15.]

9. Imogene's caretaker, Davis, stole a number of blank checks from Imogene Seller's home that were drawn on the Trust accounts maintained at Defendant's bank, and engaged in “double forgeries”. [Imogene Dep., Exh. 2, p. 22; Affidavit of Lt. Shawn Milligan, Exh. 23.]

10. Between January 17, 2007 and April 3, 2008, Davis forged the name of “Imogene Sellers” as the drawer on the front of 67 of those checks. Davis made 60 of the 67 checks payable to “cash”, and made 7 of the 67 checks payable to “Kenneth Fulk”, a cab driver. On the reverse side of the check, Davis indorsed 65 of the 67 on-us checks as “Imogene Sellers”. Davis then requested the assistance of Kenneth Fulk, a cab driver, in cashing the forged checks. [Imogene Dep., Exh. 2, p. 24 - 28; Affidavit of Fulk, Exh. 8; Schedule of Fulk Checks, Exh. 7.]

11. Between October 17, 2005 and June 15, 2007, Davis forged the name of “Imogene Sellers” as the drawer on the front of 37 of the Trust checks. Davis made all 37 checks payable to “cash”. On the reverse side of the check, Davis indorsed 31 of the 37 checks as “Imogene Sellers”. Davis then requested the assistance of Lorraine Hammill, a next door neighbor to Imogene Sellers, in cashing the forged checks. [Imogene Dep., Exh. 2, p. 28 - 31; Affidavit of Lt. Shawn Milligan, Exh. 23; Affidavit of Danny Sellers, Exh. 10; Schedule of Hammill Checks, Exh. 9.]

12. Between May 26, 2007 and June 8, 2007, Davis forged the name of “Imogene Sellers” as the drawer on the front of 5 of the Trust checks. Davis made all 5 checks payable to “Melissa Garcia”, Davis' granddaughter. On the reverse side of the check, Garcia indorsed all 5 checks as “Melissa Garcia”. [Imogene Dep., Exh. 2, p. 31 - 33; Affidavit of Lt. Shawn Milligan, Exh. 23; Schedule of Garcia Checks, Exh. 11.]

13. On August 8, 2007 and again on November 6, 2007, the Defendant cashed in all three CDs in reliance on forged hand-written statements prepared and signed by Davis, although Imogene Sellers Trustee had not authorized her to do so. The proceeds of the three CDS were deposited into the Trust accounts, and thereafter withdrawn by checks made payable to cash forged by Davis for the benefit of Davis. [Imogene Dep., Exh. 2, p. 35 - 38; Affidavit of Lt. Shawn Milligan, Exh. 23; Hand-Written Indorsements, Exh. 12.]

14. The Trustees of the Trust first learned of these transactions several months later after the Defendant became suspicious of irregularities in the Trust accounts. Defendant contacted Adult Protective Services on or about April 22, 2008. Adult Protective Services then contacted Lonnie Sellers and Danny Sellers. In late April, 2008, Lonnie Sellers and Danny Sellers as Co-Trustees immediately gave timely notice of the forged indorsement dispute to Defendant, and requested information from Defendant regarding the status of the CDs. Defendant advised the Co-Trustees that it had cashed in all three CDs and deposited the proceeds of same into the Trust accounts, and that the Trust Accounts had been depleted. [Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Lt. Shawn Milligan, Exh. 23; Adult Protective Services Report, Exh. 13.]

15. The tellers at Defendant's bank ignored their own policies and procedures in cashing Trust checks, and were negligent in facilitating the fraud by Davis in this double forgery situation. The tellers who accepted or participated in the processing of the majority of the Trust checks are Michelle Keller, Stella Callier, Brenda Smith, Patricia Joseph, Christy Collins, and Rachel Kirk. [Keller Dep., Exh. 18; Smith Dep., Exh. 22; Joseph Dep., Exh. 20; Kirk Dep., Exh. 21.]

16. Said tellers repeatedly cashed forged on-us checks in excess of $1,500.00 presented by a non-customer through the bank drive-through, without requiring a photo ID, without listing an address on the cashed check, without listing the identification number on the cashed check, without listing date of birth on the cashed check, without listing the date the ID was issued on the cashed check, without verifying the signature of the maker or indorser of the check, and without Defendant officer approval of the check. [Keller Dep., Exh. 18; Smith Dep., Exh. 22; Joseph Dep., Exh. 20; Kirk Dep., Exh. 21.]

17. Only after all funds were depleted from the Trust accounts did the Defendant become suspicious of irregularities in said Trust accounts and contacted Adult Protective Services regarding Imogene Sellers on April 22, 2008. [Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Lt. Shawn Milligan, Exh. 23; Adult Protective Services Report, Exh. 13.]

18. On or about April 29, 2008, Adult Protective Services contacted Lonnie Sellers and advised him of forgery and **financial exploitation** of Imogene Sellers by Davis. [Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Imogene Sellers, Exh. 3; Affidavit of Lt. Shawn Milligan, Exh. 23; Adult Protective Services Report, Exh. 13.]

19. As soon as knowledge of the forgery came to the Trust's attention, Lonnie Sellers and Danny Sellers reported to Defendant the irregularities found by Adult Protective Services. Lonnie Sellers and Danny Sellers demanded that Defendant exhibit the cancelled checks to the Trustee of the Trust. [Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Imogene Sellers, Exh. 3; Affidavit of Lt. Shawn Milligan, Exh. 23; Adult Protective Services Report, Exh. 13.] In response, Defendant informed Lonnie Sellers and Danny Sellers that the Trust certificates of deposit had been surrendered for payment, and began the process of compiling bank records on the Trust accounts and Trust certificates of deposit. [Imogene Sellers Dep., Exh. 2, p. 22.] A new signature card dated April 30, 2008 was thereafter issued which had the signatures of “Danny L. Sellers” and “Lonnie Gene Sellers”, as Co-trustees of the Imogene W. Sellers Trust, on the front. The April 30, 2008 signature card is stamped “This Card Supercedes all Others”. [Signature Cards, Exh. 6.]

20. On April 29, 2008, Lonnie Sellers and Danny Sellers reported to the police department the forgery and **financial exploitation** of Imogene Sellers by Davis. On that same day, a police officer, accompanied by Lonnie Sellers and Danny Sellers, arrived at Imogene Seller's home and observed Davis' termination as caretaker and removal from Imogene's home. [Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Imogene Sellers, Exh. 3; Affidavit of Lt. Shawn Milligan, Exh. 23.]

