2011 WL 8192971 (Okl.Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Oklahoma.
Oklahoma County

Danny L. SELLERS, Successor Co-trustee of the Imogene W. Sellers Trust, and AttorNey-if-fact under a Durable Power of Attorney of Imogene W. Sellers, Original Trustee of the Imogene W. Sellers Trust, Plaintiff,

v.

FIRST ENTERPRISE BANK, Defendant/Third Party Plaintiff,

v.

Jp Morgan Chase, N.A. and Danny Sellers, individually, Third Party Defendants.

No. CJ-2010-3030.
December 28, 2011.

Motion for Summary Judgment of Defendant First Enterprise Bank

Lee, Goodwin, Lee, Lewis & Dobson, Edward O. Lee, OBA # 5334, Kyle Go win, OBA #17036, William Lewis, OBA # 19862, 1300 E. 9th, Suite 1, Edmond, OK 73034, (405) 330-0118, (405) 330-0767 (fax), kgoodwin @edmondlawoffice.com, blewis@edmondlawoffice.com.

COMES NOW Defendant, First Enterprise Bank, and moves for Partial Summary Judgment in the above entitled and styled matter against the Plaintiff, the Imogene W. Sellers Trust, pursuant to the provisions of Title 12 O.S. Rules for the District Courts of Oklahoma, Rule 13, and submits the following statement of material facts as to which no substantial controversy exists, argument and citations of authority and brief in support of its Motion for Partial Summary Judgment.

I. BACKGROUND

The facts giving rise to this action begin in the year of 2004 when Ms. Imogene Sellers, then a widow of approximately 78 years of age, determined to establish a revocable trust. Ms. Sellers formed the self administered Imogene W. Sellers Revocable Trust, dated May 26, 2004, in which she was the primary beneficiary, trustee and settlor of the revocable trust. Subsequent to formation of this revocable trust, Ms. Sellers transferred her accounts at First Enterprise Bank into the name of the revocable trust and executed various deposit agreements which governed the relationship between the trust and First Enterprise Bank.

Ms. Sellers' advanced age apparently induced her son and successor trustee, Danny Sellers, to obtain the services of a Ms. Lynn Davis, a convicted felon on probation at the time, to assist her with general daily duties. Despite hiring Davis, Ms. Sellers was at all times competent, able to handle her **financial** situation and capable of understanding the consequences of her actions. Indeed, up until Ms. Sellers' recent passing, no attempt to establish a conservatorship over either Ms. Sellers' person or her assets occurred.

Sometime shortly after Ms. Sellers and her son hired Ms. Davis, the Plaintiff alleges that Ms. Davis began a scheme to defraud Ms. Sellers of a considerable amount of money. It is without dispute that Ms. Davis was on probation for the conviction of the crime of **financial** **exploitation** of an **elderly** person while she was allegedly perpetrating the scheme against Ms. Sellers. During a period commencing in 2005 and running through mid-2008, at least according to the allegations of the Plaintiffs Petition, numerous checks were written to Ms. Davis or to “cash” and the signature of Ms. Sellers was forged thereon.

Additionally, Plaintiffs Petition alleges that a prior employee of Ms. Sellers, one Sheila Cole, improperly forged and cashed checks drawn on the Trust account which total $60,430.00 between the years 2004 and 2005. This sole allegation in Plaintiffs

Petition relating to the alleged forged checks with Cole as the Payee forms the basis for a portion of seven separate claims for relief in Plaintiffs Amended Petition.

The Sellers Revocable Trust, through the successor trustee and son of the now deceased Imogene Sellers, seeks to establish liability against First Enterprise Bank for the actions of Ms. Sellers and her care-takers. The theory implicit in the action is that First Enterprise Bank is responsible for the **financial** losses suffered by the Sellers Revocable Trust (or Ms. Sellers) because it did not intervene sooner to identify and stop the improper actions of Ms. Davis and other accessories to her schemes. A number of theories are advanced in the Petition.

Notwithstanding First Enterprise Bank's empathy with the plight of Ms. Sellers and the extremely unfortunate circumstances that have resulted in an alleged loss to Ms. Sellers, First Enterprise Bank believes that this attempt to cast the responsibility for Ms. Seller's **financial** well being or her care upon it is ill-considered and without legal support. More specifically, for purposes of this Motion, any and all of Plaintiff's claims relating to alleged forged checks drawn on the accounts of Plaintiff are barred by 12A O.S. § 4-406, and should be dismissed as a matter of law.

II. STATEMENTS OF UNDISPUTED FACTS

1. The Imogene W. Sellers Revocable Trust, dated May 26, 2004 (the "Sellers Trust") established and entered into replacement deposit accounts with First Enterprise Bank on or about May 26, 2004, and transferred Imogene Sellers' personal funds on deposit with First Enterprise Bank into the re-named Sellers Trust accounts. See, Exhibit 1 - Assignment dated May 26, 2004; Exhibit 2 - Signature Cards (2) and Deposit Agreement for Account #XXXXXXXXX, and Exhibit 3 - Signature Card and Deposit Agreement for Account #XXXXXXXXXX.

2. Plaintiffs Petition alleges that over a multi-year period, two separate employees of Imogene Sellers perpetrated embezzlement schemes wherein checks drawn on Plaintiffs account were forged and monies were improperly withdrawn or charged back to Plaintiff's accounts with the Defendant. *See,* Plaintiffs Amended Petition, ¶¶ 30, 31 and 37, attached as Exhibit 13.

3. Plaintiff's Petition alleges the primary wrongdoers and forgers were Sheila Cole and Lynn Davis. Cole and Davis were alleged to have forged 152 checks between October 15, 2004 and April 3, 2008. *See,* Exhibit 13, ¶¶ 37-41.

4. Imogene Sellers admitted she paid her own bills and balanced her own checkbook at all times prior to 2004 and following the formation of the Trust, including from 2004 through mid-2008. *See* Exhibit 4 - Deposition Excerpt of Imogene Sellers, pg. 43, lines 3-17.

