State of Wisconsin | Circuit Court | Milwaukee County

Geoff Davidian Plaintiff	*	**DECISION on MOTIONS OF DEFENDANT**
Versus	*	**Case Numbers 06-CV-011909**
J P Morgan Chase Bank et al Defendants	*	and
	*	**06-SC-045116**

Introduction

Defendants filed the following motions on 28 December 2007:

A. Motion for Summary Judgment.

B. Motion in Limine to preclude Plaintiff from pursuing his claim for punitive damages.

C. Motion in Limine to have Court determine that Plaintiff's actual damages are limited to $150.00 for the insufficient funds fee and $38.90 for the monthly services fee and $65.00 for the presumed annual fee paid by Plaintiff to enroll in the rewards program associated with his debit card.

In addition Defendants have filed a legal memorandum and submitted affidavits and exhibits from Lina Holguin, Jeff Childs and Attorney Natalie Remington which relate to all of the motions. As a result of not receiving certain discovery information, Plaintiff was twice given additional time to

file his responsive brief. The extension of time matter is dealt with in Order 8 dated 13 February 2008 and Order 7 dated 8 January 2008. It is noted that defendants, in Counsel's letter of 10 March 2008, assert that Plaintiff did not timely file his brief on Defendants' pretrial motions. The parties are in disagreement as to when the last discovery document was provided to Plaintiff. Out of caution related to fairness, a realization that only a few days at most are at issue and a desire to resolve matters on the merits after full input, the Court is going to accept the legal briefs submitted by all parties in making its rulings on Defendants' motions.

Plaintiff filed his brief on 10 March 2008. It includes an affidavit by Attorney Michael Mishlove and (under seal) Defendant Chase's Record Retention Policy that Plaintiff obtained through discovery.

Defendants replied (under seal) in a brief filed on 14 March 2008. Attached to the reply brief is an affidavit from Attorney Remington which includes, as attachments, the deposition (with exhibits) of Mr. Childs from 29 November 2007 and the deposition of Mr. Brian Thurman of 3 August 2007. The sealed envelope also include a Certificate of Service to Attorney Mishlove.

Wisconsin has a preference for resolving disputes, if at all possible, on the merits as presented by parties in court. **Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 287 (1991).** Yet, when there is no dispute as to material facts such that there is nothing to try to the Jury, then the motion should be granted. In **Just v. Land Reclamation, Ltd., 155 Wis.2d 737, 768-9 (1990)**, our Supreme Court said:

> "It must be granted by the trial court if no material issues of fact exist because the purpose of summary judgment is to avoid trial when there is not conflict."

However, Judge Marvin C. Holz of Milwaukee noted, as an experience trial judge, in the December 1983 issue of the **Milwaukee Lawyer**, that summary judgment motions are the most oft made motion in civil cases. In his article titled "The Art of Effective Presentation of a Motion for Summary Judgment", he said:

> "The hearing and deciding of motions for summary judgment probably constitutes the most unproductive work of a trial judge. They are time consuming and few are granted...The Supreme Court of Wisconsin has expressed its concern about a possible over-use of such motions and the volume of appeals they generate. **Hardscrabble Ski Area v. First National Bank, 42 Wis. 2d 344 (1968).**"

In the 25 years since Judge Holz wrote that article, he has been proven to, perhaps, have understated the nature of this problem. Rarely does a

litigated, large claim dispute go by without a summary judgment motion being brought by one or both sides.

Impeachment is dealt with in the evidence code at Wisconsin Statutes, sections 907.07 and 906.08. Usually prior inconsistent statements are at issue and these statements can be considered as substantive evidence under certain circumstances. **Vogel v. State, 96 Wis. 2d 372 (1980).**

