2019 IL App (1st) 181455-U

FOURTH DIVISION
March 21, 2019

No. 1-18-1455

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES Q. WHITAKER and PATHOLOGY INSTITUTE OF MIDDLE GEORGIA, P.C.,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 15 L 2617
WEDBUSH SECURITIES, INC.,	)	Honorable John C. Griffin and Daniel J. Kubasiak, Judges Presiding.
Defendant-Appellee.	)	

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the trial court properly granted summary judgment for a futures commission merchant on its customer's fraudulent concealment claim and ruled in favor of the futures commission merchant on the customer's claim under Article 4A of the Illinois Uniform Commercial Code.

¶ 2 Plaintiffs James Q. Whitaker (Whitaker) and Pathology Institute of Middle Georgia, P.C. (Institute) maintained futures trading accounts with defendant Wedbush Securities, Inc. (Wedbush), a futures commission merchant (FCM). In December 2014, criminals hacked Whitaker's email account and transmitted multiple wire transfer requests directing Wedbush to transfer plaintiffs' funds to foreign bank accounts. Wedbush rejected one request but processed others, resulting in the transfer of approximately $375,000. In a complaint filed in the circuit

court of Cook County, plaintiffs asserted claims against Wedbush pursuant to Article 4A of the Illinois Uniform Commercial Code (UCC), which applies to wire transfers. See 810 ILCS 5/4A-101 *et seq.* (West 2014). Plaintiffs also asserted fraudulent concealment claims based on Wedbush's alleged failure to disclose the unauthorized wire transfer requests. The circuit court granted summary judgment in favor of Wedbush on the fraudulent concealment counts and ruled in favor of Wedbush on the UCC counts following a bench trial. On appeal, plaintiffs challenge these rulings and certain evidentiary rulings during the trial. As discussed herein, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Whitaker, a physician who resides in Georgia, owns and controls Institute. In 1987, Whitaker entered into a customer agreement[1] with Goldenberg, Hehmeyer & Co. (Goldenberg), authorizing Goldenberg to purchase and sell futures contracts in accordance with his instructions. Goldenberg was acquired by Penson Worldwide (Penson) in 2007, and plaintiffs' two futures trading accounts – the Whitaker account and the Institute account – were transferred to Penson. As part of another sale in 2012, the two accounts were transferred to KCG Futures (KCG). When KCG sold its FCM business to Wedbush on December 1, 2014, the accounts were assigned to Wedbush. Plaintiffs did not enter into any new agreement with Wedbush.

¶ 5 Wedbush is registered as an FCM and as a broker-dealer, *i.e.*, a brokerage firm that buys and sells securities. Although a single legal entity, Wedbush has represented that it has separate employees, separate back offices, and separate policies and procedures with respect its broker-dealer business and its FCM business. Plaintiffs interacted solely with the FCM side.

¶ 6 Before December 2014, plaintiffs periodically had directed KCG (and its predecessors) to wire transfer funds to plaintiffs' bank accounts in Georgia. Shortly after KCG's sale of the FCM business, Wedbush received multiple wire transfer requests via email, ostensibly from plaintiffs

[1] The record is unclear as to whether Institute executed a customer agreement.

but actually from foreign criminals who had hacked Whitaker's email account. The first occurred on December 17, 2014, when a Wedbush employee received a request to wire transfer $78,600 to a third party in South Africa from Institute's account. Later that day, a second Wedbush employee who received the same wire transfer request responded via email that the wire transfer would not be processed because it requested the transmission of funds to a third party. Wedbush then received another email minutes later, requesting the transfer of $128,600 from the Institute account to an account purportedly held by Institute at a bank in Poland. The wire transfer was completed the next day. Wedbush subsequently received requests to transfer additional funds from plaintiffs' account to a Polish bank account on December 19 ($124,600 from the Whitaker account), December 22 ($60,880 from the Institute account), and December 29 ($60,880 from the Whitaker account). In each instance, a Wedbush employee sent an email to Whitaker's email address acknowledging receipt of the request and a subsequent email confirming completion of the wire transfer.

¶ 7 Although Whitaker (but not Institute) received daily account statements from Wedbush via email, the wire transfers and the corresponding reductions in the account balance did not appear on the statements. The record suggests that the account statements emailed by Wedbush were intercepted by the hackers and either modified or deleted. Whitaker contacted Wedbush on December 29, 2014, after receiving account statements containing inaccurate information regarding the balance. After repeatedly requesting account information from Wedbush, Whitaker received account statements on January 12, 2015, reflecting the December 2014 transfers. On the next day, plaintiffs demanded return of the transferred funds from Wedbush.

¶ 8 Plaintiffs subsequently filed an action in the circuit court of Cook County against Wedbush. In their four-count amended verified complaint (complaint), each plaintiff asserted

claims based on fraudulent concealment and Article 4A of the UCC. Article 4A addresses how to allocate the risk of loss from unauthorized payment orders. Under Article 4A, if a bank accepts a payment order in good faith that purports to be from its customer and verifies its authenticity by complying with a security procedure agreed to by the bank and the customer, the customer is required to pay the order even if it was not authorized. 810 ILCS 5/4A-202 (West 2014). The bank is entitled to such payment, however, only if the court finds that the security procedure was a commercially reasonable method of providing security against unauthorized payment orders. *Id.* Conversely, if the bank accepts an unauthorized payment without verifying it in compliance with a security procedure, the bank is responsible for the loss. *Id.*

¶ 9 Wedbush filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). Wedbush noted that plaintiffs' funds were not deposited with Wedbush, but were in a segregated account at BMO Harris Bank, N.A. (BMO Harris). When Wedbush received an instruction from plaintiffs to wire money to a specific beneficiary, Wedbush would electronically instruct BMO Harris to wire the money to the bank account identified by plaintiffs. Wedbush argued that the UCC counts should be dismissed because Wedbush – as an FCM registered with the Commodity Futures Trading Commission (CFTC)[2] – is not a "bank," and Article 4A is thus inapplicable. As to the fraudulent concealment counts, Wedbush contended that plaintiffs did not, and could not, allege that Wedbush withheld information with an intent to deceive.