5. At all times relevant to when forgeries allegedly were committed by the employees of Plaintiff, between 2004 and mid-2008, Imogene Sellers was capable of handling her own **finances** and reviewing her bank statements. See Exhibit 5 - Deposition Excerpt of Lonnie Sellers, pg. 54, ¶¶ 2-8. Both sons, Danny and Lonnie, agreed at the time she was capable of handling her own **finances** in the period between 2004 and mid-2008.

6. True and correct examples of the checking account statements and accompanying check images which First Enterprise Bank prepared for the Plaintiffs accounts for the months of October, 2004 through April, 2008, are attached as Exhibit 6 hereto (copies of the October 2004 and April 2008 statements from account #XXXXXXXX are provided as examples, all statements during the above dates for both accounts have been previously provided to counsel for Plaintiff and can be produced to the Court upon request).

7. First Enterprise Bank mailed Plaintiff a detailed checking account statement, which included check images, for Plaintiff's accounts with First Enterprise Bank for each month between October of 2004 through the present date. The statements were mailed monthly between 2004 and mid-2008 to the Plaintiffs address on file with First Enterprise Bank, specifically, 1400 Casady Ln, Oklahoma City, Oklahoma 73120. See Exhibit 6 and Affidavit of Joan Stephenson, ¶ 5, attached as Exhibit 14.

8. Ms. Sellers lived in the same address, 1400 Casady Ln, Oklahoma City, Oklahoma 73120, from approximately 1960 until the middle of 2008, or at a minimum for 55 years. See Exhibit 7 - Termination of Joint Tenancy Affidavit and Exhibit 8 - Deposition of Imogene Sellers Excerpt, pg. 8, line 21.

9. At no point during the time period of October 2004 through March 15, 2010, did Plaintiff, Imogene Sellers, or any other party, request First Enterprise Bank to furnish replacement checking account statements for Plaintiffs accounts. *See*, Exhibit 13, ¶ 49 and Exhibit 14, ¶ 6.

10. The Bank's files contain no notation or indication the mailed statements were undeliverable or returned without delivery. *See*, Exhibit 14, ¶ 7. Pursuant to the First Enterprise processes and systems, any bank statement undeliverable would have been flagged by First Enterprise. *See*, Affidavit of Joan Stephenson, Exhibit 14, ¶ 7.

11. During the deposition of Imogene Sellers, she disclosed that certain monthly bank account statements were found behind a clothes dryer and in a tool chest at her residence, 1400 Casady Ln, Oklahoma City, Oklahoma 73120. See Exhibit 9 - Deposition Excerpt of Imogene Sellers, pg. 65, lines 11-25.

12. Neither the Plaintiff, Imogene Sellers nor any other party notified First Enterprise that any of the checks included in its monthly checking account statements from October, 2004 through April, 2008 (except for those three checks described in Paragraph 13), contain a forged signature of Imogene Sellers or any alteration or any other error or omission until March 15, 2010. Affidavit of Joan Stephenson, Exhibit 14, ¶ 10.

13. The Plaintiff notified First Enterprise three (3) checks were allegedly forged on March 5 and 6, 2008; however, the three (3) checks allegedly forged are not subject to this lawsuit and Plaintiff seeks no reimbursement for said checks. See Exhibit 10, Affidavits of Forgery.

14. By letter dated March 15, 2010 (Exhibit 11), from Plaintiff's counsel addressed to counsel for First Enterprise Bank, the Plaintiff gave First Enterprise notification that alleged forgeries had occurred in Plaintiff's accounts. By subsequent letter dated March 29, 2010 (Exhibit 12), Plaintiff's counsel specifically identified the alleged forged checks drawn on Plaintiff's Account for which it now seeks recovery. See Exhibits 11 and 12, Letters from Sheldon Swan dated March 15 and March 29, 2010; See also, Plaintiffs Amended Petition, Exhibit 13, ¶¶ 29, 49 and 50.

15. Plaintiff filed its original Petition on April 12, 2010. See, docket sheet on file in this matter.

16. Plaintiff's Amended Petition alleges that Plaintiffs employee, Lisa Davis intercepted certain of the bank account statements mailed by First Enterprise Bank to Plaintiff. See Plaintiff's Amended Petition, Exhibit 13, ¶ 28.

17. The Deposit Agreements (Exhibits 2 and 3) executed by Mrs. Sellers contained the following provisions:

> 3. STATEMENTS AND ADDRESS CHANGES. **Financial** Institution is authorized to mail periodic statements of this Account and returnable items by ordinary mail to address provided by Depositor. If such mail is returned as undeliverable, **Financial** Institution may hold further statements and items until called for by Depositor. Depositor is responsible for examining statements and contents carefully. If statement or contents contain any errors, forgeries, unauthorized withdrawals, or some other discrepancy exists, Depositor is responsible for promptly notifying **Financial** Institution in writing within a reasonable period of time not to exceed 30 calendar days (60 days in the case of ACH items). Depositor cannot assert an unauthorized withdrawal or error against **Financial** Institution unless such notification is made. Depositor is responsible for notifying **Financial** Institution in writing of changes in address and name.

Additionally, the Deposit Agreements further stated the following:

> 35. ACCOUNT STATEMENTS. You are responsible for promptly examining your statement each statement period and reporting any irregularities to us. The periodic statement will be considered correct for all purposes and we will not be liable for any payment made and charged to your Account unless you notify us in writing within certain time limits after the statements and checks are made available to you. We will not be liable for any check that is altered or any signature that is forged unless you notify us with thirty (30) days calendar days after the statement and the altered or forged item(s) are made available. Also we will not be liable for any subsequent items paid in good faith containing an unauthorized signature or alteration by the same wrongdoer unless you notify us within ten (10) calendar days after the statement and first altered or forged items were made available...If we truncate your checks, you understand that your original checks will not be returned to you with your statement. You agree that our retention of checks does not alter or waive your responsibility to examine your statement or change the time limits for notifying us of any errors.

III. STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

Pursuant to the newly enacted provisions in the Oklahoma Pleading Code, 12 O.S. §2056 now states:

> B. BY A DEFENDING PARTY. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

Furthermore, the Rules for District Courts, Rule 13(a), 12 O.S. Ch. 2, App. states:
A party may move for judgment in his favor on the ground that the depositions, admissions in the pleadings, stipulations, answers to interrogatories and requests for admissions, affidavits, and exhibits on file, filed with leave of court show that there is *no substantial controversy as to any material fact.*

[emphasis added.]

If the facts set forth show no substantial controversy exists as to any material fact, summary judgment should be granted. *First National Bank and Trust Co. v. Nesbitt* 598 P.2d 1197, 1198 (Okla. 1979); Rules for District Courts, Rule 13(e), 12 O.S. Ch. 2, App. Furthermore, a court may render a judgment as to those issues not in controversy, and proceed with the action on the remaining issues. See, *RST Service Mfg.. Inc. v. Musselwhite,* 628 P.2d 366, 368 (Okla. 1981); Rules for District Courts, Rule 13(e), 12 O.S. Ch. 2, App. *citing Pettit v. Vogt,* 495 P.2d 395 (Okla. 1972). In this regard, 12 O.S. Ch. 2, App., Rule 13(e), explicitly states, in pertinent part:

> [I]f the Court finds that there is no substantial controversy as to certain facts or issues, it shall make an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the remaining facts or issues....

See also, *Seitsinger v. Dockum Pontiac Inc.,* 894 P.2d 1077, (Okla. 1995):

> "Summary judgment is proper only when it appears that there is no substantial controversy as to any material fact, and that one of the parties is entitled to judgment as a matter of law. *Erwin v. Frazier,* 786 P.2d 61, 62 (Okla.1989). The trial court may look beyond the pleadings at submitted evidentiary materials such as, but not limited to, affidavits, depositions, and answers to interrogatories. *Hargrave v. Canadian Valley Elec. Co-op.,* 792 P.2d 50, 55 (Okla.1990); 12 O.S.1991, Ch. 2. App., Rule 13. All inferences must be taken in favor of the opposing party. *Manora v. Watts Regulator Co.* 784 P.2d 1056 (Okla.1989). The moving party has the initial burden of showing that there is no substantial controversy to any material fact. *Loper*

> *v. Austin*, 596 P.2d 544, 545 (Okla.1979). Thereafter, the opposing party must show, by materials included with the response, that there is a material fact remaining in dispute. *Samuel Roberts Noble Foundation. Inc. v. Vick*, 840 P.2d 619, 623 (Okla.1992); *Hargrave*, 792 P.2d at 55."

Applying this rule to the facts of this case, it is apparent that the Defendant is entitled to summary judgment as a matter of law.

IV. ARGUMENT AND AUTHORITIES

The Plaintiff has alleged various causes of action in its Amended Petition, including specifically the following: Count I (Facilitating Forgery); Count II (Breach of Fiduciary Duty and/or Aiding and Abetting Fiduciary Wrongdoing); Count III (Negligence or Gross Negligence); Count IV (Violation of UCC 4-401/Breach of Contract); Count V (Breach of Implied Covenant of Good Faith and Fair Dealing); Count VI (Violation of Oklahoma Banking Code, 6 O.S. 712); and Count VII (Equitable Accounting). The fiduciary duty claims and aiding and abetting of Count II were the subject of a prior Motion for Partial Summary Judgment and such claims were previously dismissed by Order of this Court.

PROPOSITION I.

THE PLAINTIFF'S CONTRACT AND TORT BASED CLAIMS ARE PRECLUDED BY THE OKLAHOMA VERSION OF THE UNIFORM COMMMERCIAL CODE

Oklahoma's version of the Uniform Commercial Code was adopted to make uniform all manners of the check collection, presentment and payment processes. See 12A O.S. §4-102. This includes both tort based (negligence and gross negligence) and contract based claims asserted by the Plaintiff. Throughout Article 4, negligence by various parties is addressed by statute and liabilities apportioned accordingly. As such, the particular provisions of the Oklahoma Uniform Commercial Code displace the common law and statutory based claims of the Plaintiff (Counts I through V and VII).

In support of this conclusion, various Courts have addressed whether 12A O.S. § 4-406 (or an individual State's version of 4406) precludes both negligence and contract based claims. Such Courts have been almost completely uniform in determining 4-406 is a statute of repose, rather than a statute of limitations, and both negligence and contract based claims may be precluded by its application. See *Equitable Life Assurance Society v. Okey. III*, 812 F.2d 906 (4th Cir. 1987) (interpreting South Carolina's version of UCC 4-406, Court found common law negligence claims were displaced by the UCC in actions founded upon unauthorized signatures); *Arkwright Mutual Insurance Co., v. State Street Bank & Trust Co.*, 703 N.E.2d 217 (Mass. 1998) (common law negligence claims displaced by Code in forged endorsement case); *Jensen v. Essexbank*, 483 N.E.2d 821 (Mass. 1985) (UCC 4-406 precluded claims in contract and negligence when customer failed to give notice to bank of forged signatures on checks within one year); *Wetherill v. Putnam Investments*, 122 F.3d 554 (8th Cir. 1997) (Where customer did not report unauthorized signatures within one year of statements being made available, UCC barred claims for fraud, negligence, conversion, breach of fiduciary duty, failure to adhere to commercially reasonable standards and bad faith); *Union v. Brand Banking & Trust Co.*, 627 S.E.2d 276 (N.C.App. 2006) (failure to report unauthorized signature precluded negligence claims even if customer is incompetent); *Siecinski v. First State Bank of East Detroit*, 531 N.W.2d 768 (Mich.App. 1995) (customer's failure to report unauthorized signature precluded all claims against bank, regardless of the type...i.e., both breach of contract and negligence); *Euro Motors. Inc. v. Southwest* ***Financial*** *Bank and Trust Co.*, 696 N.E.2d 711 (Ill. App. 1998) (provision of UCC that requires a bank customer to discover and report unauthorized signature bars all claims after one year, regardless of theory); *American Fed. Of Teachers. AFL-CIO v. Bullock*, 605 F.Supp.2d 251 (D.C. 2009) (failure by customer of duty to discover and report unauthorized signatures barred claims of both negligence and aiding and abetting breach of fiduciary duty).