Punitive damages are dealt with in the Wisconsin Statutes at section 895.85 (pre-1 November 2006) and renumbered section 895.043 (post-November 2006). It is a subject that has garnered much comment at the federal and state level. Both in Wisconsin and at the federal level, there are now important punitive damage cases before our highest courts. In Wisconsin we have guidance from Wisconsin Jury Instructions-Civil, number 1707.1. As noted in the Jury Instructions the purpose of punitive damages, which is a dependent claim, is to punish and/or deter the wrongdoer from engaging in similar conduct in the future. These damages can only be awarded if compensatory or actual damages also have been awarded. **Tucker v. Marcus, 112 Wis. 2d 425, 443 (1988).** Prerequisites include action by Defendant(s) which evidence malice and/or an intentional disregard of Plaintiff's rights. The burden of proof is upon Plaintiff to establish that Defendant's misconduct occurred by evidence that is clear and

convincing. **Wangen v. Ford Motor Co., 97 Wis. 2d 260 (1980).** After the parties have created their record, the Court acts a the gatekeeper in this area by determining whether there is sufficient evidence for submission of punitive damages to the Jury. See **Wangen,** supra and **Comment 5** to Wisconsin Jury Instructions-Civil, number 1707.1. Unless the Court concludes that sufficient evidence exists for a reasonable Jury to consider the issue of punitive damages, the matter does not go on the Verdict Form or to the Jury.

The burden as to damages is upon the party claiming to have suffered a loss. **Town of Fifield v. State farm Ins. Co., 119 Wis. 2d 220, 229 (1984) and Polebitzke v. John Week Lumber Co., 173 Wis. 2d 509 (1921).** The actual loss need not be proven with mathematical certainty. **Cutter Cranberry Co. v. Oakdale Electric Corp., 78 Wis. 2d 222 (1977).** The trier-of-fact, after hearing all of the evidence, determines whether to award damages and, if so, the reasonable amount thereof. See generally Wisconsin Jury Instructions-Civil in the 1700 series.

Discussion

Plaintiff claims that he has been damaged as a result of a breach of contract and conversion by Defendants. The instant motions are brought by

Defendants. Plaintiff's pre-trial motions have already been ruled upon.

I. As to Summary Judgment Motion

A general statement of the facts as claimed by the parties follows. Plaintiff had opened 2 accounts at Chase Bank. Number 1251 was a joint account with Plaintiff and his spouse and was opened on 1 June 2006 and the other (number 5243) was only in Plaintiff's name and was opened prior to that date. Plaintiff asserts that the terms of the contractual relationship between Chase Bank and Mr. Davidian were set forth in Chase's Account Rules and Regulations. Plaintiff also signed up for a Continental Airlines debit card so that he could accumulate reward points. A $65 charge was assessed for participating in this rewards program. On 12 June 2006, Plaintiff contacted Chase Bank (Mr. Brad Diamond) regarding $150 in NSF charges that had been imposed against his account as a result of a Wisconsin Department of Revenue levy. Later on that same day Plaintiff spoke to Mr. Childs, the Branch Manager. It is Plaintiff's position that Mr. Childs refused to identify the causes for the NSF fees. Defendants disagree and point to a letter that they sent to Plaintiff. No mention was made that the fees were imposed by mistake then or in the next few weeks. Just the opposite was asserted. Then, Chase Bank (Mr. Diamond and Mr. Childs) tried to sell Plaintiff overdraft protection as a way to avoid the charges in

the future. Mr. Davidian continued to demand the return of the NSF fees and Defendants refused to do that. Plaintiff filed this action (as a Small Claims case) on 24 July 2006. The NSF fees were returned that same day by virtue of a bank entry. The affidavit of Lina Holguin says that the $150 NSF fee was returned as a credit by Chase Bank as a courtesy to Mr. Davidian, who was a valued customer. When Ms. Holguin directed that the $150 NSF fee be returned to Mr. Davidian, she only was aware of Plaintiff's request for the refund. She did not know about any lawsuit and, in fact, that lawsuit, though filed, had not yet been served upon Defendants. An affidavit from Mr. Childs notes that he caused the accounts of Plaintiff with Chase Bank to be closed in a letter dated 22 December 2006. Mr. Childs' affidavit also notes that he caused the monthly service fees to be refunded to Mr. Davidian when Plaintiff made a complaint regarding them.

