SIXTH DIVISION
January 15, 2016

No. 1-15-1817

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LESLIE JOHNSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 L 13315
	)	
M.B. FINANCIAL BANK, N.A.,	)	
	)	
Defendant-Appellee	)	
	)	
(Jordan Margolis and The Margolis Law Firm, P.C.,	)	Honorable
	)	John H. Ehrlich,
Defendants).	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the grant of summary judgment in favor of defendant, and entered summary judgment in favor of plaintiff, on plaintiff's conversion count, finding no genuine issues of material fact and that plaintiff was entitled to judgment as a matter of law.

¶ 2 In this Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)), appeal, plaintiff Leslie Johnson appeals the circuit court's order granting summary judgment in favor of defendant, M.B. Financial Bank, N.A., and denying plaintiff's cross-motion for summary judgment, on two counts of plaintiff's first amended complaint alleging conversion (count I) and negligence (count IV). We reverse the grant of summary judgment for defendant and enter summary judgment for

plaintiff on count I in the amount of $277,407.40; we affirm the grant of summary judgment in favor of defendant as to count IV.

¶ 3 In May 2005, plaintiff retained Jordan Margolis and his firm, the Margolis Law Firm, to represent him in connection with a workers' compensation claim. In the second or third week of May 2012, one of the attorneys at the Margolis Law Firm, Mr. Candiano, told plaintiff he was hoping to settle the case, with plaintiff receiving about $318,000 after the firm's attorneys fees were paid. Mr. Candiano asked plaintiff to sign a power of attorney giving him the authority to settle the case. Plaintiff was reluctant to sign a power of attorney, but Mr. Candiano told him that by doing so, any settlement monies would be paid into the firm's client trust fund account and remitted to plaintiff once all attorneys fees had been paid. Plaintiff agreed to sign the power of attorney. On May 19, 2012, the Margolis Law Firm settled the workers' compensation case for $375,000, but they did not notify plaintiff of the settlement. On May 31, 2012, plaintiff signed a power of attorney granting the Margolis Law Firm: the power to settle the workers' compensation case; the power to sign any documents necessary to settle the case; the power to release any responsible parties; and the power to sign the settlement check, settlement contract, or release and to pay all fees, costs, liens, and outstanding bills related to the case. The power of attorney was neither witnessed nor notarized.

¶ 4 In June 2012, the Margolis Law Firm received the $375,000 settlement check. The check was made payable to "The Margolis Law Firm and Les Johnson." Unbeknownst to plaintiff, the law firm's office manager endorsed the back of the check for the law firm, signed plaintiff's name to the back of the check, and the check was deposited into the law firm's general-operating account at the defendant bank. Plaintiff was not a customer of the bank. In accepting the

deposit, defendant never attempted to verify plaintiff's signature nor did it ask to see the power of attorney.

¶ 5 Later, in June 2012, plaintiff received a phone call from Jim Eusau of the Attorney Registration and Disciplinary Committee (ARDC), which was investigating complaints made against the Margolis Law Firm by several other clients. Mr. Eusau told plaintiff that his workers' compensation claim had been settled, which was the first time plaintiff had learned of the settlement.

¶ 6 Plaintiff subsequently spoke with Jordan Margolis in January 2013, and Mr. Margolis told plaintiff he was under investigation by the ARDC, that the client trust fund account was being audited, and that he could not then disburse any funds from that account. Mr. Margolis stated he had to open up a "new account with fresh funds" in order to pay plaintiff his settlement monies, and that plaintiff would receive all the settlement monies by March 2013. By August 2013, plaintiff had received approximately $97,600 from the Margolis Law Firm; he is still owed $277,407.40.

¶ 7 Plaintiff brought a four-count, first-amended complaint against defendant, Jordan Margolis, and the Margolis Law Firm. Counts I and IV were directed at defendant. Count I presented a claim for conversion under section 3-420 (810 ILCS 5/3-420 (West 2012)) of the Uniform Commercial Code (UCC). Plaintiff alleged that defendant converted the $375,000 settlement check in violation of section 3-420 of the UCC by accepting the deposit of the settlement check and paying the $375,000 into the Margolis Law Firm's corporate checking account when the firm was not authorized by plaintiff to make such a deposit. Count IV alleged common-law negligence against defendant for accepting the deposit and paying the $375,000 into the firm's corporate checking account.

¶ 8 The parties filed cross-motions for summary judgment. On June 15, 2015, the circuit court entered a memorandum opinion and order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment on counts I and IV. The order contained a Rule 304(a) finding that there was no just reason for delaying the enforcement or appeal of the judgment. Plaintiff filed this timely appeal.

