IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

HAROLD HAYES	*	
Plaintiff	*	
v.	*	Cv. No. 326349
AUTOCORP, LLC t/a ELITE MOTOR SPORTS, *et al*	*	
Defendants	*	

MEMORANDUM OPINION

The parties still remaining at issue in this matter, Harold J. Hayes, individually and as the assignee/inseminator of Albank, (collectively "Hayes") and Citibank, N.A. ("Citibank") have filed cross motions for summary judgment. This Court took the matter under advisement to study the briefing and the statutory and regulatory authority cited to the court.

Factual Background

The parties agree that the factual scenario is largely, if not completely undisputed. John Jordan, who resides in Potomac, Maryland, retained the services of Autocorp, LLC (hereinafter "Elite"), located in Rockville, Maryland, to sell a 1960 Aston Martin DB4 which he owned. Elite was retained as an automobile broker-dealer and agreed to serve as Jordan's agent in any transaction. In November, 2008, Hayes responded to an online advertisement posted by Elite. Hayes telephoned Robert Peacock, a principal of Elite and one of its salesmen and after several calls, the two negotiated a deal in which Hayes agreed to purchase the Aston Martin for $345,000.[1]

[1] Of the $345,000, $10,000 was to be withheld by Elite as commission on the sale. The remaining $335,000 was to be wired by Mr. Peacock to Mr. Jordan upon receipt from Hayes.

Hayes signed a purchase contract and paid $5,000 to Elite via his credit card. Hayes also forwarded a check from J.J. Best Banc & Co. for $200,000 which was negotiated by Elite on December 22, 2008. At the same time, Hayes sent a second check in the amount of $140,000 drawn upon a personal account held with Albany Bank and Trust Company, N.A. ("Albank"), which was numbered #2300.

On or about December 22, 2008, both checks were deposited by Peacock in Elite's account at Citibank. For reasons which are not entirely clear, neither check was endorsed prior to deposit. On December 24, 2008, the check for $140,000 was presented to Albank for payment by the Federal Reserve and Albank paid the check and debited Mr. Hayes account for the corresponding amount.

On December 23, 2008, Mr. Peacock wired $50,000 of the proceeds he had received from Hayes to Mr. Jordan. Then, on December 29, 2008, Mr. Peacock wired an additional $200,000 to Mr. Jordan.

On January 6, 2008, Mr. Jordan called Mr. Hayes directly to inquire about the remaining balance he was expecting, which was necessary to complete the sale of the car. Mr. Hayes responded that he had sent the full balance to Mr. Peacock. After discussing the transaction with Albank and ensuring that the funds had cleared, Mr. Hayes again called Mr. Jordan and informed him that he had already paid the full negotiated price for the car. Subsequently both Hayes and Mr. Jordan attempted to discuss the matter with Mr. Peacock, but they, along with his employees, were unable to reach him. Parties later learned that Mr. Peacock stole and diverted $85,000 of Check #2300.[2]

[2] While the facts regarding Peacock's theft are nebulous at best, it appears to the Court that the remaining $55,000 from Check #2300 was remitted to Mr. Jordan for payment of the Aston Martin. Facts in the pleadings indicate that those funds were then returned to Hayes through Elite, because Hayes insisted on wiring $140,000 at one time.

After talking to Hayes, Albank began to investigate Check #2300 and determined that it was deposited without a proper endorsement by Elite. On or about January 8, 2009, Check #2300 was returned by Albank because of a lack of endorsement and stamped with "Return Reason – Endorsement Irregular." The check was returned with a notice to Citibank stating "endorsement not as drawn." Due to returned check, the Federal Reserve Account of Citibank was debited $140,000 and it was credited to Albank and the Hayes account.

On January 9, 2009, Citibank issued Elite a "debit advice," and debited the $140,000 from Elite's account. Citibank also returned the "legal copy" of Check #2300 to Elite noting that "This is a LEGAL COPY of your check. You can use it the same way you would use the original check. RETURN REASON – J ENDORSEMENT IRREGULAR." In fact, what was returned to Elite was a printed copy of the original check. Under current banking regulations, the original check was destroyed upon processing and replaced with a copy. The copy's actual status becomes an important issue of contention in this case.

