

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

BRIAN MOORE,

Plaintiff,

VS.

PINNACLE BANK,

Defendant.

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NO. 16-241-BC

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DAVIDSON CO. CHANCERY CT.  
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**MEMORANDUM AND ORDER DENYING DEFENDANT'S  
MOTION FOR JUDGMENT ON THE PLEADINGS AND  
SETTING 6/17/16 DEADLINE TO SCHEDULE RULE 16 CONFERENCE**

This lawsuit was filed by the Plaintiff asserting that the Defendant Bank electronically transferred funds, without Plaintiff's authorization, from his Money Market Account into a business franchise account.

The Plaintiff has sole signature authority on the Money Market Account. On the business franchise account the Plaintiff shared signature authority with his former business partner. Upon transfer to the business franchise account, the funds were applied, the Plaintiff alleges, by his former business partner for uses not agreed to by the Plaintiff.

The Plaintiff has sued the Defendant Bank for breach of contract on the theory that the signature card for the Money Market Account constituted a contract. That was breached, the Plaintiff claims, when the Defendant Bank released the funds allegedly without the

Plaintiff's authorization. The Plaintiff seeks to recover compensatory damages in excess of \$50,000 and prejudgment interest.

The case is presently before the Court on the Defendant's *Motion for Judgment on the Pleadings*. Although the Defendant disputes the facts the Plaintiff alleges and asserts in its Answer that the Plaintiff did verbally authorize the transfer, those factual disputes are not at issue on the *Motion*. The premise of Defendant's *Motion* is that it is entitled to judgment in its favor because the lawsuit is time-barred. The Defendant's argument is that the lawsuit was filed outside of the statute of limitations provided in the parties' contract.<sup>1</sup>

In support of its *Motion*, the Defendant relies upon two limitation periods provided for in an Agreement incorporated by reference into the parties' Money Market Account signature card contract and undisputedly constituting a part of the parties' contract. One is a 30-day limitation period; the other is a 60-day period. The undisputed facts are that the Plaintiff did not notify the Bank of the alleged unauthorized transaction within either 30 or 60 days. This is evident from the allegation in the Complaint that the unauthorized transfer of funds occurred in January of 2013, and that it was three years later, March 10, 2016, when this lawsuit, notifying the Defendant of the claim, was filed. It is the Defendant's position

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<sup>1</sup>The Defendant has withdrawn its defense that Tennessee Code Annotated section 47-4-406 bars the lawsuit in light of the holding in *Harber v. Leader Fed. Bank for Sav.*, 159 S.W.3d 545 (Tenn. Ct. App. 2004) that the one-year statutory time limit does not apply to electronic transactions.

that the failure of the Plaintiff to provide notice within the limitation times contained in the Agreement bars this lawsuit.

The Plaintiff's position is that the lawsuit is not time-barred: the Tennessee statutory six-year statute of limitations has not lapsed on a 2013 breach of contract by the Defendant with the filing of this lawsuit in 2016. As to the contractual limitation periods cited by Defendant, it is the Plaintiff's defense that the 30-day limitation does not apply, and the 60-day limitation does not carry with it the consequence of barring recovery for the unauthorized electronic transaction in this case.

With these positions of the parties, the Court has studied the text of the two limitation periods cited by the Defendant in the parties' Agreement. The Court concludes the text supports the Plaintiff's position. The Court's textual analysis is that the 30-day limitation is not triggered in this case because it does not apply to electronic transfers. As to the 60-day period, while it does apply to electronic transfers, the consequences for failing to report within that 60-day time frame do not, by law, bar recovery as to the unauthorized transaction itself but as to any transactions subsequent to the 60-day time.

It is therefore ORDERED that Defendant's motion for judgment on the pleadings is denied.

The analysis on which the foregoing ruling is based begins with the proposition asserted by the Defendant that Tennessee recognizes and enforces contractual statute of

limitations. *Maples v. Tenn. Farmers Mut. Ins. Co.*, 2015 Tenn. App. LEXIS 871, \*9 (Tenn. Ct. App. Oct. 26, 2015).

Next is the 30-day limitation asserted by the Defendant. This limitation is located in a section of the Agreement pertaining to unauthorized “signatures.” Tennessee case law holds, however, that limitation periods on unauthorized signatures are not applicable to electronic transactions. *Harber v. Leader Fed. Bank for Sav.*, 159 S.W.3d 545 (Tenn. Ct. App. 2004).