¶ 9 First, plaintiff argues that the circuit court erred in granting summary judgment for defendant on count I of his first amended complaint alleging conversion under section 3-420(a) of the UCC and denying his motion for summary judgment. Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 38. When parties file cross-motions for summary judgment, they admit the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Catom Trucking, Inc. v. City of Chicago*, 2011 IL App (1st) 101146, ¶ 9. Review is *de novo*. *Id*.

¶ 10 Section 3-420(a) states in relevant part:

> "(a) The law applicable to conversion of personal property applies to instruments. An instrument is also 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 2012).

¶ 11 Comment 3 of the Committee Comments to section 3-420 explains that when section 3-420 was adopted to replace the former section 3-419, it eliminated the defense that had been

provided by former section 3-419(3) for a depository bank that acted "in good faith and in accordance with the reasonable commercial standards applicable to the business." 810 ILCS 5/3-420, Comment 3 (West 2012). For this reason, a depository bank, such as defendant here, is strictly liable for conversion under section 3-420. See *Leeds v. Chase Manhattan Bank, N.A.*, 752 A. 2d 332, 336 (2000) (finding that section 3-420's replacement of the former section 3-419 established strict liability for depository banks on conversion claims).

¶ 12 Under section 3-420, "[t]he elements of a cause of action for conversion of a negotiable instrument are 'plaintiffs' ownership of, interest in or right to possession of the check; plaintiffs' forged or unauthorized endorsement on the check; and defendant bank's unauthorized cashing of the check.' " *Continental Casualty Co. v. American National Bank & Trust Co*., 329 Ill. App. 3d 686, 697 (2002) (quoting *Burks Drywall, Inc. v. Washington Bank & Trust Co*., 110 Ill. App. 3d 569, 573 (1982)).

¶ 13 "Courts have handled authorization determinations on a case by case basis and looked to agency law to determine whether there was actual or apparent authorization." White, James J., Summers, Robert S., & Hillman, Robert A. Uniform Commercial Code, §19:4 (6th ed. 2013). "An agent's authority may be either actual or apparent, and actual authority may be either express or implied." *Saletech, LLC v. East Balt, Inc*., 2014 IL App (1st) 132639, ¶ 14. A principal gives an agent actual express authority when he explicitly grants the agent the authority to perform a particular act. *Id*.

¶ 14 Defendant here argues that the power of attorney signed by plaintiff gave the Margolis Law Firm the actual express authority to sign the settlement check on plaintiff's behalf and, as such, that plaintiff's conversion claim fails.

¶ 15 Section 3-1 of the Illinois Power of Attorney Act provides that "the public interest requires a standardized form of power of attorney that individuals may use to authorize an agent to act for them in dealing with their property and financial affairs." 755 ILCS 45/3-1 (West 2012). Section 3-3 sets out a statutory short form power of attorney that may be used to grant an agent powers with respect to property and financial matters. 755 ILCS 45/3-3(West 2012). The statutory short form power of attorney must be witnessed and notarized. *Id.*; see also 755 ILCS 45/3-3.6 (West 2012) ("Every property power shall bear the signature of a witness to the signing of the agency and shall be notarized.").

¶ 16 Section 3-1 further provides that the short form power of attorney "is not meant to be exclusive and other forms of power of attorney may be used." 755 ILCS 45/3-1 (West 2012). Even non-statutory powers of attorney, though, "must be signed by at least one witness to the principal's signature" and "must indicate that the principal has acknowledged his or her signature before a notary public." 755 ILCS 45/3-3 (West 2012).

¶ 17 Here, the power of attorney signed by plaintiff was not also signed by a witness, nor was it notarized. Accordingly, the power of attorney was invalid under sections 3-3 and 3-3.6 of the Illinois Power of Attorney Act, both of which required the power of attorney to be witnessed and notarized, and thus no authority was conveyed to the Margolis Law Firm to endorse the settlement check on plaintiff's behalf.