On January 12, 2009, Jordan contacted Elite and asked the whereabouts of the $140,000 remaining to be paid on the transaction. Elite told Jordan that the check had been returned to Albank. Elite further confirmed to Jordan that $140,000 had originally been placed into its Citibank account, but was thereafter charged back against the Elite account by Citibank. Elite was able to provide Jordan with a printout of its internet banking website showing that the money from Check #2300 had been debited by Citibank from its account. Jordan relayed this information to Hayes and asked that Hayes forward the outstanding $140,000 directly to Jordan. Jordan told Hayes that he would not

release the Aston Martin or send title documents on the car until payment of the $140,000 was received. Not unexpectedly, before sending further funds, Hayes wanted to ensure that Elite could not and would not re-deposit Check #2300. To this end, Hayes called Elite and asked them to return Check #2300. Elite sent to Hayes the "LEGAL COPY" of Check #2300. Upon receiving the legal copy, Hayes once again contacted Elite and asked for the original check, and Elite explained that the only copy Elite had received from Citibank was the one that had been forwarded to Hayes.

Hayes then directly contacted Citibank via the telephone number appearing on the debit advice. Citibank told Hayes that the original check had been destroyed, the LEGAL COPY check was returned to Elite, and the check could not be re-deposited. As a result of this conversation, Hayes arranged to wire $140,000 directly to Jordan on January 20, 2009. Hayes also placed a "stop payment" on Check #2300. As a result of the payment, Jordan released the Aston Martin and signed the title over to Hayes.

Over a month after Citibank debited Check #2300 from Elite's account, credited Hayes through Albank, and returned the "LEGAL COPY" of the check, Citibank asserted a late return claim against Albank and argued that it was entitled to be paid on the check. Citibank's claim was made through the Federal Reserve and resulted in an automatic adjustment of accounts between Citibank and Albank, once again reversing the flow of funds so that Albank and Hayes were now without the monies.[3] Apparently Citibank's actions were precipitated by the inability to recover the funds from Elite. While the details of matter are not entirely clear, it appears to the Court that Peacock, using his authority as a corporate officer with signing authority, withdrew the funds from Elite

[3] According to *Federal Reserve Operating Circular* 3 at § 20.5, the "adjustment procedure [for the late return claim] is offered as a convenience only and does not preclude any party from pursing its claim in another forum."

prior to the efforts of Citibank to debit the account.[4] All that Citibank recovered was $4,906.47 from the account of Elite. Feeling shortchanged, Citibank sought the above described recovery.

Subsequent to all of the above actions, according to counsel, Albank assigned its rights to Hayes who has pursued this claim in the name of Albank.[5]

Standard of Review

Citibank has moved for summary judgment on all counts pending against it. "[T]he function of a summary judgment proceeding is not to try the case nor to attempt to resolve factual issues, but to determine whether there is a dispute as to material facts sufficient to provide an issue to be tried." *Coffey v. Derby Steel Co., Inc.*, 291 Md. 241, 254, 434 A.2d 564 (1981). A party seeking summary judgment in his or her favor needs to establish two things: "(1) that there is no genuine dispute as to any material fact and (2) that the moving party is entitled to judgment as a matter of law." *See Maryland Rules Commentary*, 3d Ed., Paul Niemeyer & Linda M. Schuett, 352-53; *see also Syme v. Marks Rentals, Inc.*, 70 Md.App. 235, 520 A.2d 1110 (1987). In doing so, the moving party must first set forth the facts necessary to obtain judgment and show that there is no dispute as to the same. *At* 353; *see also Stewart Title Guaranty Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996). Then, the moving party must show that the undisputed facts as set forth in the motion are "insufficient to support the [non-moving party's] claim." *Id.*

[4] Counsel, during the course of argument, represented to the court that Peacock "lost" the money and it was not recoverable. Peacock was incarcerated at the time of the argument on summary judgment.
[5] Apparently Hayes also agreed to indemnify Albank from loss. Hayes has an ownership position with Albank and a large number of accounts associated with his business interests at the bank. Hayes has served as the Chairman of the Board of Albank and has additional prior service on the bank's Board of Directors.

