

ILLINOIS OFFICIAL REPORTS
Appellate Court

Hawkins v. Nalick, 2012 IL App (5th) 110553

Appellate Court Caption CORINNE HAWKINS, Plaintiff-Appellant, v. DENNIS NALICK, Defendant, and NATIONAL CITY BANK, N.A., Defendant-Appellee.

District & No. Fifth District
Docket No. 5-11-0553

Filed September 5, 2012

Held The discovery rule does not apply to toll the three-year statute of limitations in section 3-118(g) of the Uniform Commercial Code, which is applicable to actions for the conversion of negotiable instruments, in the absence of fraudulent concealment by defendant.

(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)

Decision Under Review Appeal from the Circuit Court of Madison County, No. 10-L-451; the Hon. David A. Hylla, Judge, presiding

Judgment Affirmed.

Counsel on Appeal Robert D. Larson, of Alton, for appellant.

Kurt E. Reitz, Mike W. Bartolacci , and Matthew J. Landwehr, all of Thompson Coburn LLP, of Belleville, for appellee.

Panel JUSTICE STEWART delivered the judgment of the court, with opinion. Presiding Justice Donovan and Justice Wexstten concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff, Corinne Hawkins, brought an action against her attorney, Dennis Nalick, and against his bank, National City Bank, N.A., seeking to recover funds she lost when her attorney forged her name to a check payable to her, deposited the funds into his checking account with the bank, and converted the funds to his own use. The circuit court dismissed the plaintiff’s claim against the bank based on the three-year statute of limitations on actions for conversion of negotiable instruments contained in section 3-118(g) of the Uniform Commercial Code (the UCC) (810 ILCS 5/3-118(g) (West 2010)). For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 The plaintiff’s mother died in Cleveland, Ohio, in January 2004. The plaintiff hired defendant Dennis Nalick, a lawyer, to assist her with her inheritance from the Ohio probate proceeding. After corresponding with the estate’s lawyers in Cleveland, Nalick received a check payable to the plaintiff in the amount of \$137,826.43, representing her distribution from her mother’s estate. Sometime between July 30, 2006, and August 23, 2006, Nalick forged the plaintiff’s endorsement on the check and deposited the funds into his law office checking account with the defendant bank. Nalick subsequently converted the funds to his own use.

¶ 4 After forging the plaintiff’s endorsement and depositing the funds into his law firm bank account, Nalick made repeated misrepresentations to the plaintiff concerning the delay in payment of her inheritance. Nalick’s misrepresentations included false correspondence purporting to be from him to the estate’s attorneys.

¶ 5 The plaintiff subsequently hired a new attorney. On or about March 29, 2010, the plaintiff learned through her new attorney that her mother’s estate had distributed the funds by a check delivered to Nalick and that Nalick had forged her endorsement and converted the funds. On April 23, 2010, the plaintiff filed suit against Nalick and the bank to recover her

inheritance funds. Count I of the plaintiff's complaint against Nalick has been resolved by a summary judgment against the special representative of the estate of Dennis Nalick, deceased.

¶ 6 The remaining counts of the plaintiff's complaint, counts II, III, and IV, allege claims against the bank under theories of conversion and negligence. On November 10, 2011, the bank filed a motion for a summary judgment, arguing that the plaintiff's claims were time-barred by the three-year statute of limitations contained in section 3-118(g) of the UCC (810 ILCS 5/3-118(g) (West 2010)). In support of its motion for a summary judgment, the bank argued that the discovery rule does not apply to claims for check conversion. Instead, the bank argued, the only way to toll the statute of limitations contained in section 3-118(g) is for the plaintiff to prove that the bank fraudulently concealed the conversion of her funds. The bank's motion for summary judgment included the affidavit of its loss prevention manager and excerpts from the plaintiff's deposition that established that the bank did not fraudulently conceal Nalick's forgery and conversion of funds from the plaintiff. The plaintiff was never a customer of the bank, the bank was not aware of the forged endorsement, and the bank never made any representations to the plaintiff regarding the check.

¶ 7 In response to the bank's motion for summary judgment, the plaintiff admitted that she had no evidence to support the assertion that the bank fraudulently concealed the conversion of the check which gave rise to the claim. However, the plaintiff argued that the running of the statute of limitations should be tolled under the discovery rule.