¶ 18 Even if the power of attorney *had* been signed by a witness and notarized, thereby giving the Margolis Law Firm, by its express terms, the power to "sign the settlement check," no power was given to the Margolis Law Firm to deposit the settlement check into the firm's operating account instead of a client trust account.[1]

[1] Such a power would have violated Rule 1.15(a) of the Illinois Rules of Professional

¶ 19 Plaintiff filed an affidavit in which he stated, "In signing the power of attorney, I only gave permission to Jordan Margolis and the Margolis Law Firm, P.C. to deposit the settlement funds in an appropriate and approved trust account. I never intended to give permission, and never did give permission to Jordan Margolis and the Margolis Law Firm, P.C. to deposit the settlement funds in a general operating or business account, as Jordan Margolis and the Margolis Law Firm, P.C. did here." Plaintiff similarly testified during his deposition that he signed the power of attorney after being told by one of the attorneys working for the Margolis Law Firm that the settlement monies would be deposited in a client trust fund account and then paid to him. In signing the power of attorney, plaintiff's understanding was that the settlement monies would be held in a client trust fund account "separate and apart from money that might be belonging to the Margolis law firm." Nothing in the language of the power of attorney conflicted with plaintiff's affidavit and deposition testimony.

¶ 20 Plaintiff's affidavit and deposition testimony were uncontradicted. An uncontradicted affidavit is taken as true for purposes of a summary judgment motion. *Zimmerman v. Illinois Farmers Insurance Co.*, 317 Ill. App. 3d 360, 368 (2000). This rule also applies to uncontradicted deposition testimony. *In re Estate of Allen*, 365 Ill. App. 3d 378, 387-88 (2006); *Cnota v. Palatine Area Football Association*, 227 Ill. App. 3d 640, 652 (1992). Plaintiff's uncontradicted affidavit and deposition testimony establish that even if the power of attorney was valid, it only authorized the Margolis Law Firm to deposit the settlement check into a client trust account; thus, defendant was liable for conversion for accepting the Margolis Law Firm's

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Conduct, which states: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be deposited in one or more separate and identifiable interest-or dividend-bearing client trust accounts." ILCS S. Ct. Rules of Prof. Conduct R. 1.15 (eff. Oct. 1, 2015).

deposit of the settlement check into the firm's general operating account over an unauthorized endorsement.

¶ 21 This case is similar to *Bellflower Ag Service, Inc. v. First National Bank & Trust Co. in Gibson City*, 130 Ill. App. 3d 80 (1985). Bellflower was a corporation engaged in retail sales of farm chemicals and fertilizers. *Id*. at 81. Gene Jannusch, his wife Martha, and Alan Schultze were the sole shareholders of the corporation and served as the company's board of directors and executive officers. *Id*. at 81-82. The corporation had accounts at two separate banks, the National Bank and the Cornbelt Bank; Mr. and Mrs. Jannusch and Mr. Schultze were authorized to sign checks on those accounts and to endorse checks for deposit in those accounts. *Id*. at 82. The corporation did not have an account with defendant First National Bank & Trust Company of Gibson City (First National Bank). *Id*.

¶ 22 Mr. Schultze subsequently deposited checks written to the order of the corporation into his personal account at First National Bank. *Id*. The corporation brought an action for conversion against First National Bank. *Id*. at 81. The circuit court entered judgment for First National Bank, finding Mr. Schultze had apparent and actual authority to endorse checks written to the order of the corporation in a manner which permitted their deposit in his personal account at First National Bank. *Id*. at 83. The appellate court reversed, finding from Mr. Jannusch's testimony that Mr. Schultze had actual authority only to endorse checks for deposit in the corporation's accounts in the National Bank and the Cornbelt Bank; Mr. Schultze lacked actual, apparent, or implied authority to endorse checks written to the order of the corporation in a manner permitting their deposit into his personal account at First National Bank. *Id*. at 83-85. As there was no proof that Mr. Schultze was empowered to endorse the checks except for deposit in the corporate accounts at the National Bank and the Cornbelt Bank, the appellate court found

First National Bank liable for conversion and remanded for consideration of the corporation's damages. *Id*. at 86. Similarly, in the present case, even if the power of attorney had been valid, the Margolis Law Firm lacked the power to endorse the settlement check for deposit into the firm's general operating account at defendant bank; as in *Bellflower*, defendant is liable for conversion for accepting deposit of the check over an unauthorized endorsement.

¶ 23 Defendant argues that as the settlement check was made out to both plaintiff and to the Margolis Law Firm, the firm was a "holder" of the check (see section 201 of the UCC, 810 ILCS 5/1-201 (West 2012), defining "holder" as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession") who was entitled to enforce the instrument. See 810 ILCS 5/3-301 (West 2012) (stating that a person entitled to enforce an instrument includes the holder of the instrument). Since the Margolis Law Firm was entitled to enforce the settlement check as a holder, defendant contends it cannot be held liable for conversion under section 3-420 for accepting the deposit of that check.

