

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

vBANK,

CIVIL ACTION

Plaintiff

v.

CHECK EXPRESS, INC., et al., :  
Defendants

NO. 01-3225

MEMORANDUM AND ORDER

McLaughlin, J.

May 6, 2003

This case was brought by the plaintiff, vBank, against several corporate and individual defendants for damages suffered from an alleged check kiting scheme. The plaintiff has **filed** a motion for summary judgment against one of the individual defendants, Barry Winokur. **Mr.** Winokur provided a verbal response to the motion at a settlement conference by the parties on January **21**, 2003, and did not dispute any of the facts **alleged** by the plaintiff in the motion. Defendants Check Express, Inc., B&E Express Check Cashing, Inc., BeepersCheaper.com, LLC, and Edward and Susan Williams have filed a memorandum in opposition.

The plaintiff alleges that summary judgment is warranted because Mr. Winokur has admitted engaging in the conduct alleged in the complaint, both in his deposition and **by** pleading guilty to a criminal bank fraud charge that stemmed from the conduct underlying the instant case.

The Court agrees that summary judgment is warranted on

count one, alleging RICO violations, count two, alleging RICO conspiracy violations, count three, alleging conversion, count five, alleging unjust enrichment, and count six, alleging fraud. The Court, however, holds that the plaintiff has not provided sufficient uncontested facts to support a grant of summary judgment on count four, alleging breach of contract.

## I. Background

### A. Undisputed Facts

Barry Winokur was the sole owner and an officer and employee of Best Financial, Inc<sup>1</sup>. Mr. Winokur was the secretary/treasurer and an employee and fifty-percent owner of B&E Check Express Check Cashing Inc., Best Financial, Inc., and Beepers Cheaper.com (along with Check Express, "the entity defendants"); Edward Williams owned the other fifty percent. All of the entity defendants were funded by revenues from Check

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<sup>1</sup>In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). A motion for summary judgment shall be granted where all of the evidence demonstrates "that there **is** no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

Express,<sup>2</sup> which was a check cashing business that cashed checks and provided other services **for** its customers. Ex. B, at 13-14; Ex. C, at 87-97<sup>3</sup>.

vBank is a savings bank in Philadelphia that does business under the names BankPhiladelphia and USABancshares.com. From July 1998 until June 2001, Winokur and the entity defendants maintained business and personal bank accounts with vBank. These included two Check Express checking accounts, opened in July of 1998, account numbers 365310108 (the "108 account"), and 365310157 (the "157 account"), on which Mr. Winokur and Mr. Williams were authorized signatories. Ex. B, at 18-19; Ex. C-1; Ex. D.

The 157 account was used to deposit checks cashed by customers of check express. Deposits were made to this account four or five times per day. The other account, the 108 account, was used to pay the expenses of Check Express. Ex. B, at 21-22.

When the accounts were first opened, both accounts had next day availability of deposited funds. Around Christmas 1998

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<sup>2</sup>Check Express changed its corporate name to B&E Check Cashing, inc., but continued to **do** business under the name "Check Express." The two are the same corporate entity, operating under one federal taxpayer ID number. Ex. C, at 88.

<sup>3</sup>All references to the plaintiff's exhibits are abbreviated as "Ex." followed by the relevant exhibit letter and page number. The defendants have not provided any exhibits in their response to this motion. The amended complaint is abbreviated "Am. Cmp.," followed **by** the relevant page or paragraph number.

and New Year's Day 1999, Check Express received same day availability for both these account. After this time, Mr. Winokur began to kite checks between vBank and another bank at which he had an account, Summit Bank. Ex. B., at 27-28; Ex. C, at 134-37, 142-43.

Mr. Winokur would deposit checks from various Check Express and Best Financial bank accounts at Summit Bank into the vBank 157 account. Mr. Winokur would then immediately withdraw cash from the 157 account, and the next business day deposit sufficient cash back into the Summit accounts to cover the amount of the checks written on the Summit account and deposited to the 157 account. When he wrote the checks from the Summit account, Mr. Winokur knew the funds were not available to cover the checks. Ex. C, at 134-39, Ex. C-1.

