

COMMERCIAL LITIGATION

Counsel's Liability for Disbursement of Counterfeit Funds

By Leo K. Barnes Jr.

Rainmaking 101 strives for a steady flow of new clients. Inasmuch as a law firm's website is a mainstream marketing arm, it is hardly an atypical experience when a new client is originated from the web. As anxious as we all are for new clients, counsel must not lose sight of the fact that a client's evaluation of whether an attorney is the right one for the potential client also provides an attorney the opportunity to evaluate whether the potential client (and claim which the attorney is being recruited to champion) are the right fit for the attorney. Counsel's failure to perform that due diligence can have potentially devastating consequences.

In *JP Morgan Chase Bank, N.A. v. Pinzler*, 28 Misc.3d 1214(A), 2010 WL 2943088, New York County Justice Joan Madden issued a decision which, subject to the pursuit of a counterclaim, imposes liability upon an attorney when, as a victim of an internet scam, he deposited a counterfeit bank check into his escrow account and wired the proceeds to a purported client.

According to the court's decision, defendant, an attorney, maintained a client trust account with Chase for more than 10 years. Defendant relayed that in November 2007, he responded to an e-mail sent by an individual named Chang Liu, who represented that he was the manager of AsiaLink Industrial Hong Kong, which company was allegedly soliciting US-based attorneys to collect outstanding debts from AsiaLink's customers located in North America. At

defendant's request, Liu sent an invoice to establish AsiaLink's ostensible debtor, an entity called "American Plumbing and Heating" based in Ohio. The document showed that the debtor owed more than \$300,000. Defendant then sent a retainer agreement to Liu dated November 7, 2007 which Liu signed, and faxed it back to Pinzler.

On December 5, 2007, defendant received a purported check issued by Citibank in the amount of \$197,750 payable to himself, which referenced American Plumbing and Heating (ostensibly in partial satisfaction of the outstanding invoice). After receipt of this check, AsiaLink instructed Pinzler to deposit the check and wire AsiaLink the money to a bank in Hong Kong, representing the partial debt paid by American Plumbing and Heating, minus defendant's retainer.

That same date, defendant went to a Chase bank to deposit the check into his escrow account. According to defendant, as he was depositing the check, a teller informed him that since the check was issued by Citibank, it could be cleared expeditiously, and that he would have access to the funds the next day.

On December 6, 2007, defendant went to the same Chase branch and requested a wire transfer of \$147,710 to AsiaLink in Hong Kong. Chase contended that on December 11, 2007, the check was returned from Citibank, with a notation that it was counterfeit and would not be honored, and on that same date informed



Leo K. Barnes Jr.

the Defendant by telephone that the Citibank check was counterfeit, and that he would be held responsible for the amount wired to AsiaLink. According to defendant, upon learning that the check was fraudulent, he immediately sent a facsimile to Chase, stating that he would not have caused the wire transfers had Chase not told him that he had "available funds."

After the defendant refused to pay, Chase filed a complaint containing various causes of action including breach of contract, account stated, UCC § 3-414(1), and likewise sought to recover its counsel fees. Chase argued that based upon the documents signed by defendant when he

opened his account, coupled with the relevant provisions of the Uniform Commercial Code (which was incorporated by reference on the subject deposit ticket), defendant was solely liable for any losses on the account.

After moving for summary judgment prior to the completion of discovery, the court ruled that issues of fact precluded Chase's summary judgment on the breach of contract and account stated causes of action, and then addressed the third cause of action wherein Chase argued that defendant was liable to Chase for the amount of the counterfeit check based on his breach of his indorser's warranty.

UCC § 3-414 provides:

(Continued on page 19)

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(Continued from page 13)

Contract of Indorser; Order of Liability (1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

Justice Madden concluded that, pursuant to UCC § 3-414, the defendant bore responsibility for the distribution of the counterfeit check proceeds. More specifically, the Court observed:

As the [Second Department] stated in *Welbilt Construction Corp. v. Kornicki* (26 A.D.2d 661, 662 [2d Dept 1966]), "[l]though loosely said to be secondarily liable, when sued upon his contract of indorsement, an indorser is absolutely liable thereon." See also *Bruce v. Martin*, 1993 U.S. Dist LEXIS 21382, *23 n 5 (S.D. N.Y. 1993), holding that "[t]he maker of the note bears primary liability, and the indorser of the note is secondarily liable."

Defendant deposited a check for \$197,750, which he endorsed. The deposit ticket stated that the deposit was subject to the terms of the UCC. Moreover, defendant does not deny that Chase informed him of the dishonor. Accordingly, pursuant to UCC § 3-414(1), defendant is liable to pay for the check which he endorsed, even if the check was dishonored as being counterfeit.

Despite finding that the attorney was responsible for the dishonored deposit, the court agreed to hold summary judgment in abeyance pending the defendant's pursuit of his counterclaim premised upon the bank's alleged negligence in advising that the funds had cleared his account. The consequences for the attorney are profound, including the potential for personal liability for the \$197,750 deposit; Chase's counsel fees; the defendant's counsel fees to defend the Chase claim and pursue the counterclaim; and pre-judgment interest.

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