IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDING AT MAITAMA
BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF

SUIT NO: FCT/HC/CV/39/2009

BETWEEN:

MR. LARRY NWERRIH……PLAINTIFF

AND

1. UNION BANK NIG PLC)
2. ROSEMARY O. AUDU)
3. IPINYOMI SHOLA)……DEFENDANTS

JUDGMENT

The Plaintiff in this case is a customer to the 1st Defendant Bank and maintains account number 4481150001185 with the 1st Defendant's Maitama Branch. Sometimes on the 25/07/2006 the 2nd and 3rd Defendants as Operations Manager and Cashier paid out two cheques on the account of the Plaintiff to the tune of N8,300,000.00 (Eight Million, Three Hundred Thousand Naira) to some fraudstars. The Plaintiff has claimed that he did not issue the two cheques and that the Defendants were negligent in making the payments and that the 2nd and 3rd Defendants did not exercise due care and skill to protect his fund.

He has therefore brought this action, wherein he claims the following reliefs as contained in paragraph 30 of his amended statement of claim:

(a) A declaration that the Defendant's act of payment of the total sun of N8,300,000.00 from Plaintiff's account with the 1st Defendant on cheques Nos. 11864019 and 11864020 dated 17/07/2006 without confirmation from the Plaintiff and/or due process is wrongful and constitutes gross negligence.

(b) A declaration that the continuous withholding of the sun of N8,300,000 from the Plaintiff's use constitute a breach of Defendant's duty as bankers to the Plaintiff.

(c) An Order of this Honourable Court that the Defendants pay to the Plaintiff the sum of N8,300,000.00 same having been wrongfully/negligently debited and withheld from the Plaintiff's account to the 1st Defendant bank.

(d) An Order of this Honourable Court that the Defendants pay to the Plaintiff interest at the rate of 20% per annum or the prevailing interest rate on the sum of N8,300,000.00 from the 25th July 2006 till the date of judgment and thereafter interest at the Court rate on the judgment sum, until the entire sum is liquidated.

(e) An Order that the Defendants pay to the Plaintiff the sum of N10,000,000.00 (Ten Million Naira) being general damages for acts of negligence and breach of the Defendants' fiduciary duty to the Plaintiff.

(f) Cost of this action including the Solicitors fee of N500,000.00

The Defendants denied liability to the claims of the Plaintiff as they contend that it was the negligence of the Plaintiff to protect his cheque booklet which led to the wrongful payments.

Pleadings were filed and exchanged between the parties. At the end of pleadings the matter proceeded to trial. The Plaintiff testified on his behalf and tendered documents. One Alhaji Dangana the Branch Manager to the 1st Defendant at the time of incident testified on behalf of the 1st Defendant and the 2nd and 3rd Defendants each testified on his/her behalf.

At the end of trial learned counsel for the parties filed their final written addresses and adopted same at the plenary. Learned counsel to the 1st Defendant submitted five issues for determination of the case. These are:

(1) Whether the Defendant as a banker was bound to pay/honour the cheques drawn on her by the Plaintiff.

(2) Whether the Defendant was negligent to entitle the Plaintiff to its claim of N10,000,000.00 (Ten Million Naira) damages and or the cost of solicitors fees of N500,000.00 (Five Million Naira).

(3) Whether there is anything before the Court to support the assertion that 50% of N8, 300, 00 (Eight Million and Three Hundred Thousand Naira) was ever offered to the Plaintiff.

(4) Whether the Plaintiff can be said to have proven his case.

(5) Whether the Plaintiff is not estopped by his conduct.

The learned counsel to the 2nd Defendant adopted the issues set out for determination by the counsel to the 1st Defendant as presented.

Counsel to the 3rd Defendant, Mr. Ademola Adewoye on his part listed two issues as arising for determination of the case:

(1) Whether or not from the totality of evidence before the Court the Plaintiff had discharged the onus of prove placed on him by law on the preponderance of evidence led on record to warrant a grant of the reliefs sought, and

(2) Whether 3rd Defendant as agent of the 1st Defendant can be personally held liable in this matter.

Finally the learned counsel to the Plaintiff, Miss Udemba Felicia from Tawo A. Tawo SAN & Co, was of the view that only one issue would resolve the dispute between parties.