Mr. Winokur first began writing checks for approximately \$30,000. In February 2000, Mr. Winokur used the check kiting to pay \$267,000 for cellular phones for Check Express.\* Once the kite exceeded \$200,000, Mr. Winokur used wire

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<sup>4</sup>The plaintiff has alleged that Edward Williams was consulted prior to Mr. Winokur's use of the check kite to pay for the cellular phones. The defendants who have filed a response in opposition to this motion deny that Mr. Edward Williams had knowledge of the check kiting scheme, but do not provide a record cite to show that this fact is in dispute. However, because Mr. William's knowledge is not at issue in this motion, it is unnecessary for the Court to resolve this issue. Accordingly, the Court makes no finding regarding Mr. William's knowledge or participation.

transfers to return cash to the Summit accounts because he was not permitted to make cash deposits in such large amounts. Ex. C, at 165-66; Ex. C-1.

Mr. Winokur increased the amount of the kite again in 2001 and used the funds to finance Check Express activities as well as purchase shares of vBank publicly traded stock. Though Mr. Winokur planned to sell the vBank shares at a profit and use the profits to repay the kited funds, the price of the vBank stock fell and he was unable to do so. Ex. C, at 153-57; 167.

The check kite continued until mid-June 2001, when Summit closed Mr. Winokur's Check Express accounts. vBank then received returned checks from Summit totaling \$5,470,000. vBank charged these returned checks to the 157 account, leaving the 157 account overdrawn. vBank attempted to contact Mr. Winokur about the overdrafts, but was unsuccessful. On June 29, 2001, vBank closed the 157 account with a negative balance of \$3,481,598.94. Various debits and credits were made to the 157 account after it was closed, and the final negative balance was \$2,975,881.29. Ex. F.; Ex. C-1; Ex. C, at 177-79.

vBank recovered \$233,000 from the proceeds of the sale of Check Express, Inc., B&E Express Check Cashing, Inc., and the other check cashing businesses. The total amount presently due to vBank on the 157 account is \$2,742,881.29. Ex. F; Ex. C-1.

As a result of the check kiting activities Mr. Winokur

was charged with one count of federal bank fraud in violation of 18 U.S.C. § 1344(1). Mr. Winokur plead guilty to this count on September 12, 2002. **Ex. G.**

B. Litigation

This lawsuit was brought against individual defendants Barry Winokur, his wife Sherri Winokur, Mr. Winokur's business partner Edward Williams, his sister Susan Williams, and Mr. Winokur's mother Martha Winokur ("the individual defendants"). vBank also brought suit against Check Express, Inc., B&E Check Express Check Cashing Inc., Best Financial, **Inc.**, and Beepers Cheaper.com.<sup>5</sup> Am. Cmp., at 2-4.

vBank's amended complaint included the following counts: 1) one count alleging **RICO** violations under 18 U.S.C. § 1962(c) by the individual defendants predicated upon wire fraud and bank fraud, 2) one count alleging RICO conspiracy violations under 18 U.S.C. § 1962(d) by the individual defendants; 3) one count alleging conversion by all defendants; 4) one count alleging breach **of** contract by all defendants; 5) one count alleging unjust enrichment **of** all defendants; 6) one count alleging fraud by all defendants. Am. Cmp., at 12-20.

vBank has filed a motion for summary judgment against

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<sup>5</sup> A separate lawsuit filed by vBank against Fleet Bank was consolidated with this case but has now been dismissed after settlement by the parties involved in that case.

Mr. Winokur on all counts to which he is a defendant. This motion has not been opposed by Mr. Winokur, though, as noted, some **of** his co-defendants have filed a memorandum in opposition to the motion. This memorandum does not take any position with respect to vBank's request for summary judgment against Mr. Winokur, but does dispute any statements by the plaintiff that suggest that Mr. Williams was aware **of** or involved in the check kiting scheme.