Discussion

The old adage that hard cases make bad law is probably true in this case. The difficulty of this particular matter lies in the fact that both of the contesting parties are innocent victims of another wrongdoer. Sadly, the wrongdoer was desperate enough to violate the law and now the court is left with the responsibility of deciding who must bear the burden of the loss.

As a general rule, where, as here, there are contesting parties who are relatively blameless, it is necessary to examine the conduct of those parties to determine who had more control of the circumstances and which party was in a position to prevent the loss.

First, a determination of applicable law is helpful. The check is a device that is really nothing more than a demand note payable by the shown date. It is an instruction to a given bank by its customer to pay the stated sum in money to the named payee. Md. Code Ann., CL §3-104(c) (2002 Repl. Vol.). The customer of the bank is known as the "drawer." Ibid §3-103 (3).

The bank that cashes a check or takes a check for deposit is know as the "depositary bank." Id. §4-105 (2). The depositary bank is the first bank in the check collection process. In this case, Citibank was the depositary bank. The depositary bank normally gives its customer (the depositor) a "provisional settlement" at the time of deposit.[6] The depositary bank sends the check through one or more intermediary banks, which are "collecting banks" with the check eventually ending in the possession of the

[6] While this may be customary for some customer due to their trustworthiness, size, financial resources and reliability, it is not mandated. While the process is less frequent, particularly for smaller checks, an instrument such as a check may be held for collection, in which case the depositor is not credited with the amount of the check until it has completely cleared the banking system.

bank upon which the check is drawn. "Presentment" is then made. Id. § 4-105 (4) and (5). In this case, the intermediary bank or collecting bank is a member of the Federal Reserve Banks. The bank to which the check is presented is known as the "drawee bank" or the "payor bank." Id. §4-105 (3). In this case, Albank is the payor bank.

As was pointed out by the parties in their briefs, the check clearing process outlined above is conducted electronically. The Check Clearing for the 21st Century Act ("Check 21st Act") took effect on October 28, 2004, and facilitates the check clearing process by permitting banks to convert an original paper check to a digital image called a "substitute check," which is sometimes called an "image replacement document" or "IRD." The Check 21st Act is implemented by subpart D of the Federal Reserve Bank's Regulation CC. See 12 CFR part 229.51 *et seq.* ("Subpart D – Substitute Checks"). A substitute check is the "legal equivalent" of an original paper check, so long as it accurately represents the information on the front and back of the check existing at the time it was converted to a digital image and contains the following language: "This is a legal copy of your check. You can use it the same way you would use the original check." 12 CFR § 229.51(a). In this case, Citibank presented the original paper Check #2300 to the Federal Reserve Bank, the Federal Reserve then converted the original check to a "substitute check," and it was presented to Albank for payment.

Typically, the payor bank pays the check upon presentment and charges the amount of the check to the drawer's account. On December 24, 2008, the legal equivalent of Check #2300 was presented to Albank for payment by the Federal Reserve, and Albank paid the check and debited Hayes account. Check #2300 was "finally paid" when Albank did not dishonor and return the check within the "midnight deadline." The

"midnight deadline" is defined by Md. Code Annotated, CL I § 4-104 (a) (10) as midnight of the day after the day of receipt of the relevant item. Under CL I § 4-215 (a)(3), an item is finally paid when the payor bank makes provisional settlement for the item and fails to revoke the settlement in the time and manner permitted by statute, clearing-house rule, or agreement.

Fifteen days after Check #2300 was received by Albank, Albank dishonored the check. Apparently the precipitating cause for the dishonor was the discovery by Hayes of the actions of Peacock. Peacock had wired $50,000 of the proceeds from Hayes to Jordan on December 23, 2008. On December 29, 2008, Peacock wired another $200,000 to Jordan. It was on January 6, 2009, that Jordan called Hayes asking when the balance of the monies would be sent. Hayes had already written and passed over to Peacock Check #2300, and was surprised by Jordan's inquiry. Hayes called Albank and learned that his check had been cleared by Albank, and his account had been charged. After further efforts to obtain the car and to learn what had happened to the monies, Hayes contacted Albank for information on the cashed check. Upon examination, Albank discerned that the check did not bear any endorsement, and the bank told Hayes it would try to return the check for lack of an endorsement.

