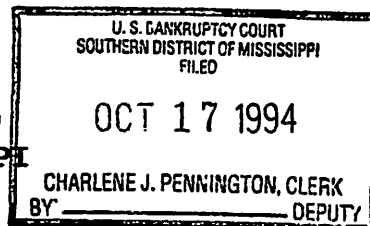


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE: FRUIT JOBBERS, INC.

CASE NO. 9000281JC

WOERNER PRODUCE CO., INC.,
FRED C. EBEL & CO., INC.,
H.C.SCHMIELDING PRODUCE CO.,
AMERIFRESH,
C.H. ROBINSON CO.,
WESTERN TOMATO GROWERS,
FOUR STAR TOMATO CO.,
DOLE FRESH FRUIT,
FRESHCO, INC.,
PISMO-OCEANO VEG. EXCHANGE,
NUCHIEF SALES, INC., AND
MIEDEMA PRODUCE, INC.

PLAINTIFFS

VS.

ADVERSARY NO. 900013JC

FRUIT JOBBERS, INC.,
GEORGE HARRISON, INDIVIDUALLY,
AND IN HIS CORPORATE CAPACITY,
KIM HARRISON, INDIVIDUALLY,
AND IN HER CORPORATE CAPACITY,
CONSUMER NATIONAL BANK

DEFENDANTS

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding is before the Court upon the Second Amended Complaint For Damages And Injunctive Relief filed by the Plaintiffs. The complaint has been dismissed as to all

Defendants except Consumer National Bank. The Plaintiffs claim Consumer National Bank is liable to them as PACA trust beneficiaries for the wrongful payment of three postdated checks drawn on the Debtor-in-Possession account of Fruit Jobbers, Inc. The Plaintiffs' second amended complaint having come on for trial and the Court having considered the evidence presented and the arguments of counsel, this Court holds that the Plaintiffs are not entitled to the relief sought, and that their second amended complaint should be dismissed with prejudice. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor, Fruit Jobbers, Inc. filed its petition for relief under Chapter 11 of the Bankruptcy Code in January of 1990. In February of 1990 this adversary proceeding was commenced wherein the Plaintiffs sought to have certain assets declared to be in trust and to have the Plaintiffs declared beneficiaries of the trust pursuant to the Perishable Agricultural Commodities Act (PACA).¹

On March 1, 1990 a judgment was entered by this Court finding that certain of the Debtor's assets, including cash, were held in trust pursuant to PACA, that the Debtor was prohibited from using those assets without prior approval of its attorney or the Court, and that the issue of trust beneficiaries would be decided

¹ The Perishable Agricultural Commodities Act is found at 7 U.S.C. § 499a, et seq.

at a later time.

On March 14, 1990 an order was entered converting the case to chapter 7.

After amendments to the pleadings, which included the addition of many parties, a settlement was reached among the Plaintiffs and all Defendants except Consumer National Bank. An order approving the settlement was entered in December of 1991.

The Plaintiffs' claim against Consumer National Bank first appeared in the Second Amended Complaint For Damages And Injunctive Relief filed in July of 1990. The essential facts alleged by the Plaintiffs are not in dispute.

On February 15, 1990, Consumer National Bank paid a check dated February 28, 1990, drawn on the Fruit Jobbers, Inc. Debtor-in-Possession account. The check was made payable to Mach Farms, Inc. in the sum of \$ 7,736.55. On March 2, 1990 Consumer National Bank paid a check dated March 15, 1990, drawn on the same account and payable also to Mach Farms for \$ 3,237.50. On March 12, 1990, Consumer National Bank paid a check dated April 2, 1990, drawn on the same account and made payable to Mach Farms in the amount of \$ 9,335.

The Plaintiffs claim that Consumer National Bank's payment of the postdated checks prior to the dates set forth on the checks was wrongful, and that as a result of the wrongful payment the Plaintiffs, as PACA beneficiaries, were damaged by a diminution of the trust assets in the total amount of the checks, \$ 20,309.05.

CONCLUSIONS OF LAW

In support of their position that Consumer National Bank is liable for the wrongful payment of postdated checks, the Plaintiffs rely upon Miss. Code Ann. § 75-3-114 (1972), which provides as follows:

§ 75-3-114. Date, antedating, postdating.