¶ 8 On November 18, 2011, the circuit court entered a summary judgment in favor of the bank based on the statute of limitations. The court held that the plaintiff's claims were time-barred under section 3-118(g) of the UCC and that the discovery rule did not apply to claims of conversion of a negotiable instrument. The court also noted that the only exception would be if the bank fraudulently concealed the conversion from the plaintiff, but the undisputed facts demonstrated that there was no fraudulent concealment. The plaintiff now appeals from the circuit court's judgment.

¶ 9 ANALYSIS

¶ 10 The plaintiff seeks a reversal of the circuit court's summary judgment in favor of the bank. "Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Schultz v. Illinois Farmers Insurance Co.*, 387 Ill. App. 3d 622, 625, 901 N.E.2d 957, 960 (2009). We review the grant of summary judgment *de novo*. *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008).

¶ 11 The issue in the present case concerns the three-year statute of limitations contained in section 3-118(g) of the UCC for actions alleging the conversion of negotiable instruments. Checks are negotiable instruments and are subject to the provisions of the UCC. *Cirrincone v. Westminster Gardens Ltd. Partnership*, 352 Ill. App. 3d 755, 762, 816 N.E.2d 730, 736 (2004). Section 3-420(a) of the UCC provides in relevant part: "An instrument is *** converted if it is taken by transfer, other than a negotiation, from a person not entitled to

enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.” 810 ILCS 5/3-420(a) (West 2010). “To establish that a financial institution is liable for conversion under Illinois law, the plaintiff must establish (1) that she owned, held an interest in, or had the right to possess a negotiable instrument; (2) that someone forged or without authority placed the plaintiff’s endorsement on the instrument; and (3) that the defendant financial institution negotiated the check without her authorization.” *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 439 (7th Cir. 2005).

¶ 12 Pursuant to section 3-118(g) of the UCC, a plaintiff has three years to bring an action based on conversion of a negotiable instrument. Specifically, section 3-118(g) states as follows: “Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this Article and not governed by this Section must be commenced within 3 years after the cause of action accrues.” 810 ILCS 5/3-118(g) (West 2010).

¶ 13 In the present case, it is undisputed Nalick deposited the check with the plaintiff’s forged endorsement into his account with the bank sometime between July 30, 2006, and August 23, 2006. The plaintiff did not discover that Nalick had forged her endorsement and deposited the money into his account and converted the funds for his own use until over three years later, on or about March 29, 2010. The plaintiff filed her complaint against Nalick and the bank on April 23, 2010.

¶ 14 “Courts in Illinois have held that a limitations period generally begins to run ‘when facts exist which authorize one party to maintain an action against another.’” *Rodrigue*, 406 F.3d at 441 (quoting *Sundance Homes, Inc. v. County of Du Page*, 195 Ill. 2d 257, 266, 746 N.E.2d 254, 260 (2001)). Accordingly, the plaintiff’s cause of action for conversion in the present case accrued when Nalick exercised unauthorized control over her funds by depositing her check. *Haddad’s of Illinois, Inc. v. Credit Union 1 Credit Union*, 286 Ill. App. 3d 1069, 1073, 678 N.E.2d 322, 324 (1997). The plaintiff’s cause of action based on conversion accrued sometime between July and August 2006, but she did not file her complaint until April 23, 2010. The complaint was filed, therefore, outside the three-year time limit provided in section 3-118(g) of the UCC.

¶ 15 The plaintiff argues that the running of the three-year limitations period should be tolled through the application of the discovery rule. The discovery rule is a judicially created rule that tolls the beginning of a statute of limitations until the injured plaintiff knows or reasonably should know that she has been injured and that her injury was wrongfully caused. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1150, 943 N.E.2d 43, 70 (2011). The discovery rule is designed to prevent the unduly harsh result of a statute of limitations barring a plaintiff’s lawsuit before she was even aware that she was injured. *Id.*

¶ 16 In the present case, the undisputed facts indicate that the plaintiff was not aware of her claim of conversion until her new attorney discovered the conversion in March 2010, after the expiration of the statute of limitations on her claim. In addition, there are no facts suggesting that the plaintiff should have known about her conversion claim prior to the

running of the statute of limitations. We must decide, as a matter of law, whether the discovery rule can be applied to toll the running of the three-year statute of limitations contained in section 3-118(g) of the UCC.