Plaintiff claims to have been injured by the conduct of defendants. He had accounts at Chase Bank and was, he believes, wrongly charged certain fees as follows:

A. NSF Insufficient Funds fees in the amount of $150.

B. Monthly Financial Software Service fees of $39.80.

C. Annual fee of $65

Plaintiff asserts that the Defendants have claimed that the imposition

of the NSF fees was due to a simple bank error. In discovery Defendants acknowledged that Chase Bank placed a freeze upon all the money in Mr. Davidian's account due to a tax levy which was filed in the amount of $2,073.74 Chase Bank did make payment on all items that were presented for payment. As a result of paying these amounts, Chase Bank concluded that Mr. Davidian had insufficient funds in his accounts and imposed an NSF fee(s) against the Plaintiff's account. Mr. Childs, in an affidavit dated 17 January 2007, said the fees imposed was $250.00 and not $150 even though Defendants and Plaintiff refer to this fee as being in the amount of $150. Defendants maintain (Mr., Childs affidavit of 21 December 2007) that Chase Bank accidentally placed a NSF fee against Mr. Davidian's account because it made an error. The error was that Chase Bank placed a lien upon Plaintiff's entire account, not just the amount of money needed to satisfy the tax levy. Plaintiff now claims that Defendants have presented conflicting explanations regarding how the Plaintiff came to be charged NSF fees without supplementing their discovery and, as a result, he has been prejudiced in his ability to obtain relevant evidence supporting his claims. Defendants present an affidavit dated 21 December 2007, from Mr. Childs that explains the errors he made regarding imposition of the NSF fees and the return of the NSF fees by check. The relief Plaintiff seeks is a

"stay" regarding the Court's consideration of Defendant's motions and a "hearing" on these conflicting explanations and their impact on Plaintiff.

Plaintiff, on this "side issue", has not established that Defendants have acted improperly or illegally in stating their reason(s) for charging Plaintiff NSF and other fees. Over time more information becomes available or a more precise explanation can be given for conduct or an action. Plaintiff can act to substantively impeach Defendants if he has found relevant inconsistencies during discovery. To stay the present consideration of the motions would improperly delay this case and not be likely to cast greater light on the interactions between Plaintiff and Defendants. If discovery has produced information regarding changes in Defendants' positions, then the trial is the place to demonstrate that to the Jury as it addresses credibility and determines the facts. It is not at all unusual for discovery to produce evidence of inconsistencies. To delay the action within a month or so of trial would be an abuse of discretion and a miscarriage of justice.

Plaintiff maintains that he had sufficient funds on deposit in his accounts from 11 July 2006 through 17 July 2006 to cover all items that were presented for payment. This covers the period when the NSF fees were imposed. Defendants note that Chase Bank did honor all items

presented for payment during this period. Plaintiff asserts that after he complained about the NSF fees in account 1251, Chase Bank began to wrongfully charge his other account (5243) monthly service fees for the period July through October 2006. Plaintiff spoke to Mr. Childs and was told the monthly account fees would be reversed. Rather, an additional fee was charged for November 2006 and the other fees remained. Defendant Childs disagrees. When the monthly account fees were refunded to Plaintiff on 10 November 2006, he returned those funds by check pending resolution of this dispute. Thereafter, on 22 November 2006, a letter was sent to Plaintiff indicating that all of his Chase Bank accounts were being closed.

Defendants contend that the Chase Bank Account Rules and Regulations allow it to return to customers funds that were withdrawn by mistake. Defendants assert that 4 separate causes of action are pled by Plaintiff. They include:

A. Breach of contract

B. Conversion

C. Section 100.18 claim

D. Misrepresentation

Plaintiff's legal brief discusses only A and B. Said differently, Plaintiff in his 29 page brief did not address the section 100.18 claim, misrepresentation

or the issue of dismissing the claims as against Mr. Banks individually. Defendants' challenge does not go to an alleged failure to properly and sufficiently plead each claim. Defendants assert that the NSF fee claim and monthly financial software service fee claim should be dismissed because of:

A. Equitable estoppel

B. Plaintiff's failure to mitigate his damages

C. Other legal reasons

Equitable estoppel is defined in **Riccitelli v. Broekhuizen, 227 Wis. 2d 100, 113 (1999)**:

> "Equitable estoppel, which focuses upon the conduct of the parties, requires:
> (1) action or non-action
> (2) on the part of one against whom estoppel is asserted
> (3) which induces reasonable reliance thereon by the other, either in action or non-action, and
> (4) which is to his or her detriment."