¶ 10 The circuit court denied Wedbush's motion to dismiss without prejudice. As to the UCC claims, the circuit court cited the definition of "bank" in section 4A-105 of the UCC: "a person engaged in the business of banking and includes a savings bank, savings and loan association,

[2] The CFTC is the federal agency charged with the regulation of commodity futures trading. *First American Discount Corp. v. Jacobs*, 324 Ill. App. 3d 997, 1007 (2001).

credit union, and trust company." 810 ILCS 4A-105(a)(2) (West 2014). The circuit court noted that the official comment to section 4A-105 provides that the definition of "bank" includes some institutions that are not commercial banks. 810 ILCS 5/4A-105 (West 2014), Uniform Commercial Code Comment 1 (1991). The official comment further states that the definition reflects the fact that "many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers." *Id.* The circuit court concluded that plaintiffs sufficiently alleged that they had grounds to bring a claim under Article 4A and questions of fact existed as to whether Wedbush was engaged in the business of banking. As to the fraudulent concealment claims, the circuit court determined that questions of fact existed as to whether Wedbush had a duty to disclose to plaintiffs the allegedly unauthorized requests to wire transfer funds, including the rejected request on December 17, 2014, and whether Wedbush intended to deceive plaintiffs.

¶ 11 Wedbush filed a verified answer and affirmative defenses. Wedbush alleged, in part, that by failing to properly secure their email accounts, plaintiffs assumed the risk that a hacker could access their email accounts. Wedbush also filed a motion to reconsider the denial of its motion to dismiss the fraudulent concealment counts.

¶ 12 In its opposition to the motion to reconsider, plaintiffs detailed various ways in which the fraudulent wire transfer requests differed from plaintiffs' prior requests: (a) they were not in round numbers; (b) they did not direct funds to be sent to plaintiffs' bank in Georgia; (c) they were not initiated by a telephone call from Whitaker;[3] (d) they bore a European-style date (*e.g.*, "18/12/2014"); (e) they were sent to a specific individual at Wedbush, rather than to the customer service department; (f) they bore the exact same forged signature (apparently copied

[3] Whitaker has averred that all of his wire transfer requests "were initiated by a telephone call by me to the Trading Desk, which transferred me to the Wire Transfer Desk, and which was followed up by an email request generated by my staff sent to Customer Service to notify them of the wiring instruction."

from a legitimate wire transfer request transmitted to KCG in November 2014); (g) they contained grammatical errors that would be unusual for a physician from the United States; (h) they listed different beneficiaries to receive the transferred funds, but provided for deposit into the same Polish bank account; and (i) the requests regarding the Whitaker account listed the incorrect account number, beginning with "CH1" instead of "CHI." Because the same employees who handled plaintiffs' accounts at KCG were also employed by Wedbush and continue to handle the accounts, plaintiffs asserted that any one of the foregoing "red flags" should have prompted, at a minimum, a telephone call with Whitaker. Plaintiffs also asserted that if Wedbush had timely responded to an inquiry by Whitaker's employee on the morning of December 29, 2014, regarding inaccuracies in the account statements, the transfer of funds later that day could have been stopped.

¶ 13 The circuit court denied the motion to reconsider. After the parties engaged in extensive discovery, Wedbush filed a motion for summary judgment on the fraudulent concealment counts of the complaint (counts II and IV). Wedbush again asserted that it had sent plaintiffs all of the information they claimed was fraudulently concealed and that plaintiffs' failure or inability to receive the information occurred as a result of its failure to secure its own email account or server. Wedbush also argued that it did not have any intent to deceive plaintiffs and did not have any duty to speak. According to Wedbush, a CFTC regulation requires an FCM such as Wedbush to issue a daily confirmation statement or monthly statements to reflect the customer funds carried or deposited with the FCM. See 17 C.F.R. § 1.33 (2012). Wedbush asserted that there was no other common law, statutory, or regulatory duty that required Wedbush to inform plaintiffs of the wire transfers. Although Wedbush argued that it had no duty to "pick up the phone," it also asserted that it did, in fact, "speak" every time it confirmed receipt of a wire

transfer request or notified Whitaker that a wire transfer was processed by emailing him at the address he supplied.

¶ 14 Wedbush's support for its motion for summary judgment included an affidavit from Greg Hostetler (Hostetler), the chief compliance officer for Wedbush at the time of the events in question. He averred, in part, that none of Wedbush's systems, computers, or servers were breached or compromised. He also stated that Wedbush did not have an agreement with plaintiffs requiring Wedbush to notify or advise them by telephone regarding the wire transfer requests. According to Hostetler, Wedbush had no knowledge of the hacking before January 13, 2015. Wedbush also attached deposition testimony from Whitaker, wherein he acknowledged that he had probably not changed his passwords in the months leading up to the hacking.