It seems beyond dispute that due to the nearly uniform interpretation of UCC 4-406, Plaintiff's negligence claims and contract based claims (Counts I through V and VII) are precluded if this Court determines Plaintiff failed to discover and report the unauthorized signatures on the checks within the relevant time periods as more fully set forth in Proposition II, below.

More particularly, First Enterprise would advise the Court of the following:

I. *Count I - Facilitating a Forgery.* This appears to be veiled attempt at asserting the "aiding and abetting" claim (Count II) which was previously dismissed by this Court. Black's Law Dictionary defines facilitation as "the act or an instance of aiding or helping..." Clearly, Plaintiffs counsel seeks to revive an aiding and abetting claim dismissed by Order of this Court dated August 29, 2011. However, even if this Court determines facilitation is a distinct cause of action, such claim is precluded by the application of 12A O.S. § 4-406. See *American Fed. Of Teachers. AFL-CIO*, above.

II. *Count II - Aiding and Abetting Wrongdoing/Breach of Fiduciary Duty.* This claim was previously dismissed by Order of the Court dated August 29, 2011.

III. *County III - Negligence and Gross Negligence.* The theories of negligence and gross negligence are clearly precluded by the application of 12A O.S. § 4-406. See *Wetherill*, above. At a minimum, these claims are precluded insofar as the Plaintiff failed to discover and report unauthorized signatures within the time set forth by contract and the Oklahoma Uniform Commercial Code, as more particular discussed below

IV. *Count IV - Breach of Contract/Violation of UCC 401.* It seems beyond dispute that the preclusions of the Oklahoma Uniform Commercial Code apply to alleged violations of the Oklahoma Uniform Commercial Code. This claim is additionally precluded as it relies exclusively on an unauthorized signature in attempting to establish liability against First Enterprise

V. *Count V - Breach of Implied Covenant of Good Faith and Fair Dealing.* A claim for breach of implied covenant and fair dealing is not an independent cause of action relating to contracts between banks and their customers under Oklahoma law. In the case of *First Nat. Bank & Trust Co. of Vinita v. Kissee*, the Court reasoned:
We strongly agree with guarantor's primary contention that banks have an obligation to exercise good faith and fair dealing with its customers. The common law imposes this implied covenant upon all contracting parties, that neither party, because of the purposes of the contract, will act to injure the parties' reasonable expectations nor impair the rights or interests of the other to receive the benefits flowing from their contractual relationship. However, what guarantor fails to recognize is that in *Rogers v. Tecumseh Bank*, this Court held that without "gross recklessness or wanton negligence on behalf of a party" to a commercial contract, a breach of the implied covenant of good faith and fair dealing merely results in a breach of contract.

We made it clear in *Rogers*, that our seminal holding in *Christian v. American Home Assurance Co.*, does not generally apply to the relationship between a bank and its customer. In *Christian*, this Court held that in an insurance context, a breach of the implied covenant of good faith and fair dealing by the insurance carrier "gives rise to an action in tort for which consequential, and in a proper case, punitive damages may be sought" by the insured. In *Rogers*, we emphasized the special relationship between an insurer and insured which differentiates insurance contracts from commercial contracts. Our reluctance to extend Christian and its progeny beyond the insurance field was also illustrated in *Hinson v. Cameron*, where this Court refused to apply *Christian* to an at-will employment relationship. Again, we refuse to expand our *Christian* holding to banking relationships.

Our examination of decisions of other jurisdictions discloses that the great weight of authority, and what we consider to be the best-reasoned opinions, support our previous statement in *Rogers*, that "to impose tort liability on a bank for every breach of contract would only serve to chill commercial transactions. This is not to say that under every fact situation arising for a breach of contract that recovery may never lie."

Upon consideration of the parties' reasonable expectations concerning the enforcement of the guaranty agreement herein, we conclude that bank did not breach its implied covenant of good faith and fair dealing, or commit any independent tortious

conduct against guarantor. Guarantor failed to produce any evidence to support his contention that bank's president acted in reckless disregard for guarantor's rights during the inception of the guaranty agreement. Indeed, the bank president's negligence and awareness that the guaranty agreement was somehow tainted *ab initio* *510 are the only instances of bad faith alleged under this cause of action.

895 P.2d 502, 509-10 (Okla. 1993). First Enterprise would suggest to this Court that Count V of the Plaintiffs Amended Petition should be dismissed pursuant to *First Nat. Bank & Trust Co. of Vinita,* or at a minimum, be subject to the preclusion of 12A O.S. § 4-406.

Count VII - Equitable Accounting. Plaintiffs claim for an equitable accounting (Count VII) directly arises from the allegations that forged checks drawn on the account of Plaintiff caused the loss sought to be accounted for. Therefore, such claim is subject to the preclusion of 12A O.S. § 4-406 as well.

Count VI - Violation of 6 O.S. § 712. The only claim which may remain alleges a statutory violation of the Oklahoma Banking Code. First Enterprise has ascertained no facts or law which would support such a claim and has demanded the withdrawal of this claim by Plaintiff pursuant to 12 O.S. § 2001. However, if Plaintiff fails to withdraw this claim, it is additionally properly dismissed insofar as it relies upon any forgeries or unauthorized signatures in the process or collection of checks by First Enterprise.

PROPOSITION II

THE CLAIMS ALLEGED BY THE PLAINTIFF ARE BARRED PURSUANT TO 12A O.S. § 4-406

• Generally, a depositor has 30 days from the time the bank statement is mailed to review and notify a bank of a forgery; failing to do so, the depositor is precluded from recovering the loss from the bank.
• In cases involving bad faith, the customer has one year from the time the statement is mailed to notify the bank of a forgery.