21. On May 1, 2008, the Investigation Division of the police department interviewed Imogene Sellers, Lonnie Sellers and Betty Hammond (Imogene Seller's nurse). The investigation revealed that Davis was over-medicating Imogene Sellers with prescription drugs such that she was unable to manage her **financial** affairs. Until produced to Plaintiff by the State prosecutor, Imogene Sellers had not seen the forged cancelled checks by Davis. Moreover, until that date, the trustees of the Trust never received monthly Trust bank statements from Defendant because Davis intercepted and concealed said statements before they came to the attention of the impaired Imogene Sellers. [December 10, 2008 Police Report, Exh. 24; Adult Protective Services Report, Exh. 13; Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Lt. Shawn Milligan, Exh. 23.]

22. Plaintiff did not discover the forgery and the fact the Trust checks and Trust certificates of deposit were paid by Defendant on unauthorized signatures and indorsements until the Defendant produced the bank records in response to the Grand Jury Subpoena and said bank records were produced to Plaintiff by the State prosecutor on March 22, 2010. Plaintiff could not, through the exercise of reasonable diligence, have discovered Davis' forgeries prior to this time because of the nature of Davis' fraud and Defendant's facilitation of Davis' illegal conduct. [December 10, 2008 Police Report, Exh. 24; Imogene Sellers Dep., Exh. 2, p. 22; Affidavit of Lt. Shawn Milligan, Exh. 23.] On March 22, 2010, Plaintiff made demand on Defendant for payment. Receiving no satisfaction, Plaintiff sued on April 12, 2010. [Demand Letter, Exh. 14; Petition, Exh. 1.]

ARGUMENT AND AUTHORITIES

I. LIABILITY OF A DEFENDANT (DRAWEE BANK) FOR FORGED DRAWER SIGNATURE AND INDORSEMENT (DOUBLE FORGERY) OF CHECKS

A. Unauthorized Signature

Under *12A O.S. § 3-401(a)*, a person is not liable on an instrument unless (1) the person signed the instrument or (2) the person is represented by a an agent or representative who signed the instrument and the signature is binding on the principal under the rules of *12A O.S. § 3-402*. Any payment of a check bearing a forged drawer's signature implicates this rule. The customer is not liable for the check, because the customer did not sign it, nor did the customer's agent. This signature rule dovetails with the general principle of *12A O.S. § 4-401* that a forged check is not “properly payable” because it violates the customer-bank contract.

B. Failure to Exercise Ordinary Care

12A O.S. § 3-406 permits the allocation of loss between a bank and its customer upon a bank's payment of a forged or altered item. *12A O.S § 3-406. (a) and (b)* provide:
(a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, *in good faith*, pays the instrument or takes it for value or for collection.

(b) Under subsection (a) of this section, if the person asserting the preclusion *fails to exercise ordinary care in paying or taking the instrument* and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss. (emphasis added.)

C. Discovery of the Fraud

12A O.S. § 4-406 permits the allocation of loss between a bank and its customer upon a bank's payment of an item on an unauthorized signature under some circumstances:
(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid....

(c) If a bank sends or makes available a statement of account or items pursuant to subsection (a) of this section, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or *because a purported signature by or on behalf of the customer was not authorized.* If, based

on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c) of this section, the customer is precluded from asserting against the bank:

(1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure;...

(e) If subsection (d) of this section applies and the customer proves that the bank *failed to exercise ordinary care in paying the item* and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) of this section and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) of this section does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (a) of this section) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration... (emphasis added.)

D. The Time Limit to Give Notice

12A O.S. § 4-4060 provides an outer time limit for reporting forgeries and alterations without regard to lack of ordinary care by the customer or loss by the bank. A customer cannot demand that his account be re-credited if he does not report his forged signature or an alteration within one year from the time he receives the statement and items. **However, 12A O.S § 4-406(f) imposes no duties on the drawer to look for unauthorized indorsement.** For forged indorsements, the statute of limitations is three years. *12A O.S. § 4-111*. With respect to a check on which both the customer's signature and his indorsement are forged, the longer three-year limit controls, in the absence of negligence or special contracts. See *Bank of Thomas County v. Dekle, 168 S.E.2d 834 (Ga. C. Appl 1969)* (the customer notified his bank after the time limit for forged signatures, but before the time limit for forged indorsements. The court held that the customer could rely on the greater limit in recovering form his bank).

The one-year outer time limit for reporting forged checks is not a statute of limitations, but is in the nature of a “non-claim” provision. If the customer reported the forgeries within one year even though suit was not commenced until after that time, the action would be timely. This is because Section 4-406 requires the customer only to “discover and report” the forgery within one year, not that suit must be commenced.

E. Statute of Limitations

An action for conversion of an instrument must be brought within three years after the cause of action accrues under Article 3. *12A O.S. § 3-118(g)*. See *12A O.S. § 4-111*, which establishes a parallel three-year statute of limitations for actions brought under Article 4. The time limit within which the customer must sue the drawee bank for paying forged checks is governed by the applicable statute of limitations, and not the one-year outer limit for notice under § 4-406. Where the scam involves a series of forgeries, the forgery and payment of each check should be considered to accrue a separate cause of action. [2]

F. Double Forgery of Check

A double forgery occurs when the negotiable instrument contains both a forged maker's signature and a forged indorsement. In 1990, new revisions to Articles 3 and 4 of the UCC were implemented (the "revisions"). Under the revised version of the UCC, the loss in double forgery cases is allocated between the depositary and drawee banks based on the extent that each contributed to the loss.

G. Forgery of Indorsements on Certificate of Deposit

Most cases holding a bank liable for conversion after paying over a forged indorsement involve checks. However, the same principle apply when a CD is involved. This is the teaching of *Ames v. Great Southern Bank 672 S.W.2d 447 (Tex. 1984)*. In *Ames*, the certificate of deposit was payable to one person, Nancy Ames Riviere. Mrs. Rivier's husband was not authorized to sign or receive the proceeds of the certificate of deposit. While Mrs. Riviere was out of town, her bookkeeper, Dealy, cashed the certificate without authorization or indorsement and permitted the funds to be transferred in such a manner that they became available to Mrs. Riviere's husband. Nancy Ames Riviere brought suit against the bank for disbursing the certificate of deposit proceeds without her indorsement. The trial court found that Dealy had apparent authority to cash the certificate, and that the requirement that the bank obtain a proper indorsement was waived by Nancy Riviere's agent, Dealy. On appeal, the Texas Supreme Court determined that Dealy did not have apparent authority to waive the requirement of indorsement, and that the **financial** institution thereby failed to follow its own contract and obtain Mrs. Riviere's indorsement. In finding for the plaintiff, the court drew a parallel between payment of a check bearing a forged indorsement and the case at hand.