This issue is whether the Defendant's act of debiting the total sum of N8, 300, 000. 00 (Eight Million and Three Hundred Thousand Naira) from the Plaintiff's account with cheques numbers 11864019 and 11864020 respectively dated 17/07/2006 without the consent of the Plaintiff and/or due process amounts to gross negligence and breach of fiduciary duty of the Defendants to the Plaintiff.

I have considered the issues identified by the parties in the light of the evidence led at the trial and it would appear to me that the issues which call for determination in this case are:

(1) Whether the Defendants were negligent and therefore in breach of contract in the payment of the disputed cheques to 3rd parties, and

(2) Whether the 2nd and 3rd Defendants as agents of a disclosed principal are liable for acts committed in the course of their duties?

DETERMINATION OF ISSUES

ISSUE ONE

Whether the Defendants were negligent and therefore in breach of the payment of the disputed cheques to 3rd parties, and

The kennel of the Plaintiff's claim is that the Defendants were negligent in the handling of his account and did not exercise due care and skill in making payments to third parties on the disputed cheques. This according to him is a breach of contract he has with them as a customer. That being the case the Plaintiff as a Claimant has a duty to lead evidence to establish negligence.

In **UZOKWE V. DENSY IND. (NIG) LTD (2002) 2 NWLR (PT.752) 528** the apex Court (Per Ogwuegbu, JSC) stated that:

> **"In civil cases, the ultimate burden of establishing a case is as disclosed on the pleadings. The person who would lose the case if on completion of pleadings and no evidence is led on either side has the general burden of proof. See Elemo & Ors V. Omolade & Ors (1968) NMLR 359"**

His Lordship went further to say that:

> **"It is only when the Plaintiff has made out a prima facie case that the onus of proof shifts from Plaintiff to defendant and vice versa, from time to time as the case progress and it rests on that party who would fail if no more evidence were given on either side."**

On this point of law see also Section 131-133 of the Evidence Act, 2011 and the following cases:

1. **ELIAS V. DISU (1962) 1 SCNLR 361;**
2. **UNIVERSITY PRESS LTD V. I. K. MARTINS NIG. LTD (2004) 4 NWLR (PT.654) 584;and**

In keeping with this principle of Law the Plaintiff pleaded and led evidence to the effect that:

(i) The 3rd Defendant who paid the two cheques the same day in very suspicious circumstances deliberately or negligently, refused to contact the Plaintiff's account officer who was not away from the Bank on the fateful day.

(ii) The 3rd Defendant claimed that on the two occasions when the drawees of the two cheques who presented their cheques separately both brought telephone numbers which they claimed belonged to the Plaintiff.

(iii) The 3rd Defendant also insisted that the cheques and phone numbers were forwarded to the 2nd Defendant who was the 1st Defendant's Operation Manager for necessary confirmation and the 2nd Defendant claimed that she called the number supplied by the alleged drawees before authorizing the payments.

(iv) The telephone numbers purportedly supplied to the Defendants was neither the Plaintiff's phone number supplied to the Defendants for purpose of all transaction in relation to the Plaintiff's account with the 1st Defendant.

(v) It is never the practice in any bank that the drawee of a cheque would be the one to supply any bank (including the 1st Defendant) with the account holder's telephone number for purpose of the confirmation of a cheque before the money is released which method was purportedly adopted by the Defendants in this case.

(vi) The Plaintiff's telephone number (contained in Bank's record) which was available to the 1st Defendant including all its agents like the 2nd and 3rd Defendants was not used at the time of making the above stated payments.

(vii) The Plaintiff states that if the Defendants had contacted the 1st Defendant's designated account officer for the Plaintiff (who was available) or used the phone number supplied by the Plaintiff at the time of opening the account which said number he has continued to use till date the payment to fraudsters if any would have been averted completely.

(viii) The Plaintiff has maintained the same telephone number at all time material to the transaction and has continued to use the same number which said number is 08037872226, and the Plaintiff does not know the telephone number purportedly called by the 1st and 2nd Defendants for purpose of the encashment made on the 25/07/2006.

(ix) There was no proper identification of the drawees of the said cheques, namely Dr. Olasehinde Ogunsina and Chief Gilbert Danner before the payments were made to them by the Defendants. The Defendants are given notice to produce copies of their identification cards/documents as the basis for honoring the said cheques at the hearing of this suit.

(x) The Defendants deliberately and negligently failed and or refused to take alleged drawees of the Plaintiff's cheques

regiscope or photographs as required before such payments were made. The Plaintiff shall rely on the 1st Defendant's letter dated 7th day of April, 2008 to the Economic and Financial Crimes Commission forwarding the service agent of the regiscope camera (Hitech Nigeria Ltd) letters of 17th day of October, 2006 and 1st March, 2007.