¶ 15 The circuit court entered an order on February 22, 2017, granting summary judgment in favor of Wedbush on the fraudulent concealment counts and dismissing the counts with prejudice. The circuit court subsequently denied two motions regarding the UCC claims: plaintiffs' motion for summary judgment and Wedbush's motion to dismiss pursuant to section 2-619 of the Code. The case proceeded to a multi-day bench trial.[4]

¶ 16 Whitaker testified, in part, that that the originating IP address[5] for the fraudulent requests was in Johannesburg, South Africa. In late January 2015 – after the fraudulent transactions – Wedbush offered Whitaker access to account statements through a password-protected portal.

¶ 17 Stacy Kipp (Kipp), an Institute employee, testified regarding the usual procedures for effectuating transactions as authorized by Whitaker. She noted that her coworkers shared a password list, and the passwords were changed infrequently. Kipp described an instance in late

[4] Judge John C. Griffin had ruled on the summary judgment motion regarding the fraudulent concealment counts; Judge Daniel J. Kubasiak presided over the subsequent trial regarding the UCC claims.

[5] "IP stands for Internet Protocol. An IP address is a series of numbers that identifies a computer or other device on a network." *Choice Escrow and Land Title, LLC v. BancorpSouth Bank*, 754 F.3d 611, 614 n.1 (8th Cir. 2014)

December 2014 when an email disappeared from her computer screen while she was viewing it, as if someone with remote access had deleted it. Kipp testified that plaintiffs' information technology consultants discovered the hacking in January 2015.

¶ 18 The witnesses also included multiple current and former Wedbush employees, most of whom had also worked for KCG and Penson. The employees described the process for handling wire transfer requests. The customer service department would receive the request from the customer; the department typically processed 15 to 20 wire transfer requests per day, including transfers to foreign accounts. The customer service employees would verify that the name on the account, the account number and the email address matched the information Wedbush had on file. According to multiple employees, the wire transfer requests emailed by customers often included errors. None of the employees testified that they were aware of any rule or policy that required them to telephone the customer or to compare the customer's current request to their prior requests. Wedbush's risk department would then verify that adequate funds were available, and the accounting department would process the transfer.

¶ 19 Hostetler was questioned regarding a CFTC regulation (17 C.F.R. § 1.33(g)(2) (2012)), which required the FCM to obtain the customer's signed consent acknowledging the disclosure of the information set forth in the rule regarding the means of electronic transmission of account statements. He did not recall viewing a signed consent for either plaintiff. Hostetler also did not know whether Whitaker had actually been notified regarding the availability of the online portal prior to the fraudulent transactions.

¶ 20 Megan Kells (Kells), the vice president of international operations at BMO Financial Group in December 2014, testified that Wedbush was BMO Harris's client; BMO Harris held Wedbush's customer segregated funds. Kells indicated that Wedbush utilized the BMO Harris

online business banking portal to transact for wire payments. Although Wedbush was listed as an "OGB" – meaning an "originator bank" – on the BMO Harris system, she described "OGB" as a system-generated internal descriptor utilized by BMO Harris for its financial institution group, or "FIG," clients. According to Kells, BMO Harris defined clients by sector, and the FIG sector would include other banks, as well as FCMs, broker-dealers, and other institutional clients. Kells testified that BMO Harris did not believe that Wedbush was acting or transacting as a bank.

¶ 21 George Thomas (Thomas), an expert who was retained by plaintiffs, testified regarding Wedbush's security procedures with respect to emailed communications from customers. Thomas opined that Wedbush should have had multifactor authentication, *i.e.*, a security system which requires more than one method of authentication to verify the sender's identity. According to Thomas, Wedbush had "no factor authentication," which was not the industry practice. Although he also testified that most financial institutions utilized technology to identify the IP address of an originator, Thomas acknowledged that there were no rules or regulations which required an FCM to use such tool as a fraud detection or prevention advice.

¶ 22 Over Wedbush's objection, Thomas further testified that Wedbush performed many banking functions, including: initiating wire transfers; maintaining customer accounts; following banking regulations regarding anti-money laundering; rendering trading statements; performing customer due diligence because of the risk associated with margin accounts; and complying with the Bank Secrecy Act. Wedbush argued, in part, that neither plaintiffs' disclosures regarding Thomas's testimony pursuant to Illinois Supreme Court Rule 213 (eff. Jan. 1, 2018) nor Thomas's written report referenced or offered an opinion regarding Wedbush acting as a bank.

¶ 23 On cross-examination, Thomas acknowledged that he had never worked at an FCM and

his experience was exclusively in banking. He also testified that Wedbush was not registered as a bank. Thomas confirmed that there was no requirement that Wedbush telephone Whitaker to inform him that it rejected a funds transfer request, although Thomas maintained that "common sense" and industry practice would dictate otherwise.

¶ 24 After the circuit court denied Wedbush's motion for a directed finding, Elizabeth James (James) testified as an expert for Wedbush. She testified regarding her experience in the FCM industry and opined that Wedbush's policies and procedures were reasonable for a firm of its complexity and size. She questioned Thomas's reference to "industry standards," noting the futures industry and the banking industry are "very different." According to James, Wedbush was not a bank or "acting as a bank."