## 11. Analysis

### A. RICO Violations

The plaintiff has alleged that Mr. Winokur has violated **18 U.S.C. §§ 1961-1968**, the RICO statute. This statute makes it illegal for any "person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern **of** racketeering activity." **18 U.S.C. § 1962(c)** .

In order to be liable **for RICO** violations, 1) the defendant must be employed by or associated with an enterprise, 2) the enterprise must engage in or affect interstate or foreign commerce, and 3) the defendant must conduct or participate in the conduct of the enterprise's affairs through a pattern of

racketeering activity. The plaintiff has shown that all of these elements are satisfied as to Mr. Winokur.

Under the RICO statute an enterprise includes any "individual, partnership, corporation, association, or other legal entity." 18 U.S.C. § 1961(4). The entity defendants, including Check Express, are enterprises under this definition; they are either corporations or limited liability companies. Mr. Winokur was both employed by the enterprises and affiliated with them as full or partial owner.

Check Express engaged in and affected interstate commerce. As Mr. Winokur described, Check Express paid utility bills for telephone and other utilities, sold phone cards, and sold Septa tokens and passes. These activities have a direct impact on interstate commerce. See U.S. v. Pohlott, 827 F.2d 889 (3d Cir. 1987) (telephone is an instrumentality of interstate commerce); Gillete v. Rockland Coaches, 142 F.2d 616, 617 (2d Cir. 1944) (commuter service taking commuters from one state to another moving in interstate commerce). The first two elements of the RICO statute are met.

Racketeering activity includes the violation of various statutes, including wire fraud under 18 U.S.C. § 1343 and bank fraud under 18 U.S.C. § 1344. 18 U.S.C. § 1961(1). "A pattern," as defined by the statute, requires, as a threshold matter, at least two acts of racketeering activity, the last of which

occurred within ten years after the prior act of racketeering activity. 18 U.S.C. § 1961(5).

Mr. Winokur has pled guilty to bank fraud under 18 U.S.C. § 1344, and has admitted to writing over twenty checks and making several wire transfers with over a two and a half year period as part of his overall scheme to obtain funds to which he was not entitled.

Although Mr. Winokur plead guilty to only one count of bank fraud, each check transaction included all the elements of bank fraud under 18 U.S.C. § 1344, 'which encompasses the use of any scheme or artifice ... to obtain any of the moneys, funds ... or other properties owned by, or under the custody or control of, a financial institution, by means of false pretenses, representations or promises." 18 U.S.C. § 1344(2). These actions are predicate acts upon which the plaintiff's RICO claim may be premised.

In addition to meeting the two-act threshold, in order to establish a "pattern" of racketeering activity, the plaintiff must show that the racketeering acts were related to each other and amount to or pose a threat of continued activity over a significant period of time. H.J. v. Northwestern Bell. Tel. Co., 492 U.S. 229, 241-42, 109 S. Ct. 2839, 106 L.Ed. 2d 195 (1989).

A plaintiff must show that the acts at issue have the same or similar purpose, or results, or participants, or victims,

or method of commission in order to meet the requirement that the acts be sufficiently related to create a pattern. Id.

In order to show continued activity, the plaintiff must show either 1) open-ended continuity, where there is a threat of repeated conduct in the future, or 2) closed-ended continuity, where there is repeated conduct over a substantial period of time. Id. at 241-42.

Mr. Winokur's actions were sufficiently related to create a pattern. Each check and wire transaction had the exact same purpose and result, were perpetrated by Mr. Winokur and Check Express against vBank and Summit Bank, and were executed in the same manner.