A certificate of deposit (CD) is a bank's written acknowledgment of a special deposit of money, which the bank promises to pay to the order of a designated person. *12A O.S. § 3-104(j)* (A certificate of deposit is a note of the bank). The provisions of a CD form a contract which creates the relationship of debtor and creditor between the bank and its depositor. *Brown v. Eastman National Bank of Newkirk, 291 P.2d 828, 829 (Okla. 1955); W. R. Grimshaw Co. v. First National Bank & Trust Co. of Tulsa, 563 P.2d 117 (Okla. 1977)*. Such contract determines the manner in which the funds of the depositor may be withdrawn and is subject to the law of contracts. *Downing v. First Bank of Claremore, 756 P. 2d 1227, 1229 (Okla. 1988)*.

Thus, a CD requires a proper indorsement as a condition of the bank's obligation to deliver the proceeds to the owner. Failure to obtain such an indorsement or payment over a forged indorsement, creates the same liability for the bank as with a check. The UCC provision on point is *12A O.S. § 3-420* with its clear mandate that an instrument is converted when it is paid on a forged indorsement.

II. LIABILITY OF DEFENDANT FOR FORGED INDORSEMENTS ON THE THREE $10,000 CDS.

The three Trust CDS, in this instance, at the very least, formed a debtor/creditor relationship between the Trust and Defendant. They required a proper indorsement as a condition precedent to the bank's obligation to deliver the proceeds to the Trust accounts. Performance of a condition precedent was not waived by mutual agreement of Defendant and Imogene Sellers Trustee. Davis, as the caretaker for Imogene Sellers, did not handle the Trust banking transactions. Davis had no authority to sign on the Trust's accounts. Only Imogene Sellers Trustee could make withdrawals from the Trust accounts. There is no evidence of a pattern of conduct by the Trustee such as would lead a reasonable bank using due diligence to believe Davis had authority to deal with the Trust CDs. Davis was not clothed with apparent authority to modify or waive the contractual relation between Defendant and the Trust. See *Restatement (Second) Of Agency § 8 (1958)* (Apparent authority is the power of an agent to "affect the legal relations of another person by transactions with third persons").

Defendant had a duty to authenticate the indorsements on the instrument presented to it. A bank's payment of an instrument on a missing or forged indorsement results in conversion of the instrument. *12A O.S. § 3-420(a)*. Defendant's failure to follow its own depository contract by obtaining the Trustee's indorsement resulted in such conversion by Defendant of the Trust's three CDs. Therefore, since a bank which pays funds in breach of a contract on a missing or forged indorsement is liable for the face amount of the instrument, *12A O.S. § 3-420(b)*, Defendant is liable to the Trust for the full value of the three certificates of deposit.

III. LIABILITY OF DEFENDANT FOR FORGED SIGNATURE AND INDORSEMENT (DOUBLE FORGERY SITUATION) ON THE 67 TRUST CHECKS INVOLVING DAVIS/FULK.

Between January 17, 2007 and April 3, 2008, Davis forged the name of "Imogene Sellers" as the drawer on the front of 67 of those checks. Davis made 60 of the 67 checks payable to "cash", and made 7 of the 67 checks payable to "Kenneth Fulk", a cab driver. On the reverse side of the check, Davis indorsed 65 of the 67 checks as "Imogene Sellers". Davis then requested the assistance of Kenneth Fulk, a cab driver, in cashing the forged checks. Kenneth Fulk indorsed all 67 checks as "Kenneth Fulk" on the reverse side of the checks, although his indorsement was not necessary on the 60 checks payable to "cash" in that it did not take the instruments out of the definition of bearer paper. Defendant (through 3 different tellers) cashed 4 of those 67 checks and disbursed the cash to Kenneth Fulk. Chase Bank cashed 63 of those 67 checks and disbursed the cash to Kenneth Fulk. When Chase Bank ("depositary bank") presented the 63 checks to Defendant ("drawee bank") for payment, Defendant debited the Trust accounts and reimbursed Chase Bank for the money paid to Kenneth Fulk, totaling $84,435.00.

IV. LIABILITY OF DEFENDANT FOR FORGED SIGNATURE AND INDORSEMENT (DOUBLE FORGERY SITUATION) ON THE 37 TRUST CHECKS INVOLVING DAVIS/HAMMILL.

Between October 17, 2005 and June 15, 2007, Davis forged the name of "Imogene Sellers" as the drawer on the front of 37 of the Trust checks. Davis made all 37 checks payable to "cash". On the reverse side of the check, Davis indorsed 31 of the 37 checks as "Imogene Sellers". Davis then requested the assistance of Lorraine Hammill, a next door neighbor to Imogene, in cashing the forged checks. Lorraine Hammill indorsed all 37 checks as "Lorraine Hammill" on the reverse side of the checks, although her indorsement was not necessary on the 31 checks made payable to "cash" in that it did not take the instruments out of the definition of bearer paper. Defendant (through 8 different tellers) cashed all 37 checks and disbursed the cash to Davis, and debited the amounts of them to the Trust accounts on the forged signatures and indorsements of Imogene Sellers Trustee totaling $43,850.00.

V. LIABILITY OF DEFENDANT FOR FORGED SIGNATURE ON THE 5 TRUST CHECKS INVOLVING DAVIS/ GARCIA.

Between May 26, 2007 and June 8, 2007, Davis forged the name of "Imogene Sellers" as the drawer on the front of 5 of the Trust checks. Davis made all 5 checks payable to "Melissa Garcia", Davis' granddaughter. On the reverse side of the check, Garcia indorsed all 5 checks as "Melissa Garcia". First National Bank Midwest City cashed 4 of those 5 checks and disbursed the cash to Melissa Garcia. Loan Mart of Oklahoma, Inc. cashed 1 of those 5 checks and disbursed the cash to Melissa Garcia. When First National Bank Midwest City and Loan Mart of Oklahoma, Inc. ("depositary banks") presented the 5 checks to Defendant ("drawee bank") for payment, Defendant debited the Trust accounts and reimbursed First National Bank Midwest City and Loan Mart of Oklahoma, Inc. for the money paid to Melissa Garcia, totaling $1,175.00.

VI. LIABILITY OF DEFENDANT FOR FORGED SIGNATURE ON THE 43 TRUST CHECKS INVOLVING COLE.

Between October 15, 2004 and October 17, 2005, Sheila Cole, a former caretaker of Imogene Sellers, forged the name of "Imogene Sellers" as the drawer on the front of 43 of the Trust checks. Cole made all 43 checks payable to "Sheila Cole". On the reverse side of the check, Cole indorsed all 43 checks as "Sheila Cole". Defendant (through different tellers) cashed all 43 checks and disbursed the cash to Sheila Cole, and debited the amounts of them to the Trust accounts on the forged signatures of Imogene Sellers Trustee totaling $60,430.00. [Imogene Sellers Dep., Exh. 2, p. 33 - 34; Schedule of Cole Checks, Exh. 25.]