¶ 25 Over plaintiffs' objection, Wedbush called Carl Gilmore (Gilmore) – an attorney and former employee of Goldenberg, Penson, KCG, and Wedbush – as a rebuttal witness. Gilmore was questioned regarding Thomas's characterization of Wedbush's activities as "banking" activities. According to Gilmore, wire transfers were a "back office process" performed for the convenience of an FCM's client. He testified that Wedbush solely facilitated the trading of futures. According to Gilmore, FCMs do not extend credit to customers. Gilmore also testified that anti-money laundering procedures and the rendering of account statements were CFTC requirements and did not constitute a banking activity. When asked about FCMs conducting due diligence on their customers, Gilmore testified that many different institutions which are not banks are subject to the provisions of the Bank Secrecy Act.

¶ 26 After the bench trial, the circuit court entered an opinion and order on June 14, 2018, granting judgment in favor of Wedbush on the UCC counts of the complaint (counts I and III) and denying Wedbush's request for fees and costs. The circuit court stated that it could not

conclude that Wedbush's actions rose to the level of direct involvement necessary to constitute a "bank" for purposes of Article 4A of the UCC. Because Wedbush did not meet the definition of a "bank," the circuit court indicated that there was no reason to proceed to whether its actions were commercially reasonable. Plaintiff timely filed the instant appeal.

¶ 27 II. ANALYSIS

¶ 28 Plaintiffs advance multiple arguments on appeal. As to their fraudulent concealment claims, they contend that the trial court incorrectly granted summary judgment in favor of Wedbush. Plaintiffs further contend that the trial court erred with respect to multiple evidentiary rulings and the ultimate judgment in favor of Wedbush on the UCC claims. We address each argument below.

¶ 29 A. Fraudulent Concealment Counts

¶ 30 The trial court granted Wedbush's motion for summary judgment as to the fraudulent concealment claims. Pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2016)), summary judgment should be granted only where the pleadings, admissions, depositions, and affidavits on file, when viewed in the light most favorable to the nonmovant, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Thounsavath v. State Farm Mutual Automobile Insurance Co.*, 2018 IL 122558, ¶ 15. We review the grant of summary judgment *de novo*. *Id.* ¶ 16. We may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the circuit court relied on that ground. *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 34.

¶ 31 To state a claim for fraudulent concealment, a plaintiff must allege the following elements: (1) the defendant concealed a material fact under circumstances that created a duty to speak; (2) the defendant intended to induce a false belief; (3) the plaintiff could not have

discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and justifiably relied upon the defendant's silence as a representation that the fact did not exist; (4) the concealed information was such that the plaintiff would have acted differently if he had been aware of it; and (5) the plaintiff's reliance resulted in damages. *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶ 27. There is a high standard of specificity required for pleading fraud claims (*Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1085 (1998)), and a plaintiff must prove fraudulent concealment by clear and convincing evidence. *Benson v. Stafford*, 407 Ill. App. 3d 902, 918 (2010).

¶ 32 In their complaint, plaintiffs alleged that Wedbush had a duty to the plaintiffs to disclose the fraudulent wire transfer requests, and, if such disclosures had been made, plaintiffs would have informed Wedbush that the wire transfers should not have been completed. Wedbush asserted in its motion for summary judgment that it owed no duty to disclose, and, even if such duty was owed, Wedbush satisfied the duty by emailing plaintiffs at the address they provided.

¶ 33 On appeal, Wedbush instead relies on plaintiffs' admission in a response to a statement of uncontested facts, *i.e.*, that Wedbush did not know until January 2015 that Whitaker's email account had been hacked. Wedbush thus asserts that it is "inconceivable" for plaintiffs to suggest that Wedbush fraudulently concealed the hacker's activities in December 2014. Although Illinois courts have observed that a party cannot conceal information that it does not know (*Abazari*, 2015 IL App (2d) 140952, ¶ 28), we view Wedbush's contention as an oversimplification of the issue. The allegations of the complaint were *not* that Wedbush knew of the hacking at the time of the wire transfers, but rather that it failed to disclose the wire transfer requests to plaintiffs. For the reasons discussed below, we conclude that the circuit court properly granted summary judgment in Wedbush's favor.

¶ 34 Plaintiffs assert that Wedbush owed a "duty to speak." A duty to disclose a material fact may arise out of several situations. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500 (1996). First, if a plaintiff and a defendant are in a confidential or fiduciary relationship, then the defendant owes a duty to disclose all material facts. *Id.* "Such a relationship exists as a matter of law between: attorneys and clients; principals and agents; guardians and wards; and members of a partnership or joint venture." *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 59. Second, a duty to disclose material facts may arise out of a situation where the plaintiff places confidence and trust in the defendant, thus placing the defendant in a position of superiority and influence over the plaintiffs. *Connick*, 174 Ill. 2d at 500. Such position of authority may arise by reason of friendship, agency, or experience. *Id.* "Where a fiduciary or confidential relationship does not exist as a matter of law, 'facts from which a fiduciary relationship arises must be pleaded and proved by clear and convincing evidence.' " *D'Attomo*, 2015 IL App (2d) 140865, ¶ 58, citing *Magna Bank of Madison Co. v. Jameson*, 237 Ill. App. 3d 614, 618 (1992).