Nevertheless, the Defendant relies upon the 30-day limitation period arguing that even though it appears among provisions related to unauthorized signatures, the pertinent text, itself, is broader and applies to any error apparent in a statement. In this respect the section heading the Defendant seeks to fit this case under is “Terms and Conditions.” The subsection the Defendant relies upon is “Statements.” That subsection provides that if an account holder seeks to “assert the unauthorized signature or alteration against the Defendant Bank,” the account holder must notify the Defendant of “an unauthorized signature or alteration” in a time not to exceed 30 days after the account statement is sent. In addition, and critical to this case the Defendant asserts, is that the provision goes on to state that “You must report any other problem (for example, **erroneous statement**, missing signature, unauthorized endorsement, etc.) within this 30 day period or lose your right to assert the problem against us [emphasis added].” The sentence the Defendant relies upon and its

surrounding text are quoted from pages 1 and 3 of the Agreement attached as Exhibit A to the Defendant's April 11, 2016 Answer as follows:

#### Terms and Conditions of Your Account

This brochure contains rules which govern your account(s) with us, Pinnacle Bank. Please read this brochure carefully. When you sign your signature card, your acceptance of these terms allows us to access and collect fees, as disclosed, directly from your account balance. You will receive a separate schedule of interest rates, qualifying balances, and fees if they are not included elsewhere in this brochure. If you have any questions, please call us. Much of our relationship with our depositors is governed by state and federal law (which may change from time to time). This body of law is too large and complex to be reproduced here. The purpose of this brochure is to:

- Summarize the existing rules applicable to the more common transactions;
- Establish rules to govern transactions or events which the law does not regulate;
- Establish rules for certain events or transactions which the law already regulates but permits variation by agreement; and
- Provide you our funds availability and electronic funds transfer disclosures.

\* \* \* \*

#### Statements

If you do not notify us of an unauthorized signature or alteration within a reasonable time (not to exceed 30 days) after we sent or make available to you your statement and items:

- You cannot assert the unauthorized signature or alteration against us, even if we are unable to show a loss due to your failure.
- You cannot assert any unauthorized signatures or alterations by the same wrongdoer on items paid by us after the reasonable time mentioned above elapses, but before we receive your notice.

We lose these protections if we fail to exercise ordinary care in paying an item with an unauthorized signature or alteration, unless you do not notify us of the problem within 30 days of when we send or make available to you the statement and items. You must report any other problems (for example, erroneous statement, missing signature, unauthorized endorsement, etc.) within this 30-day period or lose your right to assert the problem against us.

The Defendant's application of the above provision to this case is that the alleged unauthorized electronic transaction in this case, the Defendant argues, could have been detected from the account statement and, therefore, constitutes "any other problem (for example erroneous statement . . . )" so as to require notice by the account holder within 30 days. As analyzed by the Defendant:

The language "any other problems" and the use of "etc." to denote that the example list is not exhaustive expand the applicability of this subsection to include all basic problems—a category into which the allegedly unauthorized transfer of \$332,000.00 clearly falls.

Regardless of this, the list of examples specifically includes an "erroneous statement" as a type of problem which falls within the scope of the 30-day limitation period. When Plaintiff received his monthly statement and saw over three hundred thousand dollars had been transferred out of his account, he should have voiced his complaint within the required 30-day period. Instead, Plaintiff waited nearly 1,100 days to do so. Accordingly, his claim is time-barred by the 30-day limitations period at issue.

*Pinnacle Bank's Reply in Further Support of Its Motion for Judgment on the Pleadings,*  
May 11, 2016 at 2.

To the contrary, the Court concludes the 30-day limitation is not applicable for two textual reasons. First there is a separate subsequent section in the Agreement (analyzed below), devoted solely to Electronic Transfer, "Electronic Funds Transfers: Your Rights and

Responsibilities” section. Under the principle that the particular governs the general, this section in the Agreement, particularized to electronic transfers, is the logical reference point and controlling section for the alleged unauthorized electronic transfer in this case.

Secondly, further indication that this section is the applicable one in this case is that it has its own statement errors provision contained in the “Error Resolution” subcategory of the particularized Electronic Funds section, at page 7 of the Agreement:

In case of errors or questions about your electronic transfers, call or write us at the telephone number or address listed at the end of this disclosure, as soon as you can, **if you think your statement or receipt is wrong** or if you need more information about a transfer listed on the statement or receipt. . . . We must hear from you **no later than 60 days after we send the FIRST statement on which the problem or error appeared**. If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days. Failure to provide your complaint in writing may result in a delay in provisional credit and/or our investigation [emphasis added].

Because this separate, particular section devoted to electronic transfers also addresses erroneous statements, there is no textual gap, need or reason to refer back to the erroneous statement provisions contained on page 3 of the Agreement, in the context of unauthorized signatures, and where the 30-day limitation period is found.

Based upon this textual analysis, the Court concludes the 30-day limitation is inapplicable.

Eliminating the 30-day limitation period leaves for analysis the 60-day limitation period, just quoted above, from the “Error Resolution” subsection of the “Electronic Funds Transfers: Your Rights and Responsibilities” section at page 7 of the Agreement. The Defendant’s argument focuses on this text:

We must hear from you no later than 60 days after we send the FIRST statement on which the problem or error appeared.

