

2015 IL App (1st) 142916-U
No. 1-14-2916
September 15, 2015

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

REV. TIMOTHY O'MALLEY,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 10 L 013574
)	
FIRST MIDWEST BANK CORPORATION,)	The Honorable
INC., d/b/a FIRST MIDWEST BANK,)	Margaret Brennan,
)	Judge Presiding.
Defendant-Appellee.)	

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Allegations and evidence of minor improprieties in a power of attorney form submitted to a bank, the bank's lack of a written policy for powers of attorney, and the bank's acceptance of a fiduciary's instructions for handling an account showed at most negligence, and not bad faith by the bank.

¶ 2 Timothy O'Malley filed a complaint against First Midwest Bank Corporation, alleging that First Midwest negligently permitted Timothy's brother, William O'Malley, to spend money from an account held jointly by Timothy and his mother, Eileen O'Malley. The

circuit court dismissed the complaint as untimely. On appeal, we find that Timothy failed to allege facts that could support a finding that the bank acted in bad faith, and in the absence of such allegations and evidence, the circuit court correctly held that the applicable limitations period barred the claim. Therefore, we affirm the circuit court's judgment.

¶ 3

BACKGROUND

¶ 4

Eileen and her husband had eleven children, including Timothy, who became a priest, and William, who managed one of the family's principal assets, the Palos Country Club golf course. Eileen began to suffer from dementia in 1996. Eileen and Timothy opened a joint checking account at First Midwest in 1996. At Eileen's request, First Midwest sent the account statements to Palos Country Club. When Eileen's husband died in 2000, Eileen came to rely primarily on William to take care of her finances.

¶ 5

William and two of his siblings, Thomas and Joan, developed a plan to defraud their eight siblings and Eileen, so that William, Thomas and Joan would control Eileen's assets. William, Thomas and Joan persuaded Eileen to sign documents, including wills, trust agreements and checks, which did not reflect Eileen's wishes. Eileen signed documents gifting Palos Country Club to William.

¶ 6

Timothy did not see the statements from the joint account. The joint account had a balance of almost \$5,000,000 in February 2004. By February 2009, William had succeeded in reducing that balance to less than \$100,000.

¶ 7

Eileen died in February 2009. Timothy then learned of the dissipation of the joint account. He contacted Kathleen O'Connor, who worked for First Midwest, to find out what

happened. In November 2010, Timothy filed a complaint against First Midwest, charging First Midwest with negligently permitting William to make unauthorized withdrawals from the joint account.

¶ 8 First Midwest moved for summary judgment on the complaint, arguing that the applicable statute of limitations barred the suit. See 810 ILCS 5/4-406(f) (West 2008). The parties agreed that the statute barred the suit unless Timothy could show that First Midwest acted in bad faith when it paid the checks written against the account and followed William's instructions for the account. In opposition to the motion, Timothy relied primarily on the deposition of O'Connor.

¶ 9 O'Connor testified in her deposition that when she began working for First Midwest in 2006, her manager and a co-worker told her to follow William's instructions for Eileen's assets, because Eileen had authorized William to conduct business on her behalf. O'Connor checked Eileen's file and found no written authorization for William to conduct Eileen's business. O'Connor followed William's instructions for the account, but she told William to bring in a written power of attorney. On January 25, 2007, William brought to First Midwest a power of attorney form.

¶ 10 Timothy presented the power of attorney form as an exhibit attached to his response to the motion for summary judgment. The form bore a signature for Eileen on the appropriate signature line. A notary certified that Eileen signed the form. The form named William as Eileen's attorney-in-fact, and named as successor agents, in case of William's incapacity, first

Thomas, then Timothy K. O'Malley, both identified as Eileen's sons. Eileen had no son named Timothy K. O'Malley. Her son the priest had the name Timothy J. O'Malley.

¶ 11 The form included the following:

"(YOU MAY, BUT ARE NOT REQUIRED TO, REQUEST YOUR AGENT AND SUCCESSOR AGENTS TO PROVIDE SPECIMEN SIGNATURES BELOW. IF YOU INCLUDE SPECIMEN SIGNATURES IN THIS POWER OF ATTORNEY, YOU MUST COMPLETE THE CERTIFICATION OPPOSITE THE SIGNATURES OF THE AGENTS.)