¶ 35 In its arguments regarding the UCC claims, Wedbush contends that its agency relationship with plaintiffs was not a fiduciary relationship, given the non-discretionary nature of plaintiffs' trading accounts. An agency relationship, however, presumably would give rise to a duty to disclose material facts. *E.g., D'Attomo*, 2015 IL App (2d) 140865, ¶ 58. Assuming *arguendo* such duty existed, however, the record indicates that Wedbush did not "conceal" information.

¶ 36 To state a claim for fraudulent concealment, a plaintiff must allege that the defendant *concealed a material fact* when he or she was under a duty to the plaintiffs to disclose that fact. *Connick*, 174 Ill. 2d at 500. "Mere silence in a transaction does not amount to fraud." *Hirsch*, 299 Ill. App. 3d at 1086. Accord *Henderson Square Condominium Ass'n v. LAB Townhomes,*

L.L.C., 2014 IL App (1st) 130764, ¶ 99. Silence accompanied by deceptive conduct or suppression of material facts, however, may give rise to concealment, and the party who has concealed the information has a duty to speak. *Id.*; *Hirsch*, 299 Ill. App. 3d at 1086.

¶ 37 In the instant case, Wedbush employees sent emails to Whitaker's email account confirming the receipt, processing, and rejection/completion of the wire transfer requests. Wedbush was neither silent nor engaged in the concealment or suppression of information. Plaintiffs also contend that "Wedbush's active concealment by ignoring several emails and telephone calls from Plaintiffs specifically mentioning that account statements were missing or were unusual looking, triggered Wedbush's duty to speak further." Plaintiffs fail to include any citation to the record for this proposition, in violation of Illinois Supreme Court Rule 341. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). In any event, Wedbush's alleged lack of timeliness in responding to the inquiries of plaintiffs' employees on and after December 29, 2014, did not affect the challenged wire transfer requests which had already been completed. Finally, plaintiffs point to the absence of a signed consent by plaintiffs with respect to the electronic transmission of account statements to non-institutional customers (see 17 C.F.R. § 1.33(g) (2012)). Notwithstanding any potential noncompliance with such CFTC regulation, Wedbush electronically transmitted the account statements and other information regarding the transfers to the email address provided by plaintiffs, as had been the practice in the preceding years. Plaintiffs provided no evidence that a telephone call from Wedbush was required.

¶ 38 Plaintiffs also contend that their request for punitive damages "provided an additional issue of material fact" and another reason why summary judgment in favor of Wedbush should not have been granted. None of the cases cited by plaintiffs, however, support the proposition that a request for punitive damages with respect to a fraudulent concealment claim precludes the

entry of summary judgment in favor of the defendant. *E.g.*, *Cirrincione v. Johnson*, 184 Ill. 2d 109, 116 (1998) (holding that the decision of the jury to award punitive damages to the plaintiff based on the defendant's willful and wanton behavior was not again the manifest weight of the evidence). In any event, because we find no genuine issue of material fact regarding the "concealment" element of plaintiffs' claims (*Abazari*, 2015 IL App (2d) 140952, ¶ 27), we need not address this contention.

¶ 39 For the reasons discussed above, we affirm the grant of summary judgment in favor of Wedbush on the fraudulent concealment counts (counts II and IV) of the complaint.

¶ 40 B. UCC Counts

¶ 41 The trial court conducted a bench trial with respect to the UCC counts (counts I and III) of the complaint. On appeal, plaintiffs challenge various evidentiary rulings during the trial, as well as the ultimate judgment in favor of Wedbush. We address these arguments in turn.

¶ 42 1. Evidentiary Rulings

¶ 43 Plaintiffs argue on appeal that the trial court erred in multiple evidentiary rulings. As discussed further below, the admission of evidence is within the sound discretion of a trial court and a reviewing court will not reverse the trial court unless that discretion was clearly abused. *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003). "The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court." *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 29.

¶ 44 Plaintiffs initially contend that the circuit court erred in denying the admission of the following exhibits: (a) printouts of pages referencing banking services, purportedly printed from the Wedbush website on November 24, 2015 (Exhibit 11), although Whitaker testified that he

viewed the website in November 2014;[6] (b) printouts of geo-location searches attached to printouts of the alleged fraudulent emails, reflecting the sender's location in South Africa (Exhibits 34 and 35); and (c) a printout of pages from a website referencing "SWIFT Codes" used to identify banks globally, purportedly printed on June 29, 2016 (Exhibit 90). Among other things, the parties disagree regarding whether there was proper authentication with respect to these exhibits.

¶ 45 "A party provides the foundation for admitting a document by identifying and authenticating it." *In re Marriage of LaRocque*, 2018 IL App (2d) 160973, ¶ 76. Illinois Rule of Evidence 901(a) provides that the requirements of identification and authentication are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *Id.;* Ill. R. Evid. 901(a) (eff. Jan. 1, 2011). Illinois courts may look to federal cases for guidance when interpreting the rules of evidence. *Lamorak Insurance Co. v. Kone, Inc.*, 2018 IL App (1st) 163398, ¶ 76.