• The Deposit Agreement between First Enterprise and Plaintiff reduced the one year period to notify the bank of a forgery to 30 days under any circumstances.

Oklahoma has adopted the revised Uniform Commercial Code, and Article 4 governs the relationship between a depositor and its bank. Here, the depositor (the Plaintiff Trust) and the bank (First Enterprise) have a relationship that is governed specifically by its Deposit Agreement and various provisions of Article 4 of the Oklahoma Uniform Commercial Code, 12A O.S. 4-101 et seq.

More specifically, Article 4 defines the rights between these parties with respect to bank deposits and collections. UCC Comment 3 to 12A O.S. § 4-101. Initially, all of Plaintiffs claims hinge on the theory that First Enterprise Bank should be liable for paying forged checks drawn on Plaintiffs account (i.e. under 12A O.S. § 4-401(a), the Bank charged Plaintiffs account for items "not properly payable"). However, the Plaintiff owed a corresponding duty to examine its statements and promptly report any errors, forgeries or alterations pursuant to 12A O.S. § 4-406. The Plaintiff failed to perform this duty and is subject to the preclusions that follow. Section 4-406 reads, in pertinent part:
(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.

(c) If a bank sends or makes available a statement of account or items pursuant to subsection (a) of this section, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized

because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c) of this section, the customer is precluded from asserting against the bank:

(1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and

(2) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding thirty (30) days, in which to examine the item or statement of account and notify the bank.

(e) If subsection (d) of this section applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) of this section and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) of this section does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (a) of this section) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under Section 12A-4-208 of this title with respect to the unauthorized signature or alteration to which the preclusion applies.

Should the customer fail to review the bank statements and inform a bank of an alleged forgery or alteration within such times set forth in the above statute, a customer is precluded from bringing any claims against the Bank arising from the alleged forgery. 12A O.S. § 4-406(c) and (d). Both the statute and the Deposit Agreement entered into by and between First Enterprise and Plaintiff set forth that Plaintiff has thirty (30) days to review the statements after mailing and notify First Enterprise of any disputed item. This statute, similar statutes and like deposit agreements have been repeatedly affirmed by courts in Oklahoma and other jurisdictions to preclude customers such as the Plaintiff from maintaining actions against banks when the customer fails to review and timely notify a bank of a forgery or alteration. See *Cooper v. Stock Yards Bank of OKC. OK*, 644 P.2d 123 (Okla. Civ. App. 1982).

A. REPEATER RULE

Section 4-406 also provides First Enterprise Bank with additional defenses to the claims brought by Plaintiff. 12A O.S. § 4-406(d), commonly referred to as the "repeater rule," sets forth that the customer is precluded from asserting claims for forgeries or an unauthorized signature when the same wrongdoer makes a series of transactions on the same account, if the customer fails to report the disputed transaction within 30 days after the statement containing the first forgery is made available to the customer. This provision squarely puts the responsibility on the customer for the loss if a simple review of the bank statements would have prevented further misdeeds by the wrongdoer. See *Globe Motor Car Co. v. First Fidelity Bank, N.A.*, 273 N.J.Super.388, 641 A.2d 1136, 1143 (1993) (wrongdoer's "successful series of forgeries over a three-year period is more fairly attributable to the folly and carelessness of the plaintiff in failing to detect the forgeries when the cancelled checks were returned to it than to the bank for paying the checks") and *Spacemakers of America, Inc. v. Suntrust Bank*, 609 SE.2d 683 (Ga. App. 2005) (customer's failure to timely examine his statement is that it gives the emboldened wrongdoer the opportunity to repeat his misdeed).

B. ALLEGED FAILURE TO EXERCISE ORDINARY CARE/GOOD FAITH

Section 4-406(e) explicitly states the preclusion from section (d) does not apply if the customer can prove the bank did not make payment on the forged check in good faith. The Plaintiff additionally has alleged gross negligence in the Amended Petition which appears to be Plaintiff's attempt to claim that First Enterprise failed to pay the alleged forged checks in good faith or without exercising due care.

However, 12A O.S. § 4-406(f) provides that no matter whether the bank acted in good faith or exercised ordinary care, the customer is absolutely precluded from recovery based upon an unauthorized or forged signature if she *fails to report the forgery within one year from the date when the bank statements were made available* to the customer. Compliance with this notice provision by the Plaintiff operates as a condition precedent to the customer's ability to maintain an action against First Enterprise to recover losses arising from the forged checks. This preclusion applies regardless of whether the First Enterprise exercised ordinary care or not. See *Halifax Corp. v. First Union Nat'l Bank,* 546 S.E.2d 696 (Va. 2001); *Chester Township Bd. Of Trustees v. Bank One. N.A.,* 2007 Ohio 3365 (Ohio App. 2007); *Pinigis v. Regions Bank,* 977 So.2d 446 (Ala. 2007); and *Borowski v. Firstar Bank Milwaukee. N.A.,* 579 N.W.2d 247, 250 (1998).

The UCC provisions set forth above were adopted to promote finality, certainty and predictability in commercial transactions, including those between a depositor and her bank. See 12A O.S. § 1-102. Courts have held that a customer is far more likely to be able to determine whether her signature was forged, or whether a particular withdrawal was authorized, than a bank which processes thousands of transactions every day. See *American Airlines Employees Fed. Credit Union v. Martin,* 29 SW.3d 86, 92 (Tex. 2000). See also, *Vending Chattanooga, Inc. v. American National Bank & Trust Co.,* 730 S.W.2d 624 (Tenn. 1987) (overruling earlier holdings that Banks must examine the signatures on each check and reasoning "To follow such a rule would place the bank in an impossible situation of either (1) being an insurer of all forgeries regardless of the customers' reasonable care; or (2) require the bank to hire such a large number of skilled handwriting experts so as to be economically not feasible, and certainly not commercially reasonable. We do not believe such a rule would be compatible with the intent of the Uniform Commercial Code and in practical effect § 4-406 would be useless...")