Albank did, in fact, return the check with the stated reason, "endorsement not as drawn." The return of the check was through the Federal Reserve Bank. There were no direct dealings with Citibank. When a check is returned as dishonored or unpaid, they are handled on a "with entry" basis. "With entry" indicates that a provisional payment or credit is given the bank receiving the item (Citibank) as the item is passed from one bank to the Federal Reserve Bank and on to the next bank. When Albank returned the item

"with entry" on January 8, 2009, Albank received a "provisional credit" of $140,000 from the Federal Reserve that same day.

Citibank asserts that Albank's use of the Federal Reserve Bank for the return of the check was improper. Citibank takes the position that for Albank to do so was a direct violation of Paragraph 20.3 of the Operating Circular 3 of the Federal Reserve Bank, which provides, in relevant part: "A bank that believes it has a claim for breach of warranty based on an altered check, a forged endorsement, a missing endorsement or an unauthorized endorsement against another bank should deal directly with that other bank."

Citibank received notice of the returned item from the Federal Reserve Bank on January 9, 2009. The bank's account was debited $140,000 by the Federal Reserve. Citibank, in turn, debited Elite's account, which resulted in an overdraft of $135,093.53. In essence, Citibank collected $4,906.47 against the returned check of its customer and was still far short of full recovery.

On February 6, 2009, Citibank submitted a claim of late return to the Federal Reserve Bank. Citibank's claim specified that Check #2300 in the amount of $140,000 was sent to the Federal Reserve in a "cash" letter dated December 22, 2008 and the check was not returned until January 9, 2009. On February 10, 2009, the Federal Reserve Bank provisionally credited Citibank's account and debited Albank's account in the amount of the check, $140,000. Albank responded as required that Albank had not returned the check late as dishonored, but had returned the check for improper endorsement. The Federal Reserve did not reverse the credit to Citibank and the charge to Albank.

On February 28, 2009, Albank made a direct claim against Citibank, by-passing the Federal Reserve Bank. This "without entry" claim caused the check to be presented directly by Albank to Citibank. Albank argued that the Check #2300 was not endorsed and the check could not be negotiated without an endorsement. Therefore the check had been "refused" by Albank for lack of endorsement. Citibank refused to make any adjustment.

Issues Presented by the Case for Resolution

Mr. Jordan's Liability

Counts I and II of Hayes' Second Amended Complaint allege that Mr. Jordan is liable for damages in the amount of $111,500 under breach of contract and unjust enrichment theories. With regards to Count 1 (breach of contract), Mr. Jordan is alleged to have breached his obligations under the vehicle sale contract by receiving $140,000 more than the contracted price of the Aston Martin. Despite the allegations in the complaint, the facts presented to the Court reveal that Mr. Jordan, himself, has kept no funds in excess of the $345,000.00 sale price of the car. This amount includes the $5,000 credit card down payment, the $200,000 check amount from J.J. Best Banc & Co., and the $140,000 wire transfer from Hayes. Any funds received by Mr. Jordan from Check #2300 were remitted back to Elite and not retained by Mr. Jordan himself. Finding that Mr. Jordan had no continuing obligations to Hayes under the contract and that he retained no additional funds in excess of the purchase price, this Court finds no grounds to enforce judgment against Mr. Jordan under Count I.

Under Count II (unjust enrichment), Hayes alleges that Elite was operating as an agent for Mr. Jordan for the purposes of selling the Aston Martin to Hayes and that as a result of Hayes' check being re-credited into Elite's account, Mr. Jordan continues to retain excess funds in the amount of $111,500. As stated in Joint Pre-Trial Statement, Mr. Jordan argues that Elite did not act as his agent in the transaction.