The facts as presented by Plaintiff would allow a reasonable person to conclude that Equitable Estoppel does not apply in this case as the NSF fee and the monthly financial software service fee was not even paid by Chase Bank until after Plaintiff commenced his lawsuit. No action by Plaintiff reasonably induced action or non-action by Defendants. Plaintiff had repeatedly sought the funds in question and it could reasonably be inferred,

as one option for the trier-of-fact, that intentional bad faith was behind the non-payment. Plaintiff, as a pro se litigant, had a right to reject payment and defer to the already filed legal proceeding to determine the validity of his claims. There is nothing in the record to indicate any awareness by Plaintiff as to the legal consequences to his acceptance of money from Defendants after his cause of action had been filed.

Similarly, Plaintiff's refusal to accept money from Defendants after the lawsuit was filed does not, of itself, act to establish that he failed in his duty to mitigate his damages. Commencing the lawsuit was itself the ultimate act to mitigate Plaintiff's damages. First, Plaintiff tried to obtain a refund of the fees in question. Only after that failed, did he commence his lawsuit. He fully complied with his duty in Wisconsin to mitigate his damages. This includes his return of funds paid by Defendants during the course of litigation. Also, Plaintiff's claim goes to punitive damages as well as actual damages. Central to this conclusion is the fact that the parties were already involved in a legal proceeding when Defendants tendered repayment. Clearly, Defendants have presented the affidavit of Ms. Holguin to show that the payment to Plaintiff of the $150 NSF fees had nothing to do with any lawsuit. The fact-finder can consider that, but for purposes of this motion the Court must consider the credible evidence which supports the

Plaintiff's claim. In a Summary Judgment motion the Court does not weigh the evidence and determine credibility matters. When Mr. Childs acted to refund the monthly financial software service fees to Mr. Davidian, it is possible, as a reasonable inference, that this was done to motivate Plaintiff to desist in his lawsuit or to reduce any damages that might be assessed against Defendants as opposed to simply being a positive gesture related to any general conduct of Plaintiff.

The annual fee was paid by Plaintiff to Chase Bank. One reasonable reading of the account Rules and Regulations would not allow, as a matter of contract law, for that fee to be retained when the accounts and credit card were unilaterally closed by Chase Bank. That is a genuine disputed matter. It makes no sense, without any formal offer of judgment, to have judgment entered (in this motion for Summary Judgment) for the $65 if the court determines, as to the instant motion, that the account Rules and Regulations do not call for Chase Bank to keep the annual account fee funds.

A dispute exists as to whether Plaintiff has or has not asserted a breach of contract. The parties are in agreement, it seems, that a contract was entered into between Plaintiff and Chase Bank regarding 2 accounts. What is in dispute is the concept of "breach". This term is defined in **Downey v. Bradley Center Corporation, 188 Wis. 2d 435, 441 (Ct. App.**

1994) as follows:

> "A breach of contract means a failure of a party to a contract to perform any promise which forms the whole or a part of the contract."

Every contract in Wisconsin has imputed into it a duty of good faith. **Wisconsin Natural Gas v. Gabe's Construction, 220 Wis. 2d 14, 21 (Ct. App. 1998).** It could constitute a breach of contract in Wisconsin if one party improperly closed accounts and/or cancelled a credit card if that was not contemplated by the parties in their contract. There is nothing in the record that indicates Defendants discussed with Plaintiff the bank's right to unilaterally close his accounts if he were to take action disputing their claimed wrongful imposition of fees. Such a clause, further, would be contrary to public policy. It is not grounds for termination of banking accounts and/or credit cards that a citizen exercised his legal right to sue in a court of law. It would further be in bad faith to give such a right to only one party (the bank) to the contract. This type of clause in a contract is often referred to as unconscionable. **Discount Fabric House v. Wisconsin Telephone, 113 Wis. 2d 258, 261 (Ct. App. 1983).**

> "The doctrine of unconscionability is somewhat amorphous. An unconscionable contract has been defined as one which no man in his sense, not under delusion, would make, on the one hand, and as one which no fair and honest man would accept, on the other."