The argument is that if notice of a statement error is not received within the 60 days, the Bank is not liable for the unauthorized transaction.

Supportive of Defendant’s analysis is that the above sentence contains the words: “60 days” and “must.” The entire provision, though, as quoted above, does not explicitly say, as the above 30-day section does, that the consequence of failing to meet the 60-day time limit is that an account holder’s loss claim for the unauthorized transaction is barred. Unlike the above quoted 30-day limitation on page 3 of the Agreement,<sup>2</sup> the Error Resolution subsection on electronic transfers on page 7 states no consequence of loss of recovery. The subsection instead proceeds to describe the provisional credit and investigation procedure the Bank will undertake upon receiving notice. From this trailing off, the Defendant would have the Court return to the preceding text of “60 days” and “must” and use these as indicative of a limitation time on asserting recovery for the unauthorized electronic transfer.

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<sup>2</sup> “You must report any other problems (for example, erroneous statement . . . ) within this 30-day period or lose your right to assert the problem against us [emphasis added].”



The Court, however, is persuaded by the Plaintiff's citation to the Electronic Transfer Act 15 U.S.C. § 1693(g) and its implementing regulation 12 CFR § 1005.6(b)(3) as the explanation for the Defendant's terms on erroneous statement issues related to electronic transfers. That federal law dictates the consequence for failure to report an unauthorized electronic transfer within 60 days. That consequence is a bar to recovery for subsequent unauthorized transfers which occur after the 60-day period. Yet, recovery for the unauthorized transfer, itself, is not barred by the failure to report within the 60-day period. This federal law is controlling and to be more restrictive would violate the federal law. Accordingly, the Court concludes that the 60-day limitation, as well, does not bar this lawsuit.

Lastly, in analyzing Defendant's *Motion* the Court has applied the motion to dismiss standard as explained in Defendant's April 20, 2016 *Memorandum in Support of Pinnacle Bank's Motion for Judgment on the Pleadings* at 3-4:

Tennessee Rule of Civil Procedure 12.03 states, in relevant part, that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "When a motion for judgment on the pleadings is made by the defendant, it is in effect a motion to dismiss for failure to state a claim upon which relief can be granted." *Timmons v. Lindsey*, 310 S.W.3d 834, 838 (Tenn. Ct. App. 2009). As such, the trial court considers only the sufficiency of the complaint, rather than the strength of the plaintiff's evidence. *Tennessee Realty Development, Inc. v. State of Tennessee*, No. W2008-00722-COA-R3-CV, 2008 Tenn. App. LEXIS 774, at \*12 (Dec. 29, 2008) (citing *Pendleton v. Mills*, 73 S.W.3d 115, 120 (Tenn. Ct. App. 2001)). More specifically, a motion for failure to state a claim upon which relief can be granted claims that even if all of the "relevant and

material factual allegations in the complaint” are taken as true, the facts nonetheless fail to raise a cause of action. *Id.* (citing *Marceaux v. Thompson*, 212 S.W.3d 263, 267 (Tenn. Ct. App. 2006)). The trial court must “construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief.” *Id.* (citing *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997); see *Winchester v. Little*, 996 S.W.2d 818, 822 (Tenn. Ct. App. 1998)).

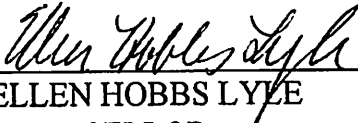
For these reasons the Court has denied Defendant’s motion for judgment on the pleadings.

Having determined that this lawsuit shall proceed, it is ORDERED that by June 17, 2016, Counsel in this lawsuit and in the related case 15-1146-BC shall contact the Docket Clerk, Mrs. Smith, 615-862-5719 as to their availability for a Rule 16 Conference on these dates:


June 28, 2016 at 10:30  
June 29, 2016 at 9:00  
July 7, 2016 at 9:00

The Conference shall be held in conjunction with a Status Conference in the related Case No. 15-1146-BC to determine if the cases should be consolidated for some or all discovery, or also for trial. The events and causes of action in the counterclaim in the related case are broader than this case.

Also, at the Conference, a trial date will be selected and deadlines for pretrial events will be set. A discovery cutoff will be established. As to Case No. 15-1146-BC, the December 9, 2015 Case Litigation Schedule shall be revised.

  
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ELLEN HOBBS LYLE  
CHANCELLOR  
TENNESSEE BUSINESS COURT  
PILOT PROJECT

cc: Jay S. Bowen  
Will Parsons  
John Wingo  
Lauren Paxton Roberts  
Dudley West (Counsel in the related case)  
Charles McElroy (Counsel in the related case)

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6-6-16