The gist of all the above averments is that the Defendants did not exercise care to:

(i) Refer the disputed cheques to the account officer who was used to Plaintiff and familiar with his voice.

(ii) That the Defendants failed to use the telephone number the Plaintiff supplied to the 1st Defendant in the account opening package.

(iii) That the Defendants did not verify the identities of the fraudsters before payment.

(iv) That the Defendants were negligent in resorting to a phone number supplied by the fraudsters, and

(v) That he was not called as was the practice when 3rd party cheques were presented.

In the amended statement of defence of the 1st Defendant and evidence of DW1 the allegation of negligence was strongly denied. It was contended that nobody was designated as account officer for the Plaintiff's account. That the Plaintiff never left instructions with the 1st Defendant that he should be called whenever 3rd party cheques are presented before payment and that the cheques in question were paid after the 2nd Defendant who usually called the Plaintiff had called him and was given a go ahead by the Plaintiff. The 1st Defendant also contended that the cheque booklet which was issued to the Plaintiff on the 21/04/2006 was complete and intact when he collected same. That the Plaintiff did not report the theft of cheque numbers 19 and 20 timeously as he issued all the cheques serially.

The defence of the 2nd and 3rd Defendants are materially the same with the 1st Defendant.

Having considered the defence presented to the claims of the Plaintiff it is clear to me that what is at the centre of their defence is that the 1st Defendant:

(1) Did not designate anybody as the account officer to the Plaintiff.

(2) That the payments of the disputed cheques were made after the 2nd Defendant had called the Plaintiff and got his consent to pay.

(3) That the 2nd Defendant had called the Plaintiff in the past and was used to his voice.

The Defendants have rather put the blame for the fraud on the Plaintiff who confirmed that the cheque booklet issued to him was complete and his failure to report the missing cheques to the 1st Defendant.

Now the law is clear from decided cases that the relationship between the Plaintiff and the 1st Defendant as customer/banker is purely contractual. The Plaintiff as customer is a creditor in respect of funds deposited with the 1st Defendant and the 1st Defendant a debtor in respect of such fund.

See: **ALLIED BANK NIG LTD VS AKUBUEZE (1997) 6 NWLR (PT. 509) 374 and UBA VS AJABULE & ANOR (2011) LPELR 8239 SC.**

It is also trite that when a customer makes a valid demand from the banker from the amount standing to his credit the banker has an obligation to pay. If a valid request for payment by a banker is not met the customer may bring an action against the banker for breach of contract.

See: **FIDELITY BANK VS ONWUKA (2017) LPELR 42 839.**

From the facts before the Court it would appear that the Plaintiff is unable to establish his claim to an account officer who ought to have been contacted before payment. This inference is drawn from the fact that the Defendants joined issue with the Plaintiff on this fact that the 1st Defendant did not have such practice. The law is clear that he who alleges banking custom/practice must proof it. See **UNION BANK OF NIGERIA PLC V. NWOYE (1993) 3 NWLR (PT.435) 135.**

I have also gone through exhibit D6 which forms part of the account opening package duly filled by the Plaintiff and it does not disclose any specific instruction on how the account was to be operated especially as it relates to contacting the Plaintiff whenever a 3rd party cheque is presented.

However it is clear from decided cases that the position of the 1st Defendant as banker in custody of the Plaintiff's fund is a position of trust which requires that in the management of the Plaintiff's fund, the 1st Defendant must exercise care and skill to ensure that the fund is protected from activities of fraudsters.

In **AGBANELO VS UBN (2000) 7 NWLR 9PT. 666) 534** the Supreme Court stated thus:

> **"A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer."**

See: S**ELANGOR UNITED RUBBER ESTATES LTD VS CRADOCK (NO. 3) (1968) 2 ALL ER 1073.**

The question then is whether the 1st Defendant exercised reasonable care in the payments of the disputed cheques. The 1st Defendant appear to appreciate this fact when it pleaded that the 2nd Defendant was in the habit of calling the Plaintiff before paying money to 3rd parties and in fact called the Plaintiff with the phone number at the bank of the disputed cheques and got the Plaintiff's instructions to go ahead before the cheques were cleared for payment.