¶ 46 Courts have found that private websites are not self-authenticating. *E.g.*, *Bibolotti v. American Home Mortgage Servicing, Inc.*, 2013 WL 2147949, at *3 (E.D. Tex. May 15, 2013). See also *Specht v. Google Inc.*, 758 F. Supp. 2d 570, 582 (N.D. Ill. 2010), *aff'd* 747 F.3d 929 (7th Cir. 2014) (noting that a printed newspaper or periodical is unlikely to be a forgery because of the "high magnitude of work and expense involved in printing a serial newspaper or magazine" whereas a printout from a website "can be easily manipulated" and "lacks the same degree of authenticity as its printed counterpart"). Proper authentication may be made with the statement or testimony of a witness with knowledge of the website, *e.g.*, a webmaster or someone else with personal knowledge. *Fraserside IP, L.L.C. v. Youngtek Solutions, Ltd.*, 2013

[6] The trial court stated, "Exhibit 11 is not going to be admitted into evidence. There's already been a stipulation as to Wedbush being subject to FINRA [Financial Industry Regulatory Authority] regulations."

WL 139510, at *14 (N.D. Iowa Jan. 10, 2013); *Bibolotti*, 2013 WL 2147949 at *3. In the instant case, no such testimony or similar verification of authenticity from a knowledgeable person was provided. Based on the foregoing, we conclude that the trial court did not abuse its discretion in denying the admission of Exhibits 11, 34, 35, and 90.

¶ 47 Plaintiffs next contend that the trial court erred in denying the admission of three exhibits containing flowcharts purportedly illustrating the steps of a typical wire transfer vis-à-vis Goldenberg, Penson, and KCG, as well as flowcharts purportedly illustrating the fraudulent transfers that are the subject of the claims against Wedbush (Exhibits 8, 36, and 62). Plaintiffs also assert that a chart containing a summary of their purported damages (Exhibit 48) should have been admitted.

¶ 48 The flowcharts and damages chart constitute demonstrative evidence, *i.e.*, evidence that "has no probative value in and of itself and is merely admitted or used as a visual aid to the trier of fact." *Sharbono*, 2014 IL App (3d) 120597, ¶ 30. A trial court's ruling on the admissibility of demonstrative evidence will not be reversed absent an abuse of discretion. *Id.* ¶ 29.

¶ 49 As to the flowcharts, neither Whitaker nor his expert Thomas provided proper authentication, and we cannot otherwise conclude that the court abused its discretion in denying their admission. Furthermore, in light of our decision to affirm the trial court's rulings in favor of Wedbush, we need not consider plaintiffs' contentions regarding the trial court's decision to not admit an exhibit containing a summary of plaintiffs' purported damages.

¶ 50 Plaintiffs further assert that the trial court erred in barring the admission of the English translation of a Polish court judgment (Exhibit 44) and a printout from the website of the Polish bank where plaintiffs' funds were transferred (Exhibit 105). In the absence of a certified translation, we cannot conclude that the trial court abused its discretion in excluding the Polish

court judgment. See, *e.g.*, *Valdivia v. Chicago & Northwestern Transportation Co.*, 87 Ill. App. 3d 1123, 1127 (1980) (requiring a certified translation of the plaintiff's affidavit from Spanish to English); *Kreda v. Kreda*, 255 Ill. App. 462, 463 (1930) (concluding that the circuit court erroneously admitted a purported Russian divorce decree without an oath or affirmation that the translation was correct). While Wedbush argues that the same rationale applies to the printed pages from the Polish bank's website, plaintiffs contend that the English language pages were on the website, *i.e.*, no translation was performed. Assuming plaintiffs' representations are accurate, however, such document was nevertheless not properly authenticated, *e.g.*, with the statement or testimony of a webmaster or someone else with personal knowledge of the website. *Fraserside IP, L.L.C*, 2013 WL 139510, at *14.

¶ 51 Finally, plaintiffs assert that Carl Gilmore should not have been allowed to testify because he was not disclosed as a rebuttal witness until shortly before the trial. According to plaintiffs, Gilmore should not have been permitted to testify given Wedbush's failure to comply with the disclosure requirements of Illinois Supreme Court Rule 213 (eff. Jan. 1, 2018).

¶ 52 The admission of evidence pursuant to Rule 213 is within the sound discretion of the trial court, and the trial court's ruling will not be disturbed absent an abuse of that discretion. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004). See also *Snelson*, 204 Ill. 2d at 24 (noting that the decision of whether to admit expert testimony is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion). Rule 213 states that, upon written interrogatory, a party must disclose the subject matter, qualifications, opinions, conclusions, and all reports of a witness who will offer opinion testimony. *Warrender v. Millsop*, 304 Ill. App. 3d 260, 265 (1999); Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2018). Rule 213(g) provides that an answer to a Rule 213(f) interrogatory limits the testimony that can be given by a

witness on direct examination. *Id.*

¶ 53 Although plaintiffs contend that Wedbush failed to comply with Rule 213 by failing to make timely disclosures with respect to Gilmore, plaintiffs seemingly ignore the deficiencies of their own disclosures. For example, the scope of the testimony of plaintiffs' expert witness, Thomas, exceeded the scope of Thomas' expert report. Specifically, Thomas did not opine in the report regarding the issue of whether Wedbush is a bank. Rather than barring Thomas's testimony, the trial court allowed Wedbush to call Gilmore as a rebuttal witness. See *In re Marriage of Liszka*, 2016 IL App (3d) 150238, ¶ 33 (providing that "barring a witness's testimony is a drastic sanction and should be exercised with caution").