Specimen signatures of
agent (and successors)

I certify that the signatures
of my agent (and successors) are correct

_Wm S O'Malley /s_____

(agent)

(principal)

_T K O'Malley /s_____

(successor agent)

(principal)

(successor agent)

(principal)"

¶ 12 O'Connor testified in her deposition that she checked to see that a notary had certified Eileen's signature. O'Connor also compared Eileen's signature on the power of attorney to Eileen's signature on the signature card for the joint account. In O'Connor's opinion, the signatures looked similar.

¶ 13 O'Connor admitted that in a single transaction, she transferred \$75,000 out of Eileen's account, following directions William gave over the phone. O'Connor's deposition also included the following testimony:

"Q. *** Is there any written policy or procedure at First Midwest concerning powers of attorney?

A. The only thing would be in whatever our disclosure says.

Q. But there is nothing internal at First Midwest Bank dealing with powers of attorney and how to handle powers of attorney?

A. Not that I have.

Q. You are not aware of any?

A. No.

Q. And just to be clear, you are here today as the designated representative of First Midwest Bank, correct?

A. Correct. Now, if another department has it, I don't know. ***

Q. You are not aware of any written policy or procedure at First Midwest Bank concerning how to handle a power of attorney, correct?

A. Correct.

Q. Did you ever receive any one-on-one-type training concerning powers of attorney and how to handle those?

A. No.

Q. *** [D]id you know Mrs. Eileen O'Malley?

A. I know of her.

Q. Did you ever meet her in person?

A. No, not that I can recall."

¶ 14 The circuit court granted First Midwest's motion for summary judgment and denied Timothy's motion to reconsider the judgment. Timothy now appeals.

¶ 15 ANALYSIS

¶ 16 We review the order granting summary judgment *de novo*. *Gillespie Community Unit School District No. 7 v. Wight & Co.*, 2014 IL 115330 ¶ 27. The circuit court should grant summary judgment only if " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Gillespie*, 2014 IL 115330, ¶ 27, quoting 735 ILCS 5/2-1005(c) (West 2010).

¶ 17 The circuit court dismissed the complaint as untimely. The parties agree that section 4-406 of the Uniform Commercial Code – Bank Deposits and Collections (UCC) governs the time for filing the complaint. Section 4-406 provides:

"(c) If a bank sends *** a statement of account ***, 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.

(e) If *** 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) 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 *** 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 year after the statement or items are made available to the customer *** 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." 810 ILCS 5/4-406 (West 2008).

¶ 18 In *Falk v. Northern Trust Co.*, 327 Ill. App. 3d 101, 108-10 (2001), the court held that the one-year limitations period stated in section 4-406(f) did not apply if the bank acted in bad faith.

¶ 19 "Bad faith" generally implies " 'actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty ***, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.' " *People v. Danielly*, 274 Ill. App. 3d 358, 364 (1995), quoting Black's Law Dictionary 139 (6th ed. 1990). Bad faith by a bank includes cases "where the taker suspects that the fiduciary is acting improperly and deliberately refrains from investigating in order that he may avoid knowledge that the fiduciary is acting improperly." *County of Macon v. Edgcomb*, 274 Ill. App. 3d 432, 436 (1995). "In determining whether a bank has acted in bad faith, courts will consider whether it was commercially unjustifiable for the payee to disregard and refuse to learn readily available facts such that it was bad faith to remain passive." *Time Savers, Inc. v. LaSalle Bank, N.A.*, 371 Ill. App. 3d 759, 768 (2007).