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[7] In determining the extent of an agency relationship, Courts first are required to determine if the agency is a master-servant relationship or an independent contractor relationship. A master-servant relationship is one which exists when the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done.[8] In contrast, while still a fiduciary relationship, an independent contractor relationship exists when an agent is not subject to the control of the principal with respect to his physical conduct in the performance of services.[9]

This distinction is significant as it determines the applicability of the doctrine of *respondeat superior*. The established rule in Maryland which governs agent relationships requires Courts to look to whether the acts complained of were within the scope and furtherance of the principal's business.[10] Under the doctrine of *respondeat superior,* a principal is subject to liability for the tortious conduct of an agent when acting within the

---

[7] *Restatement (Second) of Agency* § 1 (1958)
[8] *Brady v. Ralph Parsons Co.*, 308 Md. 486, 510, 520 A.2d 717, 730 (1987) (quoting *MacKall v. Zayre Corp.*, 293 Md. 221, 230, 443 A.2d 98, 103 (1982).
[9] *Id.* At 511, 520 A.2d at 730.
[10] *LePore v. Gulf Oil Corp. & Walters,* 237 Md. 591,595, 207 A.2d 451, 453 (1965).

scope of the agreement.[11] The doctrine, however, does not apply to the independent contractor relationship.

Given the previous definitions of agency relationships, it appears to the Court that if such an agency relationship existed between Elite and Mr. Jordan, Elite was working the capacity as an independent contractor for Mr. Jordan and not a servant. As a result, the doctrine of *respondeat superior* does not apply, and Mr. Jordan cannot be held liable for Mr. Peacock's theft. Further, even if the Court were to assume that a master-servant agency relationship did, in fact, exist between Mr. Jordan and Elite, Mr. Peacock's theft would have been an unauthorized act performed by an agent, outside of the scope of the agreement and therefore Mr. Jordan would have had no liability arising out of the theft.

Finding that neither Count I or II as alleged in the Second Amended Complaint state a sufficient cause of action against Mr. Jordan, this Court cannot imply or enforce liability against him for his actions regarding the sale and payment of the Aston Martin, the object of this dispute.

Implications of the Missing Endorsement

Case law in this area seems to indicate that a bank is not at fault if the same transaction of funds would have resulted, regardless of the missing endorsement. In *Agnes N. Conder v. Union Planters Bank,* 384 F.3d 397 (2004), the United States Court of Appeals for the Seventh Circuit was required to consider a bank's liability to victims of a Ponzi scheme. Similar to the Hayes situation, checks in the *Conder* case were written and deposited without having been endorsed by the payee. While the plaintiff tried to argue her case under a negligence theory, the Court found that there was nothing

[11] *Brady v. Ralph Parsons Co..*, 308 Md. 486, 512, 520 A.2d 717, 730 (1987)

to arouse the suspicions of the bank employees when it was instructed to deposit the checks and furthermore, "improper endorsements are common enough, and usually innocent."[12]

Additionally, and perhaps more importantly, the Court also noted that had Union Planters Bank noticed the improper endorsement, it would have returned the check to the payee, who then would have endorsed it and the check would have been re-deposited.[13] "The plaintiff would have lost her money all the same, and is therefore no worse off because of the bank's mistake."[14] The Court noted that the plaintiff's argument failed to acknowledge that the same amount of money would have passed through the bank's hands, with a delay of only a few days, had the bank returned the checks.[15] In response, the Court stated that "imposing liability on someone who hasn't actually caused harm (because the harm would have occurred anyway) creates incentives to take excessive, and therefore socially wasteful, precautions."[16] In conclusion, the Court affirmed the lower court decision, following the "intended payee" rule, which provides that

> if a bank transfers a check without a proper endorsement but the transfer is to a person whom the drawer of the check wanted . . . to have the money, the bank is not liable for any loss the drawer may have suffered as a result of the transfer, since the transfer would have gone through even if the bank had insisted that the check be properly endorsed.[17]

Applying this case to the predicament of Mr. Hayes, it seems that the failure to recognize the lacking or improper endorsement is irrelevant. Similar to the checks in the

---

[12] *Conder v. Union Planters Bank,* 384 F.3d 397, 400 (2004)
[13] *Id.* at 401.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id. See also Security Trust & Savings Bank v. Fe.l Reserve Bank of Minneapolis,* 269 F. Supp. 893, 896 (1967) (noting that "the payee, the person whom the maker intended to pay received the money" and that under such circumstances, the plaintiff was not permitted to use the lack of endorsement as an excuse for returning a check which it had paid.")