¶ 54 "Rebuttal evidence is evidence which tends to explain, repel, contradict, counteract or disprove facts already placed in evidence by an adverse party." *Hall v. Northwestern University Medical Clinics*, 152 Ill. App. 3d 716, 721 (1987). The decision to allow the introduction of rebuttal testimony is charged to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Id.* Under the circumstances herein, we cannot conclude that the trial court abused its discretion in allowing Gilmore to narrowly testify as a rebuttal witness regarding whether Wedbush is a bank. Such decision was consistent with the purpose of the discovery rules: "to avoid surprise and to discourage tactical gamesmanship." *Schuler v. Mid-Central Cardiology*, 313 Ill. App. 3d 326, 331 (2000).

¶ 55 Judgment After Trial

¶ 56 Plaintiffs contend that the trial court's judgment in favor of Wedbush following the bench trial was erroneous. Because we agree with the trial court that plaintiffs did not prove by a preponderance of the evidence that Wedbush was a "bank" for purposes of Article 4A of the UCC, we affirm the judgment.

¶ 57 As a threshold matter, the parties disagree regarding the applicable standard of review. Plaintiffs contend that the appeal involves conclusions of law, which should be reviewed *de novo*. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). See also *Prinova Solutions, LLC v. Process Technology Corporation Ltd.*, 2018 IL App (2d) 170666, ¶ 11 (noting that the construction of a statute is a question of law which we review *de novo*). Wedbush contends that we should apply a manifest weight of the evidence standard of review. "In a bench trial, the trial court must weigh the evidence and make findings of fact." *Eychaner*, 202 Ill. 2d at 251. "In close cases, where findings of fact depend on the credibility of witnesses, it is particularly true that the reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence." *Id.* A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be arbitrary, unreasonable, or not based on the evidence. *Id.* at 252.

¶ 58 While we acknowledge that the trial judge was in a superior position to judge the credibility of the witnesses and to determine the weight to be given to their testimony (*id.* at 270-71), we view the key issues herein as primarily *legal* issues, *i.e.*, what constitutes a "bank" for purposes of Article 4A and whether Wedbush met that definition. Except as otherwise noted, our review is *de novo*.

¶ 59 "Article 4A was drafted in 1989 to account for a dramatic increase in wire transfers between financial institutions and other commercial entities, commonly called wholesale wire transfers to differentiate them from wire transfers by consumers, which are governed by a separate federal statute." *Choice Escrow and Land Title*, 754 F.3d at 616. While Article 4A applies to funds transfers (810 ILCS 5/4A-102 (West 2014)), payments by check are covered in Articles 3 and 4 of the UCC.

¶ 60 Article 4A sets forth a detailed scheme concerning a bank's rights and responsibilities when presented with an electronic payment order. *Envision Healthcare, Inc. v. Federal Deposit Insurance Corp.*, 2014 WL 6819991, at *7 (N.D. Ill. Dec. 3, 2014). As noted above, the term "bank" is defined in Article 4A, in pertinent part, as a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. 810 ILCS 5/4A-105(a)(2) (West 2014). The official comment to section 4A-105 provides that the definition of "bank" in subsection (a)(2) includes some institutions that are not commercial banks, which "reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers." 810 ILCS 5/4A-105 (West 2014), Uniform Commercial Code Comment 1 (1991). A "receiving bank" is defined as the bank to which the sender's instruction is addressed. 810 ILCS 5/4A-103(a)(4) (West 2014).

¶ 61 Sections 4A-202 addresses how the risk of loss from an unauthorized payment order is to be allocated. 810 ILCS 5/4A-202 (West 2014). If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the customer's name as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the customer's order, whether or not authorized, if (a) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (b) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer. *Id*. A "security procedure" generally is a procedure established by the agreement of the customer and the bank for the purpose of (a) verifying that a payment order is that of the customer or (b) detecting error in the transmission or content of the payment order or communication. 810 ILCS 5/4A-201

(West 2014). While a security procedure may require the use of algorithms, encryption, callback procedures, or similar security devices, Article 4A provides that a comparison of the signatures on a payment order or communication with an authorized specimen signature is not by itself a security procedure. *Id.*

¶ 62 Section 4A-202 further provides that the commercial reasonableness of a security procedure is a question of law to determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, and security procedures in general use by customers and receiving banks similarly situated. 810 ILCS 5/4A-202 (West 2014).

¶ 63 Section 4A-204 provides remedies for when the bank accepts a payment order that is unauthorized or unenforceable. *Envision Healthcare*, 2014 WL 6819991, at *7. If a receiving bank accepts a payment order issued in the name of the customer as sender which is not authorized and not effective as to the order of the customer pursuant to section 4A-202, the bank is generally required to refund the payment plus interest. 810 ILCS 5/4A-204 (West 2014).

¶ 64 Based on the foregoing, the threshold issue is whether Wedbush was a "bank," *i.e.*, "a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company." 810 ILCS 5/4A-105(a)(2) (West 2014). The parties agree that Wedbush was not any of the enumerated examples, *e.g.*, a savings bank. The question is thus whether Wedbush was "engaged in the business of banking."

¶ 65 Article 4A of the UCC does not define the "business of banking," and most of the cases addressing Article 4A involve traditional banks which are unequivocally within the scope of the section 4A-105 definition. The parties have not cited any Illinois cases directly addressing the

definition of a "bank," and we thus examine cases from other jurisdictions. *Patrick v. Wix Auto Co.*, 288 Ill. App. 3d 846, 850 (1997) (noting that "[w]hen there is a lack of Illinois cases interpreting the Illinois Commercial Code, this court has looked to the Uniform Commercial Code decisions in other jurisdictions").