The assertion of erroneously and in bad faith imposing fees has been made by Plaintiff against Defendants. When the intent of the parties to a contract is in dispute (as to the ability of Chase Bank under the terms of the contract to unilaterally terminate the contract), a motion for summary judgment should not be granted in this state. **Erickson v. Gunderson, 183 Wis. 2d 106, 115 (Ct. App. 1994)**. When interpreting a contract, the goal is to come to understand the intention of the parties. **Sampson Investments v. Jondex Corp., 176 Wis. 2d 55 (1993)**. Here, Plaintiff claims Defendants acted repeatedly to wrongfully take his funds and finally to close his accounts. This was, it is claimed, not any part of what the contracting parties agreed to. This includes general contract language to cure errors.

Conversion is usually defined as an act of rightfully obtaining something and then wrongfully detaining it. See Defendants' reference to **Brunner v. Heritage Companies, 225 Wis. 2d 728 (Ct. App. 1999)**. Here the facts as presented by Plaintiff contend that Chase Bank had lawful control by contract of 2 bank accounts that contained his funds. Using that control, it is claimed that Chase Bank then took funds from Plaintiff on a number of occasions and refused to return those funds even though repeatedly asked to do so by Plaintiff. Defendants dispute that. A genuine

issue of material fact exist as to the conversion claim.

Under the section 100.18 claim, Plaintiff asserts that Chase Bank made an advertisement, announcement, statement or representation to him which contained untrue, deceptive or misleading data and that he was injured as a result. In discovery Plaintiff was asked to state the facts upon which he based this claim, including the facts which establish his damages. Plaintiff responded by referring to the Complaint and to his answer to Interrogatory No. 12. None of the referred-to material provides support for a 100.18 claim. Puffery by a seller of a service does not establish actionable conduct. **State v. American TV & Appliance of Madison, 146 Wis. 2d 292, 301-2 (1988).** The statements and marketing material that stated Plaintiff would be well taken care of and be otherwise helped as needed are examples of puffery.

The court accepts the reasoning of Defendants on this issue--particularly since Plaintiff did not respond to this very specific motion by Defendants. The focus of this part of the Summary Judgment motion relates only to the opening of the accounts at issue. The cause of action brought under Wisconsin Statutes, section 100.18 is defective as a matter of law under the facts of this case.

Wisconsin recognizes 3 types of misrepresentation--intentional, strict

and negligent. **Vandehey v. City of Appleton, 146 Wis. 2d 411, 414 (Ct. App. 1988)**. As stressed by Defendants the critical elements to be reviewed are the making of a false statement and detrimental reliance (which was relied upon by another to his/her detriment). Plaintiff claims that he was induced to open bank accounts by false and misleading statements (including "you'll be well taken care of" and "you'll be helped as needed") by Mr. Childs and the misstatement as to the applicability of the Code of Conduct in Corporate Governance and that, as a direct result, he suffered a monetary loss. Further, Plaintiff claims he was repeatedly misled by Defendants regarding funds that were wrongfully taken from his accounts. These statements could be found to go beyond puffery only at the time the accounts were opened and to constitute actual deceit as Plaintiff asserts. This is particularly the case in light of Defendants unilaterally closing Plaintiff's bank accounts after he brought an action against them in a court of law. Damages under this claim are asserted and in dispute. A genuine issue of material fact exists as to the misrepresentation claim of Plaintiff.