¶ 24 Defendant's contention is without merit, as the comment to section 3-420 states:

> "[Section 3-420] also covers cases in which an instrument is payable to two persons and the two persons are not alternative payees, *e.g.*, a check payable to John and Jane Doe. Under section 3-110(d) the check can be negotiated or enforced only by both persons acting jointly. Thus, neither payee acting without the consent of the other, is a person entitled to enforce the instrument. If John indorses the check and Jane does not, the indorsement is not effective to allow negotiation of the check. If Depositary Bank takes the check for deposit to John's account, Depositary Bank is liable to Jane for conversion of the check if she did not consent to the transaction." 810 ILCS 5/3-420, Comment 1 (West 2012).

¶ 25 The settlement check was made out to both plaintiff and the Margolis Law Firm, meaning it could be negotiated or enforced only by both of them acting jointly. Even if the power of attorney had been valid, plaintiff here never consented to the transaction at issue because he never agreed for the Margolis Law Firm to deposit the settlement check into the firm's operating account. Accordingly, defendant is liable for conversion under section 3-420 for accepting deposit of the settlement check into the firm's operating account without plaintiff's consent.

¶ 26 Defendant argues that section 9 of the Fiduciary Obligations Act (760 ILCS 65/9 (West 2012)) shields it from any liability related to the Margolis Law Firm's depositing the settlement check into an operating account rather than a client trust account. Section 9 of the Fiduciary Obligations Act states in pertinent part:

> "[I]f a fiduciary makes a deposit in a bank to his personal credit *** of checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith." *Id.*

¶ 27 Defendant contends that in accepting the deposit of the settlement check into the firm's operating account, it had no actual knowledge of any breach of fiduciary obligations nor was it acting in bad faith and, as such, that section 9 absolved it of any liability. A similar argument

was raised and rejected in *Bellflower*. The *Bellflower* court held that the purpose of section 9 of the Fiduciary Obligations Act "is to facilitate the fiduciary's performance of his responsibilities by limiting the liability of those who deal with him [citation]; it does not purport to absolve a bank from liability when it pays a check on an unauthorized indorsement." *Bellflower*, 130 Ill. App. 3d at 86. Accord, *National Union Fire Insurance Co. of Pittsburgh v. Wilkins-Lowe & Co., Inc*., 1992 WL 88295 (Not Reported in F. Supp.). In *Bellflower*, where the plaintiff corporation alleged conversion against the defendant bank for paying checks on Mr. Schultze's unauthorized endorsements, the reviewing court held that section 9 provided no protection for the defendant bank where there was no proof that Mr. Schultze was empowered to endorse the checks except for deposit in the corporation's accounts in banks other than defendant. *Id*. Similarly, here, section 9 of the Fiduciary Obligations Act provides no protection for defendant where, even if the power of attorney had been valid, the Margolis Law Firm was not empowered to endorse the checks for deposit into its general operating account.

¶ 28 *Mikrut v. First Bank of Oak Park*, 359 Ill. App. 3d 37 (2005), cited by defendant, is inapposite, as it was decided under section 7 of the Fiduciary Obligations Act (760 ILCS 65/7 (West 2000)), not section 9.

¶ 29 In conclusion, as there was no valid power of attorney, and the Margolis Law Firm had no authority to deposit the settlement check into its general operating account at defendant bank, defendant is liable for conversion for accepting that deposit. We reverse the grant of summary judgment in favor of defendant on count I (conversion) of plaintiff's first amended complaint and enter summary judgment in favor of plaintiff in the amount of $277,407.40[2].

[2] Neither side disputes on appeal that $277,407.40 is the amount owed plaintiff.

¶ 30 Defendant contends plaintiff is not entitled to an award of summary judgment in his favor due to "numerous affirmative defenses." Defendant has forfeited review by failing to adequately argue these defenses on appeal. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 31 Next, plaintiff contends the circuit court erred by entering summary judgment in defendant's favor and denying plaintiff's motion for summary judgment on count IV of his first amended complaint, which alleged negligence. We affirm, as plaintiff's common-law claim for negligence in connection with accepting the deposit is displaced by section 3-420 of the UCC. See White, James J., Summers, Robert S. & Hillman, Robert A., Uniform Commercial Code, § 19:4 n. 5 (6th ed. 2013).

¶ 32 For the foregoing reasons, we affirm the grant of summary judgment in favor of defendant on count IV of plaintiff's first amended complaint; reverse the grant of summary judgment in favor of defendant, and the denial of summary judgment in favor of plaintiff, on count I; and enter summary judgment in favor of plaintiff on count I in the amount of $277,407.40. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 33 Affirmed in part; reversed in part; judgment entered for plaintiff in the amount of $277,407.40.