VII. DEFENDANT'S TELLERS IGNORED THEIR OWN POLICIES AND PROCEDURES IN CASHING CHECKS.

The tellers at Defendant's bank ignored their own policies and procedures in cashing Trust checks, and were negligent in facilitating the fraud by Davis and Cole in this double forgery situation. The tellers who accepted or participated in the processing of the majority of Trust checks described in the First Amended Petition are Michelle Keller, Stella Callier, Brenda Smith, Patricia Joseph, Christy Collins, and Rachel Kirk. [Schedule of Checks, Exhs. 7, 9, 11, 25.] The entire deposition transcript of each of these tellers is attached to the Appendix in support of this response. [Exhs. 18 - 22.] A short "Summary of Testimony of Tellers" is attached to this response to aid the court in deciding Defendant's Motion. Additionally, the Employee Warning Notices (Exhibit 16) issued by Defendant to said tellers further evidence how these employees consistently failed to follow applicable banking policies regarding "non-customers" presenting an on-us check for "cash". Further, Defendant reference six (6) consumer complaints filed against Defendant. [Affidavit of Donna Terbush, Exh. 17.]

VIII. PLAINTIFF'S CLAIMS IN COUNTS 1 and 3 - 6 ARE NOT PREEMPTED BY THE UNIFORM COMMERCIAL CODE.

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions (emphasis added).

12A O.S. §1-103. No reported Oklahoma case has adopted the strict displacement theory advanced by Defendant's Motion. And Defendant's Motion fails to address the allegations of negligence in the First Amended Petition relating to Defendant's payment of the three $10,000 CDs over forged indorsements and explain which UCC provisions displace them and why. Oklahoma courts which have considered the language of §1-103 have recognized the purpose of this provision is to make clear that if a situation is not explicitly covered by the UCC provisions, then Oklahoma law applies without limitation.

Interpreting 12A O.S. §1-103, the Oklahoma Supreme Court stated "[t]he common law supplements the UCC in Oklahoma *unless a particular section provides that it does not"* (emphasis added). *First Bank of Okarche v. Lepak,* 961 P.2d 194, 198 (Okla. 1998). There, the Court granted certiorari, in part, to determine whether the trial court erred in determining as a matter of law that 12A O.S. § 9-307.1 *et seq.*, [renumbered effective July 1, 2004 as 12A O.S. §1-9-320.1], enacted in compliance with the federal Food Security Act, was a strict liability statute that prevented raising common law defenses. *Id.* at ¶1. The Court found "nothing in §9-307, *et seq.* indicating an intention to supplant the common law, nor any indication that it was intended as a strict liability statute." *Id.* at ¶19. So, while the concept of displacement urged by Defendant does not require an unequivocal explicit reference to the common law displaced by the UCC, at least one Oklahoma court has previously *disagreed.* "The common law supplements our statutes. *It remains in full, force unless it is clearly and expressly modified or abrogated by our constitution or by statute."* (emphasis in original) *Harkrider v. Posey,* 24 P.3d 821, 825 (Okla. 2000).

Plaintiff recognizes a number of courts have refused to recognize common law or non-UCC claims arising from transactions governed by Articles 3 and 4 of the UCC. However, where the facts alleged fall outside of the transactions contemplated by the UCC, the UCC does not specifically prohibit those claims, and the UCC does not afford an adequate remedy, displacement should not be the rule. *See e.g. Travelers Gas. and Sur. Co. of America v. Bankcorp,* ---. Supp.2d ---, 2009 WL 3519818 (D.Del. 2009) (common law negligence action not displaced); *Sun 'n Sand, Inc. v. United California Bank,* 582 P.2d 920, 937(Cal. 1978) (plaintiff not barred from remedies in tort where bank ignored signals that fraud might be in progress and did not appreciate the indicia of misappropriation).

● **Facilitating Forgery (Count 1)**

The tellers at Defendant's bank have testified to facts that show Defendant facilitated Davis' criminal conduct, either knowingly or by negligently turning a.“blind eye” to her conduct. If Plaintiff can prove Defendant facilitated Davis' crimes knowingly - then it enabled the commission of the crime by making it easier and less difficult for Davis to steal and embezzle substantial funds from the Trust and to use the illegally obtained funds for her own use and personal benefit. *See e.g. Platt v. U.S.*, 163 F.2d 165, 166 (10th Cir. 1947) (noting “facilitate” is commonly used in business and in transactions between ordinary people and has a well understood and accepted meaning); *Johnson v. Harris*, 102 P.2d 940, 941 (Okla. 1940) (defined the commission of a crime as an “unlawful act” and placed it within the meaning of 23 O.S. §3, providing a cause of action to an injured person); Okla. Count. Art. 2, §6; 23 O.S. §§3, 4; 23 O.S. §68.1(A) (“Any person who has been damaged by reason of any violation of Section 3 of this Act, may bring an action... against the person causing the damage or persons conspiring to cause the damage to recover an amount equal to all actual damages”).

The deposition testimony of the five tellers show that Defendant's acts or omissions contributed to and facilitated Davis' ability to perpetrate crimes against the Trust which directly caused the Trust damages, and for which Plaintiff is statutorily entitled to recover damages outside of the limited perimeters of recovery afforded under the UCC for forged checks. Plaintiffs claim for damages in Count 1 (including for conversion of CDs) is based upon constitutional and statutory authority which is unaffected by Defendant's displacement argument.

#, Gross Negligence (Count 3)