To me there is a burden on the 1st Defendant to establish with credible evidence that the 2nd Defendant had called the Plaintiff in the past and that the numbers with which she contacted the Plaintiff

was his number. This duty arises from the fact that the Plaintiff had alleged that the 2nd Defendant had never called him, was not familiar with his voice and did not leave any other phone number with the 1st Defendant before the disputed payment. I must state with all due respect that this burden of prove was not discharged by the Defendants. Nothing was submitted to the Court to evidence the previous calls the 2nd Defendant had made to the Plaintiff on the phone number at the back of the cheques or any other number. Even if the 2nd Defendant placed a call using the number at the back of the cheque.

It is my view that it is negligent of her not to have used the phone number officially deposited with the Defendants if the phone number in the records of the 1st Defendant was used the question of whether or not the 2nd defendant was familiar with the voice of the Plaintiff or the need to prove evidence of previous communication with Plaintiff would have been removed.

Furthermore the amount of money on the disputed cheques is substantial. This places a higher demand on the Defendants to deploy higher degree of reasonable care and skill in ensuring that the identities of the fraudsters were properly ascertained. This could be by verification of means of identification and regiscope of the fraudsters before payment. The Defendant alleged that these

steps were taken but evidence of such procedure was not tendered before the Court.

Learned counsel to the 1st Defendant made submission that the disputed payments were made because if they were not, the Plaintiff would have brought an action against the Defendants. While I agree that the 1st Defendant as banker to the Plaintiff has an obligation to pay cheques that were properly drawn on it, this obligation carries with it the need to also be sure that such payments is not made to fraudsters.

On the account of all these failures it is my view and I hold that the Defendants did not deploy appropriate standard of care and skill in the payment of the two cheques to the fraudsters and this constitute an act of negligence and breach of contract between Plaintiff and the 1st Defendant.

The 1st relief is therefore successful and it is granted.

Having held thus I need to consider the defence of the Defendants which places blame for the fraud on the Plaintiff himself. This is necessary because if their contention is established then it would be safe to hold that the Plaintiff is guilty of contributory negligence.

Now the uncontroverted evidence led by the Defendants before the Court is to the effect that the cheque book from which the disputed

leaves numbers 19 and 20 were taken was confirmed complete by the Plaintiff when it was issued. Exhibit D1 which is the cheque book collection form duty filled by the Plaintiff on the 14/2/2005 does not leave me in doubt about this fact. The last sentence of the Plaintiff on the said exhibit states “I hereby confirm that the cheque leaves are complete and intact. Thank you.” The Plaintiff then signed.

Before the Court the Plaintiff testified and agreed that he had sole responsibility to keep the cheque book securely. From this premise it is clear and safe to infer that the disputed leaves were removed from his custody.

Secondly the Plaintiff was so careless and negligent that he did not discover the absence of these leaves even when he issued no 18 when it should have been obvious to him that numbers 19 and 20 were absent and he proceeded to issue numbers 21, 22 and 23. Under such a situation it is difficult to absolve the Plaintiff of the blame for creating a favourable opportunity under which the fraud was perpetrated. What am saying is that although the Defendants were negligent in the payment to the fraudsters, the Plaintiff himself has a share in the negligence.

In **EASTCHASE ALUMINIUM PRODUCTS LTD VS UGWU & ANOR (2016) LPELR-40936 (CA)** the Court had this to say on the principle of contributory negligence:

> **"Basically the essential character with regard to the principle of contributory negligence is to the effect that the party charged must be primarily liable for the negligence if any that gave rise and caused the damage and injury. The principle of contributory negligence is founded upon the application of common sense to the simple facts of life. These are facts which reveal the action or inaction of a person who although was not primarily responsible for the accident or the cause of an injury which had occurred be it in the form of damages or otherwise. Thus contributory negligence as a defence to a claim is essentially predicated on negligence. It applies to a situation where the Plaintiff has through his own negligence contributed to cause the damage he incurred as a result of the Defendant's negligence."**

On this account it is my view and I hold that the Plaintiff was guilty of contributory negligence as he created an enabling ground for the actualization of the fraud.

ISSUE TWO

Whether the 2nd and 3rd Defendants as agents of a disclosed principal are liable for acts committed in the course of their duties?

This issue is on whether the 2nd and 3rd Defendants as agents of the 1st Defendant are liable personally to the Plaintiff.