The customer's duty to review the statements is triggered when the Bank satisfies its burden to provide sufficient information regarding the transactions to its customer. If the bank provides sufficient information (i.e., statements showing the transactions), the customer will bear the loss if she fails to review, detect and notify the bank of the unauthorized transactions. *American Airlines Employees Fed. Credit Union,* at 94.

In the case before this Court, the alleged forgery scheme occurred over a 4 year period beginning around October 15, 2004 and continuing until April 10, 2008. It is undisputed that bank statements with images of the checks at issue were mailed to the Plaintiff from First Enterprise on a monthly basis over this exact time period. It is further undisputed that the Plaintiff failed to review the bank statements, detect the forgeries or notify the bank of any alleged unauthorized transactions during this 4 year period. The customer could have prevented years of unauthorized activity if she just would have reviewed the bank statements, but she wholly failed to do so. Accordingly, the Plaintiff must bear the burden of the loss under Oklahoma's version of the Uniform Commercial Code, and it matters not if First Enterprise exercised ordinary care. See Id., at 92-94 and 12 O.S.§ 4-406.

C. PLAINTIFF'S CLAIM OF INTERCEPTED BANK STATEMENTS

The Plaintiffs Petition and deposition testimony has claimed she did not receive her monthly statements because Lynn Davis intercepted them. Even accepting this fact as true and in the most favorable light to the Plaintiff, it does not relieve the Plaintiff of her duties under 12A O.S. § 4-406.

Subsection (c) of § 4-406 is very clear in setting forth that a depositor's duty to promptly examine the account statements is triggered when the statement is "sent" by a bank. Oklahoma's version of the Uniform Commercial Code defines "send" in connection with a writing or notice as "the deposit of the item in the mail properly addressed." 12A O.S. § 1-201(38). It seems beyond dispute that the adoption and defining of the word "send" in the in respect to referenced statutes signals that the depositor's duty to inspect account statement commences from the time the statements are deposited in the mail by the bank. The definition of "send" clearly makes no requirement that they actually be received by the depositor, nor is there an equitable exception with would toll the commencement of the 30 day reporting period. See Oklahoma Code Comment 5 to 12A O.S. § 4-406; *Myrick v. National Sav. & Trust Co.,* 268 A.2d 526 (D.C.App. 1970) (depositor who failed to inquire of the bank as to her lack of receipt of monthly statements and cancelled checks was negligent as a matter of law); *Mesnick v. Hempstead Bank,* 434 N.Y.S.2d 579 (N.Y.Sup.Ct. 1980) (fact that account holder's husband intercepted bank statements would not prevent bank from invoking UCC 4-406); *Terry v. Puget Sound Nat'l Bank,* 492 P.2d 534 (1972) (holding an account holder's failure to investigate the non-receipt of monthly statements constitutes lack of due care under UCC 4-406).

The *Mesnick* case seems particularly applicable to the situation before this Court. In *Mesnick,* the Court stated:

> Although the depositor is not better able than the bank to discover isolated forgeries, he was in a better position to uncover a pattern of forgery by a trusted employee, friend or relative...to discharge [the duty imposed by Section 4-406] a depositor must necessarily obtain possession of the bank statements and scrutinize them or bear the losses which flow from his unreasonable lack of concern.

Mesnick, at 580. Additionally, various Courts have flatly rejected that a depositor can simply deny they received their statements because it would place enormous **financial** burdens on banks by forcing them to prove receipt of monthly statements by a depositor either through certified mail or other means, which costs would likely be passed onto customers. See *Stowell v. Cloquet Co-op Credit Union,* 557 N.W.2d 567, 571-572 (Minn. 1997), *Peters v. Riggs Nat'l Bank,* 942 A.2d 1163, 1170 (D.C.Ct. App. 2008); *Fundaciaon Museo de Arte Contemoraneo de Caraca - Sofia Imber v. Republic Nat'l Bank of New York,* 996 F.Supp. 277,291 (S.D.N.Y. 1998).

An insider's interception of bank statements does not excuse the depositor from her duty to review the bank statements and report unauthorized transactions. The Bank's duties under 4-406 cease once the statement is mailed, and the risk of interception by a dishonest employee or insider falls upon the depositor. See *Borowski v. Firstart Bank of Milwaukee,* 579 N.W.2d 247, 250 (1998); *Kiernan v. Union Bank,* 127 Cal.Rptr. 441 (1976); *Cooley v. First Nat'l Bank of Little Rock,* 635 S.W.2d 250 (1982); *Decatur Fed. Sav. & Loan Ass'n v. Litsky,* 429 S.E.2d 300, 303 (1993) (the bank's sending, not the customer's receiving, is what governs because this is the plain wording of the statute); *Basterrechea Distrib., Inc. v. Idaho State Bank,* 836 P.2d 518 (1992) (interception of bank statements by dishonest bookkeeper did not excuse account holder's failure to promptly examine them); *Knight Communications. Inc. v. Boatmen's Nat'l Bank,* 805 S.W.2d 199 (Mo.App. 1991) (another case holding that business partner intercepting statements did not relieve depositor of duty to bring unauthorized checks to bank's attention).

In the case before this Court, it is undisputed that bank statements were mailed every month to the Plaintiff during the four (4) year time period in which the alleged unauthorized transactions occurred. It is also undisputed that the statements contained adequate information for the depositor to identify any unauthorized activity, including images of the cancelled checks. Although it matters not for purposes of § 4-406 whether the statements were actually received by the depositor or her employees, Plaintiff admits certain of the alleged intercepted statements were later located in her home. See Exhibit 6, pg. 65, ¶¶ 11-25. First Enterprise made the bank statements available to the depositor within the meaning of § 4-406. However, the depositor failed to identify the disputed items until March 22, 2010, via letter from counsel for the Plaintiffs. The latest alleged forgery occurred on April 3, 2008, which would have been included in the May, 2008 bank statement mailed to the Plaintiff. None of the disputed items which began in 2004 were ever specifically flagged or identified as unauthorized prior to First Enterprise's receipt of the March 29, 2010 letter. Accordingly, Plaintiff is precluded from filing suit which relies upon a forged or unauthorized signature pursuant to 12A O.S. § 4-406.