Conder case, had the check in this situation been returned for lack of endorsement, it would have been endorsed and then re-deposited without concern as Mr. Jordan had chosen Mr. Peacock as a broker for the sale of his car and all payments were to go through Elite. Prior to January 6, 2008, when Mr. Hayes and Mr. Jordan directly talked to one another, there was no reason to believe that the transaction was in jeopardy or that Mr. Peacock was engaging in a plan to steal the funds before the transaction could be completed. As a result, whether the check was endorsed or not, the same outcome would have occurred, and therefore, the improper endorsement is irrelevant as to the finding of fault in this case.

The Effect of the Midnight Deadline Rule

As stated above, the "midnight deadline" is defined as midnight of the day after the day of receipt of the relevant item.[18] Under CL I § 4-215 (a)(3), an item is finally paid when the payor bank makes provisional settlement for the item and fails to revoke the settlement in the time and manner permitted by statute, clearing-house rule, or agreement. This rule is a mechanical one, seeking to ensure uniformity and definiteness for establishing when a provisional settlement may be revoked in the normal course of bank processing.[19]

As Albank concedes Check #2300 was "finally paid" when Albank did not dishonor and return the check within the "midnight deadline." As a result, the midnight deadline rule was violated by Albank when it sought to dishonor the check fifteen days later under an improper endorsement theory.

---

[18] Md. Code Annotated., CL I § 4-104 (a)(10).
[19] *United States v. Payment Processing Center, LLC,* 461 F. Supp. 2d 319, 325 (2006).

The Result of Returning Check #2300 "With Entry"

Our analysis, however, does not stop with the midnight deadline violation, as Albank submitted the check through the Federal Reserve "with entry."[20] Returning the check "with entry" was in violation of paragraph 20.3 of Operating Circular No. 3 of the Federal Reserve Bank, which states "a bank that believes it has a claim for breach of warranty based on an altered check, a forged endorsement, a missing endorsement or an unauthorized endorsement against another bank should deal directly with that other bank."[21] According to Citibank, if Albank had intended to return the check for an improper endorsement, it should have returned it "without entry," as required by the Federal Reserve Bank and dealt with Citibank directly regarding the endorsement concerns.

Whether Albank concedes this point is inconsequential as it appears from the facts in this case, as pleaded by both parties, that Albank chose to return the check "with entry" in violation of the governing Operating Circular. Citibank further argues that it is entitled to summary judgment because Albank's election to return the check "with entry" triggered an automatic process in which Albank's account was credited and Citibank's

[20] "With entry" indicates that the check was returned through the automated check processing system of the Federal Reserve, as opposed to "without entry" which indicates that a check was manually returned at a later date. *United States v. Payment Processing Center, LLC,* 461 F. Supp. 2d 319, 327 (2006).

[21] Pursuant to 4-103(b) of the UCC, the Operating Circulars of the Federal Reserve have the force and effect of law. U.C.C. 4-103 provides "(a) The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement 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. (b) Federal Reserve regulations and operating circulars, clearing-house rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled."

account was debited in the amount of the check, having the mechanical effect of unpaying the finally paid item.

The Effect of Electing to "Unpay" Check #2300 and Back-charge Elite

While Citibank asserts that this was an "automatic" process, it appears to the Court that Citibank made an election to back-charge Elite's account and at that time determined that insufficient funds remained. According to the deposition of Citibank's Corporate Designee, on January 9, 2009, Citibank's Risk Control and Loss Prevention Center twice contacted the financial center manager handling Elite's account to discuss the returned check item.[22] Also, internal emails from the supervisor of the Returned Deposit Items Unit reveal that Financial Center Manager Godwin was notified that Check #2300 was being returned "Endorsement Irregular" and that the account would be debited the same day (January 9, 2009).[23] Godwin informed Risk Control not to take any action on the check.[24] Subsequently, Citibank returned the substitute check to Elite[25] along with a Debit Advice[26] and fined Elite $10.00 for a returned check fee.[27]