There are no Oklahoma reported cases addressing Defendant's argument that all common law negligence claims (including for conversion of CDs) have been displaced by the UCC. And, not all jurisdictions agree that claims of negligence and breach of contract have been displaced by the UCC in the employee-check forging scenario. *See e.g. Roger Kaye, MD., P.C. v. T.D. Banknorth*, 2009 WL 1532513, *2 (Conn.Super. 2009) (law in Connecticut is unsettled as to the UCC's effect in relation to claims of negligence but majority of Superior Court decisions have held that the UCC does not displace common law negligence claims); *Williams v. Metropolitan Life Ins. Co.*, 367 F.Supp.2d 844, 849 (M.D.N.C. 2005) (“[u]nless displaced by the particular provisions of this chapter, the principles of law and equity... shall supplement its provisions;” denied defendant's motion to dismiss negligence claims for failing to develop the displacement argument *and* for failing to address other portions of plaintiffs negligence claims “based not only on the mere payment of forged checks...”); *Cassello v. Allegiant Bank*, 288 F.3d 339, 340-341 (8‘h Cir. Mo. 2002) (“no particular provision” of the UCC that would “displace” a common law claim of negligence and concluded “that the Missouri Supreme Court would hold that a drawer of a check could have a common law cause of action against a depositary bank for negligently handling the drawer's check”); *Dibrell Brothers Inter 'l.A. v. Banco Nazionale Del Lavoro*, 38 F,3d 1571, 1581-1582 (11 th Cir. 1994) (common law theories of recovery are available when the theory of recovery falls outside the UCC); *First Georgia Bank v. Webster*, 308 S.E.2d 579,581 (Ga.App. 1983) (while the UCC provides a remedy for the negligent violation of the duties it imposes, it does not provide relief from common law negligence such is alleged to have occurred in the present case). The cases “illustrate that it is not enough to simply say that Articles 3 and 4 of the UCC wipe out all negligence claims based on fraudulent checks. Because some types of claims are displaced and others are not, the... defendants must address all of the specific allegations of negligence in the amended complaint and explain which UCC provisions displace them and why.” *Williams, id; Bucci v. Wachovia Bank NA.*, 591 F.Supp.2d 773, 781, n. 7 (ED. Pa. 2008) (plaintiff may maintain a common law claim for negligence parallel to a claim under the Pennsylvania UCC; “the displacement analysis with respect to negligence is fact-specific, and it is not clear at this early stage of the litigation whether plaintiffs claims for negligence should be displaced by... the Code”).

● **Claim under 12A O.S. §4-401 (Count 4).**

While *12A O.S. §4-401* talks about the statutory liability of banks, it does not specifically state a bank's officers or directors shall not be liable in the case of gross or willful neglect of duty, or knowingly fraudulent conduct. Oklahoma law recognizes the corporate entity may be disregarded in some circumstances to impose personal liability on corporate officers or directors. *See Puckett v. Cornelson*, 897 P.2d 1154,1155-1156 (Okla. Civ. App. 1995); *Matter of Estate of Rahill*, 827 P.2d 896, 897

(Okla. Civ. App. 1991). Plaintiff can recover from the Individual Defendants if he can establish they neglected to perform their official corporate duties. *Preston-Thomas Const. Inc. v. Central Leasing Corp.*, 518 P.2d 1125, 1126-1127 (Okla. Civ. App. 1973) (officer or director... may be personally liable for the corporation's intentional malfeasance by preserving a state of ignorance through a gross or willful neglect of duties where the duty to know exists, ignorance resulting from a neglected official duty creates the same liability as actual knowledge). Plaintiffs 4th Claim for relief against the Individual Defendants should not be summarily dismissed.

● **Claim for Breach of Implied Covenant of Good Faith (Count 5)**

If Plaintiff can prove wanton negligence or gross negligence, Claim 5 should not be preempted by the UCC because the specific loss allocation provisions of §4-401, *et. seq.*, do not address gross recklessness or wanton negligence. When the factual situation warrants, a breach of contract may give rise to an action in tort for a breach of the implied covenant of good faith and fair dealing. *Beshara v. Southern Nat. Bank*, 928 P.2d 280, 288 (Okla. 1996). Even if this Court were to conclude Plaintiffs claim for contractual damages based on Defendant's egregious handling of the Trust accounts and daily communications with an unauthorized care taker who was embezzling funds from the Trust was displaced by the UCC, Plaintiff has sufficiently alleged a cause of action for tortuous breach of duty of good faith and fair dealing and should not be prohibited from proceeding on an alternative legal theory at this juncture.

● **Claim under 6 O.S. §712 (Count 6).**

In *Perry v. Meek*, 618 P.2d 934 (Okla. 1980), the Oklahoma Supreme Court affirmed a trial court's certification of a class action in a suit brought by stockholders, creditors, and *depositors* of Guaranty Trust Company, relying on 6 O.S. §712(A) to establish a cause of action to recover funds allegedly wrongfully diverted by defendants to the detriment of the plaintiffs. Bank officers and directors can be liable for intentional violations of statutory duties and negligent violation of common law duties. *Gay v. Akin*, 766 P.2d 985,992 (Okla. 1988) (discussing common law and statutory duties officers and directors). The language of 6 O.S. §712(B) does not foreclose suits by a bank depositor for that director, officer or other person's knowing participation in violation of Oklahoma law relative to banks and banking and trust companies. See 6 O.S.§712(A). The deposition testimony of the tellers show a claim against the Individual Defendants for violation of their duties as bank officers, by failing to exercise ordinary care and follow Defendant's internal policies and procedures by their communications with Davis, with respect to their facilitation of her crimes. Oral discovery shows they acted with knowledge under “Davis' behest” or just used terrible judgment. Oklahoma has not adopted the strict displacement theory advanced by Defendant. Plaintiffs 1st, 3rd, 4th, 5th, and 6th claims for relief should not be summarily dismissed.

IX. DEFENDANT'S NEGLIGENCE AND FAILURE TO EXERCISE ORDINARY CARE CONTRIBUTED TO THE TRUST LOSSES.

Defendant's Motion concedes a bank is liable to its customer if it charges its customer's account for an item hat is not “properly payable,” such as a check bearing a forged signature of an authorized drawer. *12A O.S. § 4-401(a)*. However, Defendant disclaims any liability to Plaintiff for reimbursement of the 152 checks forged on the Trust's accounts between October 15, 2004 and April 3, 2008, because Defendant mailed bank statements to Imogene Sellers and Imogene Sellers did not report the forgeries within one year or thirty days from each statement. Defendant relies upon two defenses outlined in *12 A O.S. §4-406.*

The facts are undisputed that at least 152 checks were forged by Davis and Cole on the Trust accounts at Defendant's bank between the dates of October 15, 2004 and April 3,2008. Although Defendant maintains that it mailed all the bank statements for that period to Imogene Sellers' home address, Imogene Sellers did not see the statements because of the continuing fraud being perpetrated by Davis. Furthermore, Imogene Sellers testified that she did not receive her bank statements and promptly

notified the Defendant of that fact. Consequently, Plaintiff disputes that Defendant actually mailed the monthly statements to Imogene Sellers.

Notwithstanding, Imogene Sellers' failure to review bank statements that were allegedly mailed within that period does not preclude Plaintiffs recovery for the items which were not properly payable if Plaintiff proves the bank failed to exercise ordinary care in paying the item and that failure substantially contributed to a loss. *12A O.S. §4-406(e).* In such situation, the statute is clear - "the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) of this section and the failure of the bank to exercise ordinary care contributed to the loss." Further, because the teller depositions prove the Defendant did not pay the check items in good faith, the loss allocation provision of section (d) would not apply at all. *12A O.S. §4-406(e).*

Accordingly, pursuant to the language of *12A O.S. § 4-406(e)*, the first defense asserted by Defendant does not apply because the summary judgment record proves the Defendant failed to exercise ordinary care in paying the check items and that failure substantially contributed to loss. "Ordinary care" is defined at *12A O.S. §3-103 (7):*

> Ordinary care in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument **if the failure to examine does not violate the bank's prescribed procedures** and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this article or Article 4 of this title.