D. DEPOSIT AGREEMENT CONTAINS PERMISSIBLE REDUCTION OF 4-406(f) REPORTING REQUIREMENT TO 30 DAYS

The Deposit Agreement between the Plaintiff and First Enterprise clearly reduced the one year reporting period provided by 12A O.S. § 4-406(f) to thirty days from the mailing of each bank statement. This variance and reduction from the statutory one-year time frame under the Uniform Commercial Code to 30 days is proper and enforceable.

Oklahoma's version of the Uniform Commercial Code allows parties to vary provisions from Article 4 by agreement, so long as the agreement does not disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit damages therefrom. 12A O.S. § 4-103(a). Official Comment 2 to § 4-103(a) states that is parties may "vary all provisions of the Article agreements of the ordinary kind...In the absence of a showing that the standards manifestly are unreasonable, the agreement controls."

The plain language of the Deposit Agreement by and between the Plaintiff and First Enterprise establishes that, if First Enterprise is not notified within thirty (30) days of the statement being mailed to Plaintiff, the statement is deemed correct and *First Enterprise will not be liable under any circumstances* for any forged or altered check. Additionally, if a forged or altered check is committed by a repeat wrongdoer, the Plaintiff has ten (10) days from the date of the statement being made available to the Plaintiff. The Deposit Agreement specifically reduces the one year period arising under 12A O.S. § 4-406(f) to thirty days, and in the case of a repeat wrongdoer, ten days.

Although there has been no published opinion in Oklahoma on whether parties may shorten the § 4-406(f) one year period to a shorter period, such as thirty (30) days, this issue has been addressed by various sister states interpreting identical statutory language from the Uniform Commercial Code. All of the various states have held this reduction in time (ranging from 14 to 60 days) by agreement is enforceable. See the following cases:

> *Peters v. Riggs Nat'l Bank,* 942 A.2d 1163 (D.C.Ct.App. 2008); *Jamison v. First Georgia Bank,* 387 S.E.2d 375 (Ga.App. 1989); *Reliance Ins. Co. v. Bank of America Nat'l Trust & Sa. Ass'n,* 2001 U.S.Dist. Lexis 695 (2001); *Peak v. Tuscaloosa Commerce Bank,* 707 So.2d 59 (La. App. 1997); *Jensen v. Essexbank* 783 N.E.2d 821 (1985); *Stowell v. Cloquet Coop Credit Union,* 557 N.W.2d 567 (Minn. 1997); *Brighton, Inc. v. Colonial First Nat'l Bank,* 422 A.2d 433 (N.J. Super.Ct.App.Div. 1980); *Zambia Nat'l Commercial Bank, Ltd. V. Fidelity Intl Bank,* 855 F.Supp. 1377 (S.D.N.Y. 1994); *Parent Teach Ass'n. Public School 72 v. Manufacturers Hanover Trust Co.,* 524 N.Y.S.2d 336 (1988); *Fundaciaon Museo de Arte Contemoraneo de Caraca - Sofia Imber v. Republic Nat'l Bank of New York,* 996 F.Supp. 277, 291 (S.D.N.Y. 1998); *ADC Rig Services. Inc. v. JPMorgan Chase Bank. N.A.,* 641 F.Supp.2d 617 (S.D.Tex. 2009); *American Airlines Employees Fed. Credit Union v. Martin,* 29 S.W.3d 86 (Tex. 2000); *Canfield v. Bank One Texas, N.A.,* 51 S.W.3d 828 (Tex.Civ.App. 2001); *Community Bank & Trust. SSB v. Flick,* 107 S.W.3d 541 (Tex. 2002); *Lone Star Nat'l Bank v. Marinez,* 2010 Tex. App. LEXIS 2113 (2010); *National Title Ins. Corp. Agency v. First Union Nat'l Bank,* 559 S.E.2d 668 (2002); *Halifax Corp. v. First Union Nat'l Bank,* 546 S.E.2d 696 (2001); *Borowski v. Firstar Bank Milwaukee, N.A.,* 579 N.W.2d 696 (2001).

First Enterprise suggests this Court uphold the reduced time periods of 4-406(f) based upon the Deposit Agreement, especially in light of the Uniform Commercial Code's stated policy of providing uniformity throughout the states for commercial transactions, and the well-reasoned opinions referenced above.

PROPOSITION III

APPLICATION OF THE PRECLUSION FOUND IN 12A O.S. § 4-406 TO PLAINTIFF'S CAUSES OF ACTIONS ASSERTED IN AMENDED PETITION

As has been repeatedly alluded to in the cases referenced above, 12A O.S. § 4-406 is treated as a statute of repose and operates as a condition precedent to a customer filing an action against a bank to recover for losses arising from an unauthorized signature no matter the actual claim asserted by the customer. See cases cited in Proposition I. In the matter at hand, Plaintiff first filed Affidavits of Forgery against three checks drawn on the account of Plaintiff on March and 6 of 2008. See Exhibit 7. Prior to such time, no report of any unauthorized or forged checks had been asserted by the customer. It should be noted by the Court that Plaintiffs Amended Petition does not seek recovery on the three (3) checks identified as forged to First Enterprise in 2008. All of the alleged unauthorized or forged checks for which Plaintiff now seeks recovery were not specifically identified or reported to First Enterprise until March 29, 2010. Taking the evidence in the light most favorable to the Plaintiff, these allegedly forged checks began in 2004 and continued until April 3, 2008, and were admittedly not reported to First Enterprise Bank until March 29, 2010 (or March 15, 2010 at the earliest). Not until March 29, 2010 did counsel for Plaintiff identify the checks alleged by Plaintiff to be forged by the repeated wrongdoers, Lynn Davis and Sheila Cole, former employees of the Plaintiff.