¶ 17 The Illinois Supreme Court has not addressed the issue of the applicability of the discovery rule in a case of conversion of a negotiable instrument. Lower Illinois courts, however, that have addressed the issue have held that the discovery rule cannot toll the running of the three-year statute of limitations contained in section 3-118(g).

¶ 18 In *Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union*, 286 Ill. App. 3d 1069, 1070, 678 N.E.2d 322, 323 (1997), the plaintiff filed a conversion action against a bank, alleging that one of the plaintiff's employees forged endorsements on checks payable to the plaintiff and deposited them in an account opened with the bank. The circuit court granted the bank's motion for a summary judgment on the basis that the three-year statute of limitations contained in section 3-118(g) of the UCC barred the action and that the discovery rule did not apply to toll the statute. *Id.* at 1071, 678 N.E.2d at 324.

¶ 19 On appeal, because the issue was one of first impression in Illinois, the *Haddad's of Illinois* court looked to other jurisdictions for guidance. *Id.* at 1073, 678 N.E.2d at 325. Based on its survey of the law in other jurisdictions, the court concluded that "the vast majority of authority runs strongly against applying the discovery rule to an action for conversion of negotiable instruments in the absence of fraudulent concealment on the part of the defendant asserting the defense of the statute of limitations." *Id.*

¶ 20 The court noted that other jurisdictions that declined to apply the discovery rule had considered the rights of unsuspecting victims of forgery in comparison with the broader interests of commerce. *Id.* at 1074, 678 N.E.2d at 325. These courts articulated two grounds against applying the discovery rule in cases involving the conversion of negotiable instruments: (1) the commercial policies underlying the UCC required liability on negotiable instruments not be open-ended, and (2) the victim of the conversion is in the best position to easily and quickly detect the loss and take appropriate action. *Id.* at 1074-75, 678 N.E.2d at 326.

¶ 21 The court noted that there were a few jurisdictions that had applied the discovery rule in actions for conversion of negotiable instruments. *Id.* at 1073, 678 N.E.2d at 325. However, the court found the majority view to be more persuasive because it best served negotiable instruments' intended purpose of facilitating the rapid flow of commerce and because three years provided the victim with an adequate opportunity to discover the conversion in the ordinary course of bookkeeping. *Id.* at 1075, 678 N.E.2d at 326. "Absent fraudulent concealment[, three years] should allow ample time for a plaintiff to discover any injury." *Id.*

¶ 22 Illinois courts again addressed the issue of applicability of the discovery rule in a case involving the conversion of negotiable instruments in *Kidney Cancer Ass'n v. North Shore Community Bank & Trust Co.*, 373 Ill. App. 3d 396, 869 N.E.2d 186 (2007). In that case, the plaintiff sued a bank for conversion, alleging that the bank allowed the plaintiff's executive director to open a savings account in the plaintiff's name, deposit donation checks payable to the plaintiff into the account, and withdraw all of the donations for cash. The circuit court

granted the bank's motion to dismiss, finding that the allegation of conversion was time-barred under the three-year statute of limitations. *Id.* at 399, 869 N.E.2d at 189.

¶ 23 On appeal, the court cited *Haddad's of Illinois* and held that “[a]lthough Illinois courts have applied the discovery rule to a number of different tort causes of action, it is only applicable in conversion-of-negotiable-instrument cases *** when there are allegations of fraudulent concealment.” *Id.* at 406, 869 N.E.2d at 195. The plaintiff in that case argued that it was not in the best position to detect the fraud because it had no knowledge of the account opened in its name and did not receive any account statements. The court, however, noted that the conversion involved the theft of donation checks and that the plaintiff was in a better position to establish internal controls for its donations than the bank. *Id.*

¶ 24 In the present case, we have also reviewed the case law in other jurisdictions and have determined that the overwhelming majority of other jurisdictions that have addressed this issue have declined to apply the discovery rule to toll the statute of limitations for actions alleging the conversion of negotiable instruments. For example, in *Mandolfo v. Mandolfo*, 796 N.W.2d 603 (Neb. 2011), the Supreme Court of Nebraska recently surveyed the law of other jurisdictions on the issue and concluded as follows: “Although some courts do apply the discovery rule, the overwhelming majority rule is that the discovery rule does not apply to cases involving negotiable instruments. That is, courts hold that the cause of action accrues and the limitations period begins running when the instruments are converted, regardless of when the plaintiff actually learns of the conversion.” *Id.* at 610-11. The *Mandolfo* court noted that many jurisdictions reject the discovery rule in order to further the UCC's purpose of promoting swift resolution of commercial disputes. *Id.* at 611. The majority of courts reason that a defined period of liability on negotiable instruments is essential to the instruments' free negotiability which, in turn, is essential to commerce. *Id.* In addition, “many courts reason that the victim of conversion is often in the best position to prevent or detect the loss.” *Id.* The *Mandolfo* court agreed with and adopted the majority view, adding that one of the purposes of the UCC is to make the laws uniform among the various jurisdictions. *Id.* Finally, the court noted that the only exception to the majority view is when the defendant has engaged in fraudulent concealment. *Id.*