A determination of ordinary care is typically a function for the trier of fact and not appropriately decided in a motion for summary judgment. *See e.g. Hunter 's Modern Appliance, Inc. v. Bank IV of Oklahoma, N. A.,* 949 P.2d 701, 704 (Okla. Civ. App. 1997).

Defendant's Motion has set forth no undisputed facts establishing a *prima facie* case that it exercised ordinary care in the payment of check items that were not properly payable. Defendant's Deposit Agreement, attached as Exhibit 2 to Defendants' Motion, at paragraphs 22 and 35, states "**Financial** Institution agrees to use ordinary care in handling your Account" and "we will not be liable for any subsequent items paid in good faith containing an unauthorized signature..." *Wilder Binding Co. v. Oak Park Trust and Sav. Bank,* 552 N.E.2d 783 (III. 1990) (whether bank exercised ordinary care in paying checks without manual verification of the signatures created a genuine issue of material fact which should be answered by the trier of fact).

Through discovery, Plaintiff expects to learn the circumstances which raised Defendant's suspicions in finally contacting Adult Protective Services. *See AmSouth Bank N.A. v. Spigener,* 505 So.2d 1030,1038 (Ala. 1986) (bank had a duty to contact its customer regarding activity on the customer's account when it was aware of the suspicious circumstances).

In this case, the facts are unrefuted that Defendant engaged in unauthorized communications with the forger, Davis, on a regular basis regarding the Trust accounts. Most of the 152 checks forged by Davis and paid by Defendant from the Trust accounts were "on-us" checks payable to "cash" for amounts more than $1,500.00 and some were out of sequence checks which ultimately caused the Trust accounts to be overdrawn, yet Defendant never contacted Plaintiff to inquire about the large dollar amount checks to "cash". The tellers have disclosed their handling of the Trust accounts and the forged checks, and the factual record in this case shows that Defendant's handling of the Trust accounts was not ordinary at all. Whether Defendant exercised ordinary care in the handling of the Trust accounts at Defendant's bank is a question of fact to be determined by the trier of fact upon consideration of all the evidence.

X. THE UCC IMPOSES NO DUTIES ON THE TRUST TO LOOK FOR FORGED INDORSEMENTS.

Defendant should not be granted summary judgment based on the one year preclusion in *12A O.S. §4-406(f)*. Defendant's Motion totally ignores the fact that the Trust checks contain both a forged maker's signature and a forged indorsement. *12A O.S. § 4-406(f)* imposes no duties on the drawer to look for unauthorized indorsement; therefore, the one year outer time limit to give notice does not apply to this double forgery situation. For forged indorsements, the statute of limitations is three years. *12A O.S. § 4-111*. With respect to a check on which both the customer's signature and his indorsement are forged, the longer three-year limit controls, in the absence of negligence or special contracts. See *Bank of Thomas County v. Dekle, 168 S.E.2d834 (Ga. Ct. Appl. 1969).* Plaintiff did not discover the forgery and the fact the Trust checks and Trust certificates of deposit were paid by Defendant on unauthorized signatures and indorsements until Adult Protective Services became involved in April 2008.

Thereafter, the Defendant produced the bank records in response to the Grand Jury Subpoena and said bank records were produced to Plaintiff by the State prosecutor on March 22, 2010. Plaintiff could not, through the exercise of reasonable diligence, have discovered Davis' forgeries and misconduct prior to this time because of the nature of Davis' fraud and Defendant's facilitation of Davis' illegal conduct. On March 29, 2010, Plaintiff made demand on Defendant for payment. Plaintiff sued on April 12, 2010, or within the three-year limit.

Even assuming the outer time limit for reporting forgeries applies to double forgeries, and that Defendant mailed the bank statements to Imogene Sellers, the facts are undisputed that Plaintiff notified Defendant of irregularities within the Trust accounts within one year from the account statements from the period April 2007 - April 2008. The one year preclusion of claims under 12A O.S. § 4-406(f) does not bar Plaintiffs claim for reimbursement of respective checks forged by Davis on the Trust accounts between April 2007 and April 2008.

Oklahoma courts have not addressed what constitutes sufficient “notice” under Article 4 of the UCC. Neither §4-406(f) nor the Deposit Agreement defines what constitutes acceptable notice. Section 4-406(f) requires the customer to “report the customer's unauthorized signature ... and the Deposit Agreement merely requires the customer to “report any irregularities to us ... It is undisputed in this case that Defendant became suspicious of irregularities in the Trust accounts and contacted Adult Protective Services regarding Imogene Sellers on April 22, 2008. On April 29, 2008, Adult Protective Services contacted Lonnie Sellers and advised him of **financial exploitation** of Imogene Sellers by Davis. As soon as knowledge of the forgery came to the Trust's attention, Lonnie Sellers and Danny Sellers reported to Defendant the irregularities found by Adult Protective Services. Lonnie Sellers and Danny Sellers demanded that Defendant exhibit the cancelled checks to the Trustee of the Trust. In response, Defendant informed Lonnie Sellers and Danny Sellers that the Trust certificates of deposit had been surrendered for payment, and began the process of compiling bank records. A new signature card dated April 30, 2008 was thereafter issued which had the signatures of “Danny L. Sellers” and “Lonnie Gene Sellers”, as Co-trustees of the Imogene W. Sellers Trust, on the front. The April 30, 2008 signature card is stamped “This Card Supercedes all Others”. On April 29, 2008, Lonnie Sellers and Danny Sellers reported to the police department the forgery and **financial exploitation** of Imogene Sellers by Davis. Clearly, Defendant was aware there were irregularities in the Trust accounts.

The notice given by Plaintiff and Lonnie Sellers, commencing April 29, 2008, and this lawsuit filed on April 12, 2010, was sufficient for Plaintiff to satisfy the three year statute of limitations of § 4-111, and the one year reporting limitation imposed by §4-406(f), even if applicable to indorsement and CDs. *Robinson Motor Xpress, Inc. v. HSBC Bank USA,* 826 N.Y.S.2d 350 (N.Y.A.D.2 Dept. 2006) (recognizing the general rule that written notice is not required to satisfy the one year preclusion of §4-406). Imogene Sellers' testified on December 9, 2010 that when she did not receive her monthly bank statement, she called Defendant “several times” and spoke to a woman from the Defendant's bank, but never received any replacement account statements from Defendant. The first relevant account statement would have been mailed (or made available) to Imogene Sellers on or after the time of Imogene Sellers termination of Davis' employment, or April 29, 2008. Plaintiff notified Defendant of the forgeries within one year from that date. *Wetherill v. Putnam Investments,* 122 F.3d 554 (8th Cir. 1997) (time for bringing suit expires one year following the availability of the relevant account statements).