The most recent alleged forged check for which recovery is sought by the Plaintiff is a check drawn on the trust account made payable to Kendall Faulk on April 3, 2008 and allegedly forged by the employee of the Plaintiff, Lynn Davis. See Plaintiff's Amended Petition, ¶ 38. According to Plaintiff's Amended Petition, the checks forged by Davis and cashed by the next door neighbor Lorraine Hamill occurred between October 17, 2005 and June 15, 2007, those deposited by Melissa Garcia and forged by Davis occurred between May 26, 2007 and June 8, 2007, and those checks allegedly forged by Sheila Cole were dated between October 15, 2004 and October 17, 2005. See Plaintiff's Amended Petition, ¶¶ 39-40. None of these checks were reported as unauthorized or forged prior to March 29, 2010. See Plaintiff's Amended Petition, ¶ 50. Those sole checks reported as forged on March 5 and 6, 2008 are not subject to this lawsuit. It seems to be without dispute that each of the checks which the Plaintiff now seeks recovery upon were not reported to First Enterprise within the 30 days from the date a statement was made available to the Plaintiff as required under the deposit agreements or the one year period as set forth under 12A O.S. § 4-406 (f). The Court need not even determine if the shortening of the time period to report forgeries to 30 days is permissible, as not one of the checks Plaintiff now seeks recovery upon were discovered and reported to First Enterprise prior to March 29, 2010.

The last forgery which Plaintiffs seek recovery upon was issued on April 2, 2008 and cashed on April 3, 2008. This transaction was disclosed on the Plaintiffs April 17, 2008 bank statement. See Exhibit 4. This check was issued after a series of allegedly forged checks perpetrated by the same wrongdoer, giving the Plaintiff ten (10) days under the Repeater Rule to discover and notify First Enterprise Bank from and after April 17, 2008 for all claims except those involving bad faith. For those claims alleging bad faith, the time period to notify First Enterprise is thirty (30) days pursuant to the permissible reduction of time in the deposit agreement. Even if this Court ignores the permissible reduction, the outside date under any interpretation of 12A O.S. § 4-406(f) for claims arising from bad faith is one year from April 17, 2008. Plaintiff failed to notify First Enterprise of this allegedly forged transaction until March 29, 2010, approximately two (2) years after the bank statement was made available to the Plaintiff. Accordingly, First Enterprise would suggest to this Court that under any interpretation, all contract and negligence based claims (including those alleging bad faith or gross negligence) are precluded by law.

CONCLUSION

First Enterprise Bank respectfully submits to this Court that it is entitled to summary adjudication disposing of Plaintiffs remaining contract and tort-based claims. It is, of course, disturbing that an **elderly** woman such as Ms. Sellers was so grievously taken advantage of by her own care providers. However, there is no basis in fact or in law which would warrant imposing responsibility upon FEB for this unfortunate circumstance. There is simply no evidence to suggest that FEB failed in its responsibility to provide monthly bank statements to Ms. Sellers or her Trust. Indeed, the testimony provided that at least some of the statements were found in her house, behind the clothes dryer or in her tool box. What became of these statements once

they reached Ms. Sellers' home is a topic upon which much discussion could be had, but, FEB was in no position to guard Ms. Sellers against the conduct of those that she and her sons placed in her home.

One of the inexplicable obstacles to the Plaintiff's recovery in this case seems to be the marked discrepancy between the claimed propensity and capability of Ms. Sellers to examine and reconcile her own bank statements during her life - even into her late years - and the fact that *over the course of some four (4) years, Ms. Sellers never gave any indication to FEB that anything was amiss with her account.* Whether Ms. Sellers' failure to give notice to FEB that the disputed checks were clearing her account was a result of some successful fraud practiced by her home care providers or is an indication that, in her loneliness, Ms. Sellers through her kindness and generosity wanted the funds to be given to the providers is a question that will likely remain unanswered.

It is clear, however, that of all the persons and parties involved in this matter, only Ms. Sellers and her children were in a position to give an alert or otherwise stop the activities of the persons hired to care for her. In a sense, this case is no different from the large number of unfortunate cases in which a trusted employee embezzles funds from their employer.

The underlying principle which supports the code provisions of Oklahoma's Uniform Commercial Code, such as §4-406, and the opinions cited herein interpreting it seems to simply restate the long-standing equitable theory that, when a court must apportion a loss between two or more innocent persons, the loss should fall upon that person who was in the best position to have avoided it. Oklahoma has long recognized that: “where one of two innocent persons must suffer by the fraud of a third, he who put it in the power of the third to commit the fraud must suffer.” *Nelson v. Jones,* 219 P. 667, 93 Okla. 85 (1923).

The undisputed facts that have been established in this case seem to quite clearly support the application of the preclusive effect of the cited provisions of the Uniform Commercial Code, as fully as they would application of earlier equitable principles of apportionment of loss. Despite the sympathy which the facts of this case engender for Ms. Sellers, now deceased, it cannot be disputed that she and her family were not merely the ones who put Ms. Davis and Ms. Code in position to take advantage of Ms. Sellers; they were the only ones who could have promptly and timely alerted the authorities, and FEB, of the conduct of these employees. Both their responsibility for placing these persons in a position of trust and their failure to adequately review the bank statements that were sent, operate to prevent the Plaintiff from successfully recovering from FEB.

WHEREFORE, premises considered, First Enterprise Bank, prays this Court enter an Order and Decree dismissing the claims that have been asserted by the Plaintiff in their entirety; or in the alternative; for each claims set forth in the Amended Petition except for Count VI: Violation of Oklahoma Banking Code and issue further Order that Count VI is hereby dismissed insofar as it relies upon a forged signature on any checks or items presented to First Enterprise Bank; and for such other and further relief as may be appropriate the circumstances considered.

Respectfully Submitted,

LEE, GOODWIN, LEE,

Edward O. Lee, OBA # 5334

<<signature>>

Kyle Go win, OBA #17036

William Lewis, OBA # 19862

1300 E. 9 th , Suite 1

Edmond, OK 73034

(405) 330-0118

(405) 330-0767 (fax)

kgoodwin@edmondlawoffice.com

blewis@edmondlawoffice.com

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