¶ 25 Although the Illinois Supreme Court has not addressed the applicability of the discovery rule to section 3-118(g) of Illinois's version of the UCC, the court has stated that Illinois generally follows the majority interpretation of UCC provisions. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 491, 675 N.E.2d 584, 589 (1996). Illinois courts generally follow the majority interpretation of UCC provisions in order to further the UCC's goal of making the law among the various jurisdictions uniform. *Id.* (citing 810 ILCS 5/1-102(2)(c) (West 1994)). As noted above, almost every jurisdiction that has addressed this issue has held that the discovery rule does not apply to the UCC's three-year statute of limitations on claims for the conversion of negotiable instruments. See *Estate of Hollywood v. First National Bank of Palmerton*, 2004 PA Super 321, ¶ 20 (and cases cited therein). Accordingly, we are compelled to adopt the majority view and hold that the discovery rule does not toll the running of the three-year statute of limitations set forth in section 3-118(g) of the UCC.

¶ 26 In the present case, there is no evidence that the plaintiff could have known that Nalick converted her inheritance check from her mother's estate. Unlike the plaintiffs in *Haddad's*

of *Illinois* and *Kidney Cancer Ass'n*, there is no indication that the plaintiff in the present case was in the best position to easily and quickly detect the loss and take appropriate action or that she could have detected the conversion sooner with adequate bookkeeping. Nonetheless, we believe that we must apply the three-year statute of limitations on claims for the conversion of negotiable instruments.

¶ 27 “The rationale most often cited in support of the majority perspective is that application of the discovery rule would be inimical to the underlying purposes of the UCC, including the goals of certainty of liability, finality, predictability, uniformity, and efficiency in commercial transactions.” *Rodrigue*, 406 F.3d at 445-46. Application of the discovery rule to a cause of action for the conversion of a negotiable instrument undermines the underlying goals of the UCC. *Id.* Although the mechanical application of the statute of limitations in the present case leads to a harsh result, courts addressing this issue have noted that greater good is served by the strict application of the limitations period. *Menichini v. Grant*, 995 F.2d 1224, 1230 (3d Cir. 1993); *Husker News Co. v. Mahaska State Bank*, 460 N.W.2d 476, 479 (Iowa 1990) (“Strict application of the limitation period, while predictably harsh in some cases, best serves the twin goals of swift resolution of controversies and ‘certainty of liability’ advanced by the U.C.C.”).

¶ 28 We also note that the Illinois legislature incorporated the language of the discovery rule into other sections of the UCC. See 810 ILCS 5/3-416(d), 3-417(f), 4-208(f) (West 2010). It did not incorporate the discovery rule or the language of the rule into section 3-118(g). In *Auto-Owners Insurance Co. v. Bank One*, 852 N.E.2d 604, 611 (Ind. Ct. App. 2006), an Indiana court declined to apply the discovery rule because, in part, the language of Indiana’s three-year statute of limitations does not expressly mention the discovery rule or use the language of the rule, but other sections of Indiana’s UCC use the language of the discovery rule.

¶ 29 Accordingly, in the present case, we believe that we must apply the three-year statute of limitations notwithstanding the plaintiff’s failure to discover the forged endorsement within the time limit. The plaintiff’s claim for conversion accrued when Nalick deposited the check with the forged endorsement, but the plaintiff did not file her claim until over three years after her claim for conversion had accrued. Because the plaintiff’s claim is subject to the three-year statute of limitations provided in section 3-118(g) of the UCC and she has not alleged any fraudulent concealment on the part of the bank, we must hold that her claim is barred by the statute of limitations.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we affirm the circuit court’s summary judgment in favor of the bank.

¶ 32 Affirmed.