Defendants ask that Mr. Childs be dismissed as an individual defendant. Plaintiff is not in privity of contract with Mr. Childs. All of the alleged wrongful actions and misrepresentations by Mr. Childs were as an agent of Chase Bank. The statements made at the time the accounts were

opened only would be considered puffery. However, those statement also must be considered in the context of subsequent statements made by Mr. Childs regarding the imposition of bank fees and the return of those funds. Plaintiff contends that Mr. Childs engaged in series (course of conduct) of wrongful and deceitful communications with him that caused him to be financially harmed. If the statements Mr. Childs made to Plaintiff were false (knew or should have known), we don't know if that was authorized conduct within the scope of his employment. Plaintiff has alleged wrongdoing by Mr. Childs (Defendants disagree.) and it would not be proper to dismiss him as a Defendant. A genuine issue of material fact exists regarding the claims made by Plaintiff against Mr. Childs.

II. As to Punitive Damage Motion

Defendants seek to have the Court rule in advance of trial that Plaintiff is not entitle to punitive damages. Although Defendants assert that Plaintiff is not able in this matter to recover any actual damages, that is a matter that is now only speculative. The Jury will make that determination. In addition, Defendants state that Plaintiff will not be able to demonstrate that Defendants' actions were so "egregious" as to warrant any punitive damages. This motion need not be further considered as the Court would erroneously exercise discretion and act contrary to law if it considered and

ruled on the motion before all of the evidence in this matter had been presented during the trial. The gate-keeper function of the court is not anticipatory to the presentation of the evidence at trial. This motion cannot be granted or even considered now.

III. As to the motion to limit Plaintiff's actual damages.

Damages awarded, if any, are limited by the proof submitted. This matter does not involve a disagreement (beyond those already dealt with in this decision) over claims regarding the following matters:

A. $150.00 for NSF fees

B. $39.80 for monthly service fees

C. $65.00 for annual fee

In fact, what this motion is about has to do with limiting Plaintiff's possible damage claim to these 3 fee matters. What is at issue, however, is punitive damages and what Plaintiff's brief refers to as "emotional distress" resulting from the wrongful conduct of Defendants. This matter was gone into in discovery where Plaintiff explained, in answer to questions posed, how the alleged wrongful conduct of Defendants impacted him and his family. Plaintiff gave interrogatory answers as a pro se litigant regarding his damages. However, Defendants made inquiry during discovery into the dimensions of the claimed injury experienced by Plaintiff. The dispute is

going forward. The facts will come out from both sides at trial. We are fortunate to have clear law in Wisconsin regarding what must be established by a party seeking recovery under emotional distress. The conduct must be extreme and it must be a cause of Plaintiff's disabling emotional response or injury. Defendants did have notice regarding this type of damage being claimed by (one who at the time was) a pro se litigant. At trial, after all evidence from both sides has been put into the record, this issue can be dealt with (if such a motion is brought) in a manner that would allow the law regarding emotional distress to be applied to the facts The party seeking to recover for a claimed loss has the burden of proof. Whether that burden is met will depend on what occurs at trial. It would be an abuse of discretion for the court, on the record created by the parties, to grant this motion to limit Plaintiff's ability to even seek damages under emotional distress.

Decisions on Motions

Based upon the foregoing, the court makes the following rulings on the Motions of Defendants:

A. The Motion for Summary Judgment regarding the section 100.18 claim is GRANTED.

B. The remainder of the Motion for Summary Judgment is DENIED. Defendants have not established a prima facie case for the relief they seek. A genuine issue of material fact does exist. Plaintiff's claims are not barred by equitable estoppel. Plaintiff has not failed in his duty to mitigated his damages under the data submitted. The contract between Plaintiff and Defendant Chase Bank does not preclude Plaintiff from seeking a return of his $65 annual fee. Plaintiff has viable breach of contract, misrepresentation and conversion claims that he may present to the Jury. Mr. Childs is a proper party Defendant in the case.

C. The Motion to have the Court rule that Plaintiff is not entitle to punitive damages is DENIED.

D. The Motion to have the Court limit Plaintiff's claim for damages to $150 for NSF fees, $39.80 for monthly service fees and $65 for the annual fee is DENIED.

In addition, the Motion made by Plaintiff in his responsive brief for a stay of proceedings and a further discovery hearing regarding conflicting information obtained in discovery is DENIED.

Dated this 27th day of March 2008

Dennis J. Flynn
Reserve Circuit Judge