(1) The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

(3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

Also applicable, but cited by neither the Plaintiffs nor the Defendant, is Miss. Code Ann. § 75-4-407 (1972) which provides as follows:

§ 75-4-407. Payor bank's right to subrogation on improper payment.

If a payor bank has paid an item over the stop payment order of the drawer or maker or *otherwise under circumstances giving a basis for objection by the drawer or maker*, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

(a) of any holder in due course on the item against the drawer or maker; and

(b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

(emphasis added).

Effective January 1, 1993, the Mississippi legislature enacted a new article 3 of the UCC. Miss. Codes Ann § 75-3-113 (Supp. 1994) replaces the prior § 75-3-114 and provides in pertinent part as follows:

§ 75-3-113. Date of Instrument.

(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date. Except as provided in Section 75-4-401(c), an instrument payable on demand is not payable before the date of the instrument.

Section 75-4-401(c)(Supp. 1994), which is referenced in the above section, provides:

§ 75-4-401. When a bank may charge customer's account.

....
(c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in Section 75-4-403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in Section 75-4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under Section 75-4-402.

Since the checks were written in 1990, the newly enacted UCC sections are not applicable to the present case, but they are instructive of present legislative intent to limit the liability of banks for premature payment of postdated checks. Had the checks

been written after the effective date of the amendments, clearly the Plaintiffs would not be entitled to the relief which they seek.

No cases construing Mississippi's version of the UCC sections at issue have been presented to the Court and the Court has not located any Mississippi cases on point.

In determining whether the Plaintiffs are entitled to the relief sought, the initial question the Court must answer is which party bears the burden of proving whether payment of the checks was wrongful and the amount of damages sustained. Again, no cases have been presented to the Court regarding the burden of proof.

While the UCC does not explicitly state where the burden of proof lies in an action for wrongful payment of a postdated check, it does address the burden of proof in an action for payment of a check in disregard of a stop payment order. Miss. Code Ann. § 75-4-403(3)(1972), in effect when the postdated checks in issue were paid, provides, "[t]he burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer." Likewise, the present version of Miss. Code Ann. § 75-4-403(3) (Supp. 1994) states, "[t]he burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close account is on the customer."

Because the UCC makes no specific reference to the burden of proof in an action for wrongful payment of a postdated check, the following analysis, which the Court finds persuasive, has been made:

Since the drawer or depositor must prove the loss which he has sustained by the violation of his order to stop payment, it would appear inconsistent to require that the depositor prove actual loss when his explicit command to refrain from paying is ignored, without reaching the same conclusion where there is no express statement not to pay but merely the implied statement to refrain from making payment until a certain date has arrived.

Francis M. Dougherty, Annotation, *Extent of Bank's Liability for Paying Postdated Check*, 31 A.L.R. 4th 329.


The Court holds that the Plaintiffs bear the burden of proving both wrongful payment by the bank and damages resulting from the wrongful payment. However, the Court need not decide whether payment of the checks was wrongful under the superseded version of the UCC because, even if payment of the checks was wrongful, no evidence of damages was presented to the Court. At trial, the Plaintiffs introduced into evidence a copy of the three checks and the bank statements showing the dates the checks were paid. The Plaintiffs argue that because the funds in the DIP account were trust assets, the payment of the checks caused damage to the trust beneficiaries. The Plaintiffs offered no evidence to show why the trust beneficiaries were damaged by the payment of the checks, i.e., payment of the checks caused other items to be dishonored or any other damage that may have resulted from early payment of the checks.

Because the Court has before it no evidence that the Plaintiffs, as PACA trust beneficiaries, were damaged as a result of Consumer National Bank's payment of the three postdated checks prior to the date shown on each check, the Court finds that the

complaint against Consumer National Bank should be dismissed with prejudice.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 17th day of October, 1994.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED
OCT 17 1994
CHARLENE J. PENNINGTON, CLERK BY _____ DEPUTY

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DEFENDANTS

FINAL JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, the Second Amended Complaint For Damages And Injunctive Relief filed by the Plaintiffs against the Defendant, Consumer National Bank should be and hereby is dismissed with prejudice.

SO ORDERED this the 17th day of October, 1994.


UNITED STATES BANKRUPTCY JUDGE