Furthermore, under the Deposit Agreement, all that is required is that the customer “report any irregularities to us...” Plaintiff did exactly that. Plaintiff notified Defendant on April 29, 2008 of the irregularities in the Trust accounts; the signature cards

to the account were effectively changed. Plaintiff requested copies of bank statements and commenced a investigation of the Trust accounts. Plaintiff's notice to Defendant on April 29, 2008 constitutes sufficient notice in this case to preclude summary judgment on this matter. The notice creates a question for the jury to decide. This Court cannot decide the sufficiency of Plaintiffs notice where the statute does not define the extent of notice, the Deposit Agreement only requires the customer "report any irregularities," and the record has not been fully developed.

XI. THE PROVISIONS OF THE DEPOSIT AGREEMENT WHICH SHORTEN THE STATUTORY NOTICE PERIOD OF §4-406(f) VIOLATE SECTION 4-103(a) OF THE UCC, VIOLATE THE OKLAHOMA CONSTITUTION, ARE MANIFESTLY UNREASONABLE, AND ARE AMBIGUOUS.

Defendant argues that the cutdown clause in its Deposit Agreement offers a jackpot defense to Plaintiffs claims, apparently including for the forged indorsement on the three CDs. Davis' scheme called for engaging in "double forgery situation", meaning the Trust checks contain both a forged maker's signature and a forged indorsement. *12A O.S. § 4-4060(f)* imposes no duties on the drawer to look for unauthorized indorsement; therefore, the one year outer time limit to give notice does not apply to such double forgery checks. For forged indorsements, the statute of limitations is three years. *12A O.S. § 4-111*. Therefore, the cutdown clause has no application to forged indorsements.

Ignoring such fact, Defendant argues the Deposit Agreement, which it claims was included or inserted in the Signature Card of Imogene Sellers, reduced the one year statutory notice period set forth in 12A O.S. § 4-406(f) to thirty (30) days from the issuance date of each statement. The pertinent part of the Deposit Agreement states:

> ... We will not be liable **for any check** that is altered or any signature that is forged unless you notify us within thirty (30) days calendar days after the statement and the altered or forged item(s) are made available. Also we will not be liable for any subsequent items paid **in good faith** containing an unauthorized signature or alteration by the same wrongdoer unless you notify us with ten (10) calendar days after the statement and first altered or forged items were made available...

Defendant's Motion ignores the fact that:

* The Deposit Agreement cutdown provision includes only forged checks. Such provision does not apply to certificates of deposit unlawfully cashed by Defendant because the Trustee had not authorized the transactions nor did she have knowledge of there occurrence.

* The Deposit Agreement cutdown provision does not give the Defendant a defense against a suit by the Trust who was victimized by a "double forgery" committed by her care taker in the context of forged drawers signatures and indorsements.

* The cutdown clause expressly requires that the items be paid by Defendant in good faith. Based on the deposition testimony of the tellers, this case involves bad faith on the part of Defendant. The cutdown clause should not apply to items which were not paid by the bank in good faith

* A shortened notice period without regard for the Defendant's exercise of ordinary care is manifestly unreasonable, especially when the Defendant expressly agrees in the Deposit Agreement "to use ordinary care in handling your Account".

* The Deposit Agreement provisions work only between the two contracting parties. Many of the on-us checks were deposited with Chase as the bank of first deposit, and Imogene Sellers had no direct deposit agreement with Chase.

Although Defendant argues this "agreement" is enforceable, Defendant acknowledges that no Oklahoma court has ever addressed whether a bank may unilaterally alter the statutory one year notice period of § 4-406(f) to a shorter period, such as

thirty days or ten days. Defendant's interpretation of this language, to cutdown the one year condition precedent of §4-406(f) does not apply to this double forgery situation, violates § 4-103(a), is manifestly unreasonable, violates the Oklahoma Constitution, and is ambiguous.

A. The cut-down provision violates 12A O.S. § 4-103(a).

While *12A O.S. § 4-103(a)* permits the provisions of Section 4 to be varied by agreement, "the parties 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." Interpreting the language of the Deposit Agreement to replace §4-406(f) would effectively do exactly what 12A O.S. §4-103(a) forbids there would never be a situation where §4-406(d) or §4-406(e) would apply, thereby indirectly accomplishing what §4-103(a) prohibits - a backdoor disclaimer of the bank's responsibility to exercise ordinary care and act in good faith.

The question is whether this interpretation and "modification" of the UCC provision is manifestly unreasonable. Plaintiff submits that it is. In In re Clear Advantage Title, Inc., 438 B.R. 58, 68, n6 (Bkrtcy.D.N.J. 2010), the court noted the "60 day" time frame provided in the deposit agreement was manifestly unreasonable because the agreement reduced the statutory time period by too great a percentage, the bank did not obtain a knowing and voluntary waiver from the plaintiff, and the plaintiff did not receive any benefit as a result of the shortening of the provision. *See also Regatos v. North Fork Bank,* 257 F.Supp.2d 632, 644 (S.D.N.Y. 2003) (15 day notice period shortening one year statute of repose relating to funds transfers was invalid and unreasonable); *Herzog, Engstrom & Koplivitz, P.C. v. Union Nat. Bank,* 226 A.D.2d 1004, 640 N.Y.S.D.2d 703 (N.Y.A.D.3Dept. 1996) (14 day cut-down provision would not protect defendant if plaintiff established defendant did not observe standards of ordinary care); *Stowell v. Cloquet Co-Op Credit Union,* 557 N.W.2d 567, 568 (Minn. 1997) (construing 20 day cut-down provision as bar to claims where bank failed to exercise ordinary care in paying checks would be manifestly unreasonable). Plaintiff has shown that Defendant did not exercise ordinary care in the handling of the Trust accounts, and the language upon which Defendant relies is (according to Defendant) so broad that it would protect Defendant even if they failed to exercise ordinary care or good faith - in direct contravention of §4-103(a) and Paragraph 22 of the Deposit Agreement.