The evidence before me which is fairly settled is that the 2nd and 3rd Defendants are staff of the 1st Defendant in its Maitama Branch. The 2nd Defendant was the Operation Manager and the 3rd Defendant was a Cashier. They were therefore working for the 1st Defendant when they made out the payments on the two disputed cheques. In Company Law they are agents of the 1st Defendant who is a disclosed principal. The law is clear that the principal is vicariously liable for the acts of his agent committed in the cause of his official duty.

In **AGBANELO (Supra)** the Supreme Court stated the law thus:

> **"Where an allegation of negligent act is made against a corporate body such as the Defendant, doing business through several branches it is inconsequential to the question of liability whether the acts were done through one of the branches or**

another. What is material is whether the negligent act alleged against the corporate body has been proved. There is no doubt that the act of a branch is the act of the company just like the act of an employee of the company done in the course of his employment makes the company vicariously liable regardless of the branch from which he operates."

See also: **IFEANYICHUKWU OSONODU LTD VS SOLEH BONEH LTD (2000) 3 S.C 42.**

Similarly, on the doctrine privity of contract the 2nd and 3rd Defendants who are not privies to the contract between the 1st Defendant bank and the Plaintiff cannot in law be held liable for breach of contract.

In **IDUFUEKO VS PFIZER PRODUCTS LTD AND ANOR (2014) 12 NWLR (PT. 1420) 96** the Supreme Court stated thus:

"This appellant's argument does not take into consideration the simple doctrine of privity of contract which is that a contract cannot as a general rule confer or impose obligations arising under it on any person except the parties to it. In other words only the parties to a contract can sue or be sued on

the contract. A stranger to a contract can neither sue or be sued on the contract."

On the account of all I have said above it is my view that the claims of the Plaintiff against the 2nd and 3rd Defendants as constituted are lacking in merit and I held as such. They are not liable to the Plaintiff and the suit against them is dismissed.

Now that I have held that the 1st Defendant bank was negligent and did not apply reasonable care and skill in the payment of the Plaintiff's fund to fraudsters and also held that the Plaintiff is guilty of contributory negligence, what is left is for me to determine the proportion of liability of each of the parties for the wrongful payment.

In the determination of this I have considered the rights and obligations of parties to each other and the higher responsibility of the 1st Defendant in ensuring safety of the customer's fund and I apply liability between them in the ratio of 40/60 against the 1st Defendant.

In other words the 1st Defendant is liable to the Plaintiff to the extent of 60% of the total sum of N8, 300, 000 (Eight Million, Three Hundred Thousand Naira).

I therefore Order the 1st Defendant to pay the said sum to the account of the Plaintiff forthwith.

The Plaintiff is also claiming 20% interest on the Judgment sum. I reckon that this is a commercial transaction and that if the Judgment sum was kept in a deposit account it would be entitle to interest which in the present state of things would have been more than 20%. I therefore see merit in the claim and it is granted.

I have also considered the Plaintiff's cliam for Court interest also known as post judgment interest and I find merit in same. Accordingly and pursuant to my power under Order 39(4) of the Rules of this Court I award 10% post judgment interest on the judgment debt.

The Plaintiff is also claiming general damages for breach of contract in the sum of N10, 000, 000 (Ten Million Naira).

It is now well settled that in a claim for damages for breach of contract, the Court is only concerned with damages which are natural and probable consequence of the breach or damages within the contemplation of the parties at the time of the contract.

See: **MOBIL OIL NIG LTD VS AKINFOSILE (1969) 1 NMLR 227; ARISONS TRADING AND ENGINEERING COMPANY LTD VS MILITARY GOVERNMENT OF OGUN STATE (2009) 15 NWLR (PT 1169) 26.**

On the premise of the above principle it would amount to double award to award interest on the amount granted and at the same

time grant general damages. The claim for general damages is therefore refused and dismissed.

The last relief sought by the Plaintiff is for cost of action including solicitor's fee of N500, 000 (Five Hundred Thousand Naira). This sum was neither pleaded nor any evidence given in respect thereof. It is therefore not proved and accordingly dismissed.

SIGNED
HON.JUSTICE HUSSEINI B. YUSUF
(PRESIDING JUDGE)
07/01/2020

Appearance:

Felicia Odemba esq – For the Plaintiff

Fredricks E. Itula esq _ For the 1st Defendant
(with Celestina Benjamin esq)

Aisha Bello esq - For the 2nd Defendant

SIGNED
HON.JUSTICE HUSSEINI B. YUSUF
(PRESIDING JUDGE)
07/01/2020