¶ 66 In a number of cases from other jurisdictions, Merrill Lynch – a brokerage firm – has argued that it is a "bank" so as to invoke Article 4A's one-year statute of repose as a defense. *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 n.3 (2d Cir. 2010); *Gold v. Merrill Lynch & Co.*, 2009 WL 2132698, at *3 (D. Ariz. July 14, 2009). These cases, however, provide minimal analysis in support of the court's conclusion regarding Merrill Lynch's status as a "bank." *E.g.*, *Ma*, 597 F.3d at 88 n.3 (stating in a conclusory fashion that the Article 4A definition of bank encompasses Merrill Lynch). Relying on these cases and the official comment to section 4A-105, plaintiffs contend that Wedbush operates as a bank because it processes wire transfers. If the processing of wire transfers was sufficient in and of itself to place a financial institution within the parameters of Article 4A, however, the definition of "bank" would not be necessary. See *In re D.M.*, 2016 IL App (1st) 152608, ¶ 28 (providing that a court may not construe a statute in a manner that would render a provision of the statute meaningless).

¶ 67 Wedbush relies upon cases addressing the definition of "bank" in Articles 3 and 4 of the UCC, which is substantially similar to the Article 4A definition. 810 ILCS 5/3-103 (West 2014); 810 ILCS 5/4-105 (West 2014). Although we recognize that the focus of Articles 3 and 4 is different from Article 4A – generally checks versus wire transfers – we reject plaintiffs' unsupported contention that the cases interpreting the definition of bank in Articles 3 and 4 are irrelevant to our analysis.

¶ 68 In cases under Articles 3 and 4 of the UCC, courts have concluded that a key factor in the

determination that an entity is a "bank" is whether it offers checking services. *E.g.*, *Borchers v. Vanguard Group, Inc.*, 2011 WL 2690424, at *1 (D. Ariz. July 11, 2011) (finding that a mutual fund company was a bank because the check-writing service it provided for its customer "functioned as a traditional bank checking account that provided checks, honored drafts, and mailed out account statements"); *Nisenzon v. Morgan Stanley DW, Inc.*, 546 F. Supp. 2d 213, 224 (E.D. Pa. 2008) (noting that brokerage firms offering checking services are considered banks for the purposes of the UCC); *Edward D. Jones & Co. v. Mishler*, 161 Or. App. 544, 559 (1999) (stating that "[b]y offering defendant a checking account, and by participating in the bank collection process related to the checks that plaintiff had provided and that bore its name," the plaintiff had engaged in banking activities); *Woods v. MONY Legacy Life Insurance Co.*, 84 N.Y.2d 280, 285 (1994) (concluding that the defendant insurance company was a bank for UCC purposes; noting that "there is no reason to treat the account at issue differently from a checking account administered at a bank"); *Asian Int'l, Ltd. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 435 So.2d 1058, 1062 (La. Ct. App. 1983) (stating that where an investment brokerage firm provided its customers with a general securities and a checking account, "much like that provided by a depositary bank," the relationship between the brokerage and the customer "is analogous to that of a bank and its customer").

¶ 69 During oral arguments, plaintiffs' counsel directed this Court to the official comments of multiple UCC provisions. *E.g.*, 810 ILCS 5/4A-203 (West 2014), Uniform Commercial Code Comments (1991). We may examine the pertinent UCC comments to discern the legislature's intent (*Milledgeville Community Credit Union v. Corn*, 307 Ill. App. 3d 8, 13 (1999)), and we recognize that certain comments discuss the respective liabilities of banks and their customers in various "hacking" scenarios. The comments do not squarely address, however, the core issue in

this appeal, *i.e.*, what exactly constitutes the "business of banking."

¶ 70 After reviewing the appellate record, the language of the UCC and the official comments, and the case law interpreting Article 3, 4, and 4A, we cannot conclude that Wedbush was engaged in the business of banking. Based on the admissible evidence, there is no indication that Wedbush offered checking services to its FCM customers like plaintiffs. Although plaintiffs contend without citation to the record – in violation of Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018) – that "Wedbush offered deposit accounts and loan services in connection with the margin trading accounts used by customers such as Plaintiffs," the admissible evidence does not appear to support this statement. While plaintiffs also assert – without citation to the record – that "Wedbush wrote checks out of Plaintiffs' accounts monthly as shown on their account statements showing debits for payment to a storage company holding silver and for payment of sales tax on such storage," plaintiffs do not elucidate how such activity would constitute the "business of banking." Plaintiffs further contend that Wedbush's compliance with federal banking law regarding anti-money laundering means that it was engaged in the business of banking. The cases addressing the business of banking do not suggest, however, that such compliance is a relevant factor. Finally, to the extent that the trial court weighed the conflicting testimony from plaintiffs' expert (Thomas) and Wedbush's rebuttal expert (Gilmore) regarding, among other things, the import of Wedbush's adherence to federal anti-money laundering statutes or regulations, we conclude that its findings were not against the manifest weight of the evidence. *Eychaner*, 202 Ill. 2d at 251.

¶ 71 Given our conclusion that Wedbush was not a "bank" for purposes of Article 4A of the UCC, we need not consider whether a commercially reasonable security procedure was in place. We affirm the trial court's judgment in favor of Wedbush on plaintiffs' UCC claims.

¶ 72 III. CONCLUSION

¶ 73 For the reasons discussed herein, the judgment of the circuit court is affirmed in its entirety.

¶ 74 Affirmed.