B. The cut-down provision violates Art. 23, § 9 of the Oklahoma Constitution.

The language in the Deposit Agreement, which whittles the one year notice provision to 30 days or 10 days, is violative of Article 23, § 9 of the Oklahoma Constitution, which provides: "Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void." (emphasis added) Defendant's Motion at p. 18 admits "Compliance with this notice provision by the Plaintiff operates as a condition precedent to maintain an action against *First Enterprise to recover losses arising from the forged checks."*

The language relied on by Defendant, which Defendant claims shortens the statutory notice provision of §4-406(f), is a provision of a contract or agreement which stipulates for notice or demand other than required by law (here §4-406(f)), as a condition precedent to Plaintiffs ability to file an action against the Defendant's bank for losses arising from the payment of items which were not properly payable. Regardless of what other states have decided on the issue of whether a bank may reduce the statutory notice period in a deposit agreement, in Oklahoma, such a reduction clearly violates the plain language of our state Constitution. *See McDonald v. Amtel, Inc.,* 633 P.2d 743 (Okla. 1981) (contract provision between owner of retail service station and supplier, by which the parties agreed that no civil or equitable action under the provisions of antitrust laws could be brought by either party against the other unless instituted within two years of the date of the transaction upon which the action was based, was null and void under Art. 23, § 9); *Brakebill v. Chicago, R.I. & P. Ry.Co.,* 131 P. 540 (Okla. 1913) (contract with railway shop employee, providing that failure of employee to give notice of injury within 30 days "shall be a bar to the institution of any suit on account of such injuries" was violative of Art. 23, § 9).

C. The Deposit Agreement is an Adhesion Contract, and Ambiguous Provisions Must be Construed in Favor of Plaintiff.

Bank deposit agreements are not negotiable. There is a clear disparity in bargaining power, and Imogene Sellers had no choice in the terms of the Deposit Agreement. It was not mutually negotiated; it is an adhesion contract. *Freeman v. Bodyworks, Inc.*, 213 P.3d 838, 840 (Okla. Civ. App. 2008) ("an adhesion contract is a form contract the terms of which cannot be changed); *Max True Plastering Co. v. US. Fidelity and Guaranty Co.*, 912 P.2d 861, 864 (Okla. 1996) (in an adhesion contract, there is no adjustment of the rights of the parties; the contract is on a take-it-or-leave-it basis); *Bolding v. Prudential Ins. Co. of America*, 841 P.2d 628, 630 (Okla. Civ. App. 1992).

Because of the disparity of the bargaining positions of the parties, when interpreting an adhesion contract, ambiguities in the contract are construed in favor of the non-drafting party. *See Bratcher v. State Farm Fire and Cas. Co.*, 961 P.2d 828, 830 (Okla. 1998) (discussing insurance contracts). *See generally* 15 O.S. §§ 151-157. A contract is ambiguous if it is reasonably susceptible to at least two different interpretations. *Pitco Production Co. v. Chaparral Energy, Inc.*, 63 P.3d 541, 546 (Okla. 2003). The language of the Deposit Agreement, construed as Defendant proposes, does not disclose that the Defendant's bank drafted this provision to reduce the statutory period afforded a customer to report fraud, forgeries or alterations. Here, Imogene Sellers had no choice in the terms of this "contract." Defendant merely, allegedly, provided the Deposit Agreement to its customer as an insert with a Signature Card. Defendant's nondisclosure of how its interpretation of its terms affect a customer's legal rights (reducing the amount of time afforded a customer to bring a claim against the bank) is unfair, one-sided and bears none of the hallmarks of the statutory prerequisite of mutual assent necessary for the formation of a valid contract. Construing the "cut-down" provision to reduce the statutory period allowed a customer to bring a claim against a bank (§ 4-406(f)) is unconscionable. *Barnes v. Helfenbein*, 548 P.2d 1014, 1020 (Okla. 1976) ("The basic test of unconscionability of a contract is whether under the circumstances existing at the time of making of the contract, and in light of the general commercial background and commercial need of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party.")

The language at issue operates as a disclaimer of liability whether it specifically says it does or not. Its effect is to disclaim liability for all losses due to fraud, forgeries and alterations which are not reported "within 30 days of the statement date." The paragraph 22 of the Deposit Agreement states that Defendant "agrees to use ordinary care in handling your Account". Paragraph 35 of the Deposit Agreement states that Defendantss liability is limited only if it acted in "good faith". The provision should not be read to say what it does not say, and it should be construed in favor of the non-drafting party - Plaintiff herein.

D. UCC § 4-406(f) Does Not Preclude Claims for Payment of Checks Not Paid in Good Faith

The preclusion of claims under §4-406(f) should not be read to include items which were not paid by the bank in good faith. Courts have recognized that the public policy behind placing the burden on the customer to determine unauthorized signatures or alterations is not served when the bank is a party, either actively or passively, to a scheme to defraud the customer. *Falk v. Northern Trust Co., Falk v. Northern Trust Co.*, 763 N.E.2d 380, 387 (III. App. I Dist. 2001). In Falk, the court noted the legislature's use of the term "care" in § 4-406(f) could not be read to include "good faith" and stated, "[t]he fact that, in other parts of section 4-406, the legislature drew a distinction between "ordinary care" and "good faith" in describing the consequences suffered clearly indicates that the legislature did not intend to limit a bank's liability when it acted in "bad faith" as opposed to acting with a lack of care when paying an item." *See also Appley v. West*, 832 F.2d 1021 (7th Cir. 1987) (§ 4-406(f) did not apply where Appley raised allegation of "bad faith"). Here, Plaintiff has raised material facts through the teller depositions which create questions of fact as to whether Defendant acted in bad faith and were actively or passively involved in Davis' scheme to defraud Plaintiff.

Plaintiff respectfully submits Defendant's Motion for Summary Judgment should be denied in its entirety.

Footnotes

1 On December 30, 2011, Plaintiff filed an Appendix in support of his response, which contains evidentiary materials relied upon in support of the response and is incorporated herein by reference. All references herein to exhibits refer to Exhibits 1 through 25 of the Appendix, except for the “Summary of Testimony of Tellers” attached hereto.

2 There are two key exceptions to the general rule that torts accrue when the wrong is committed, both of which may be applicable to Plaintiff's claims. The first is the “discovery rule,” under which the statute is tolled on some claims until the claimant knows or should know of the claim. See *McVay v. Rollings Construction, Inc., 820 P.2d 1331, 1332-33 (Okla. 1991); Lincoln Bank and Trust Co. v. Neustadt, 917 P.2d 1005 (Okla. App. 1996).* The second is the “continuous tort” rule, which holds that if a wrongful act is continuous or repeated, the statute of limitations runs from the date of the last injury. *54 CJ.S. Limitations of Actions § 177 (1987); Tiberi v. Cigna Corp., 89 F. 3d 1423, 1430-31 (10th Cir. 1996).*

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