Such internal communications reveal that Citibank had the opportunity to review the late-returned check and to internally decide what the appropriate next steps with regard to the check. As a result, based on the facts presented to the Court, it appears that Citibank elected to back-charge Elite's account, resulting in the overdraft of approximately $135,000. This election is critical to the resolution of this dispute. The

[22] Citibank Dep. at 137:15 – 138:10.
[23] Citibank Dep. Exh. 15
[24] *Id.* At 138:20 – 139:90.
[25] Citibank Dep. At 34:9 – 35:4; 74:21 – 75:13; 78:20 – 79:20.
[26] Citibank Dep. Exh. 7
[27] Citibank Dep. at 102:12 – 104:7.

election to pursue its customer, Elite, if successful, would have resulted in a return of the $140,000 paid over to Elite. In fact, some monies were recovered by the attempt of Citibank to back charge its customer. But, Citibank wants to keep the $140,000 claimed due from Albank. When Citibank made such an election to collect from its customer, Citibank is no longer entitled to use the legal copy of the check because it is now "owned" by Elite. It is presumed that Citibank evaluated and weighed its options before debiting Elite's account and determined that its chances of recovery were better against Elite than with attempting further recovery from Albank Because the strategy elected by Citibank against its customer was unsuccessful, Citibank is no longer entitled to a second bite of the apple against Albank, nor may it legally do so without title to the check copy. Legal title of check #2300 would be vital to Albank because it would then be entitled to sue Elite directly and could not do so without the check. In effect, by making the election to pursue and debit its customer, Citibank waived further claim against Albank..

"Waiver includes the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances."[28] Given Citibank's actions in this case, it appears to the Court that they initially elected to "honor the dishonor" and by doing so, waived its right to make a late return claim, even though it could have done so the day Check #2300 was presented to it for un-payment after the midnight deadline had passed. When a month later Citibank risk control made a late return claim, Hayes had, based on Citibank's actions and assurances, already separately wired money to obtain title to the car.

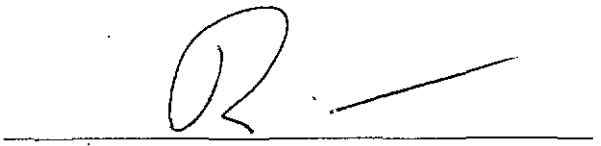
[28] *Gould v. Transamerican Assoc,* 224 Md. 285, 294, 167 A.2d 905, 909 (1961).

Citibank is a large, sophisticated financial institution with responsibility to oversee accounts held by its clients and to monitor them for fraudulent activities. While this opinion does not state, nor does it intend to state, that Citibank has a duty to prevent all fraudulent activities from occurring in the future, it does intend to acknowledge that Citibank's holding of the account *is a factor* to be considered in establishing who was in the best position, in this limited factual situation, to control the circumstances and prevent the loss that occurred. As a result of Citibank's failure to do so, along with Citibank's election to back-charge Elite's account, Mr. Hayes, believing that the transaction could not again be reversed, wired an additional $140,000 to Mr. Jordan and eventually paid significantly more for the Aston Martin than originally negotiated.

Conclusion

As this opinion previously acknowledged, both of the contesting parties are victims of another's wrongdoing, leaving the court with the responsibility of determining who is to bear the burden of the loss. After examining the conduct of the parties involved, it appears to the Court that Citibank, being the holder of Elite's account and having elected to back-charge Elite for the late returned check, had more control over the circumstances and was in a better position to prevent the financial loss that eventually occurred. As a result, this Court, by separate order of even date, grants Hayes' Motion for Summary Judgment and denies the Motion for Summary Judgment of Citibank and will enter a monetory judgment is the sum of $111,500, plus the costs of this action, but without an award of prejudgment interest. Per force of the decision, it is unnecessary to alter or change any action taken by Citibank against Elite, including, but not limited to its

retention of any monies recovered from Elite as a result of its debit, plus pursuing any further claim against Elite for recovery of further monies.



7-13-11

Ronald B. Rubin, Judge
(For Durke G. Thompson, Judge)

Date