¶ 20 Thus, a plaintiff seeking to avoid the one-year limitation of section 5/4-406(f) must show either (1) the bank acted with actual knowledge that the person who ordered transactions did so in breach of fiduciary duties or without authorization; or (2) the bank knew facts that led the bank to suspect the person ordering transactions breached his fiduciary duties or acted without authorization, but the bank deliberately refrained from investigating to determine whether the person using the account acted in violation of fiduciary duties or without authorization. *Edgcomb*, 274 Ill. App. 3d at 438-40; *National Casualty Co. v. Caswell & Co.*, 317 Ill. App. 66, 72 (1942); *Master Chemical Corp. v. Inkrott*, 563 N.E.2d 26, 27 (Ohio 1990). "Mere suspicious circumstances are not enough to require the bank to inquire. *** [T]here are many legitimate reasons why an agent and principal might engage in odd

checking practices." *Johnson v. Citizens National Bank of Decatur*, 30 Ill. App. 3d 1066, 1072 (1975). "The facts and circumstances must be so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction." *General Insurance Co. of America v. Commerce Bank of St. Charles*, 505 S.W. 2d 454, 458 (Mo. Ct. App. 1974).

¶ 21 Timothy presented no evidence that First Midwest actually knew William used the account in breach of his fiduciary duties or without authorization. He argues that the evidence shows that First Midwest knew facts that led it to suspect that William used the account in breach of his fiduciary duties or acted without authorization, and it deliberately refrained from investigating the possible breach of duty.

¶ 22 First Midwest knew that in 2007 William presented a power of attorney form with the specimen signature section filled out improperly. The form's instructions state that if the person filing the power of attorney form includes specimen signatures for the agent and successor agent, that person "MUST COMPLETE THE CERTIFICATION OPPOSITE THE SIGNATURES OF THE AGENTS." The form William presented included specimen signatures, but no certification. The form indicated that the power of attorney would remain effective if the person filing it did not provide specimen signatures for the agent and successor agent. Due to the impropriety of failing to provide certification, First Midwest personnel should have treated the form as though it included no specimen signatures.

¶ 23 First Midwest also had both the power of attorney form and the forms creating the account Eileen held jointly with Timothy. If First Midwest personnel compared the forms,

they could have noticed that the account made Timothy J. O'Malley a joint owner, while the power of attorney listed Timothy K. O'Malley as a successor agent.

¶ 24 O'Connor testified that in 2006 her superior told her to follow William's instructions for Eileen's account even though First Midwest had no power of attorney form or other written documentation to show that Eileen authorized William to handle her account. O'Connor, who did not remember ever meeting Eileen, followed William's instructions for the account. O'Connor also testified that First Midwest did not train her on handling powers of attorney, and First Midwest did not give O'Connor a written policy concerning how its employees should handle powers of attorney.

¶ 25 The *Edgcomb* court faced a similar question of whether a bank acted in bad faith. The plaintiff in *Edgcomb* alleged that the bank knew the fiduciary used funds of the principal's account for personal purposes, and that the transactions involved large dollar amounts. The *Edgcomb* court held that the complaint did not allege facts that could support a finding that the bank acted in bad faith when it disbursed funds from the account. *Edgcomb*, 274 Ill. App. 3d at 438.

¶ 26 The evidence and allegations here, considered in the light most favorable to Timothy, similarly show at most negligence, and not bad faith. The evidence does not show that First Midwest benefited from William's transactions and therefore deliberately refrained from investigating suspicious transactions. See *Mikrut v. First Bank of Oak Park*, 359 Ill. App. 3d 37, 51 (2005). The minor irregularities in the power of attorney form did not put First Midwest on notice that William had likely breached his fiduciary duties. O'Connor's

testimony that she saw no written policy from First Midwest concerning powers of attorney, and her testimony that she followed William's directions for the account even before he filed a power of attorney form, and when she had not met Eileen, shows at most negligence by First Midwest. No reasonable trier of fact could find that First Midwest acted in bad faith, turning a blind eye to clear evidence of breach of fiduciary duties, when it followed William's instructions for handling Eileen's assets. Accordingly, we affirm the order granting First Midwest's motion for summary judgment.

¶ 27

CONCLUSION

¶ 28

Because Timothy did not allege facts or present evidence that could support a finding that First Midwest acted in bad faith when it followed William's instructions for Eileen's account, the circuit court correctly granted First Midwest's motion for summary judgment on Timothy's complaint. Therefore, we affirm the circuit court's judgment.

¶ 29

Affirmed.