Mr. Winokur's conduct also meets the requirements for both open-ended and closed-ended continuity. The Third Circuit has found that open-ended continuity exists where the fraudulent activity becomes a regular part of the defendant's business. E.g., Tabas v. Tabas, 47 F.3d 1280, 1295 (3d Cir. 1995). H.J., 492 U.S. at 243. As Mr. Winokur explained in his deposition, his illegal conduct became a regular part of Check Express' business operations, to the point that the check kiting was the only way that Check Express could pay some of its bills. See Ex. C-1, ¶2-3. This is sufficient to create create a significant risk that, had the kite not been detected, the conduct would have continued for a significant period of time.

Mr. Winokur's conduct also likely meets the requirements for closed-ended continuity. The Third Circuit has not set a threshold for how long predicate activity must occur before the Court may find that it occurred for a "substantial period" that would create closed-ended continuity. In holding that a motion to dismiss should not have been granted, the Third Circuit noted that closed-ended continuity may have been found where the activity lasted for fourteen months. Swistock v. Jones, 884 F.2d 755, 759 (3d Cir. 1989). The Third Circuit has also held that three and one-half years period was sufficient to create closed-ended continuity, but that less than twelve months was not. Tabas, 47 F.3d at 1293-94. See also United States v. Pelullo, 964 F.2d 193, 209 (3d Cir. 1992) (nineteen month period may be sufficient to satisfy continuity requirement).

In this case, Mr. Winokur's check-kiting conduct lasted continuously **from** the end **of** 1998 through June **of** 2001, a period of two and one-half years. This is substantial, particularly where the checks and wire transfers were made with regularity over that two and one-half year period.

Because Mr. Winokur's conduct meets all **of** the requirements of 18 U.S.C. §§ 1961-68, summary judgment for the plaintiff is granted on count one of the complaint.

The plaintiff asserts that it is also entitled to summary judgment on count two of the complaint, which alleges

conspiracy to commit RICO violations. To prove conspiracy, the plaintiff must show that Mr. Winokur had an agreement with another to commit the predicate acts and that the parties to the conspiracy had knowledge that the acts were a part of a pattern of racketeering activity. Shearin v. E.F. Hutton, 885 F.2d 1162, 1166-67 (3d Cir. 1989), overruled in part on other grounds, Beck v. Prupis, 529 U.S. 494, 146 L.Ed. 2d 561, 120 S. Ct. 1608 (2000).

Mr. Winokur testified that he discussed the check kiting scheme that serves as the predicate for the RICO violations with Mr. Williams. In his opposition, Mr. Williams disputes that he was ever aware of the check kiting scheme.

The Court holds that the plaintiff is entitled to summary judgment on the conspiracy count because Mr. Winokur, against whom this motion is pending, has conceded that he conspired to commit RICO violations. The Court expresses no view or judgment with respect to Mr. Williams and what knowledge or culpability, if any, he had with respect to Mr. Winokur's conduct; his potential liability is not at issue in this motion.

#### B, Conversion

The plaintiff seeks summary judgment on the conversion count of its complaint as well. Under Pennsylvania law, conversion is the deprivation of another's right of property in,

or use or possession of, a chattel, without the owner's consent and without lawful justification. Pioneer Commercial Funding Corp and Bank One, Texas N.A. v. American Financial Mortgage Corp, 2002 Pa. Super. 68 (2002). Money is considered a chattel for these purposes and may be converted. Id.

The elements of conversion are met here. Mr. Winokur has admitted taking funds from vBank by drawing on account balances that were created by fraudulent checks. This deprived vBank of the right to, and the control over and use and possession of funds to which it, not Mr. Winokur, was lawfully entitled. vBank did not consent to the withdrawal of funds in excess of the amount actually on deposit. Nor did Mr. Winokur have any lawful justification for writing the fraudulent checks and keeping the proceeds thereof.

C. Breach of Contract

The plaintiff seeks summary judgment on the breach of contract count of their complaint as well. In order to succeed on its breach of contract claim, the plaintiff must show 1) that there was a contract, 2) the essential terms of the contract, 3) a breach of the duty imposed by the contract, and 4) damages resulting from the breach. McCabe v. State Farm Mutual Automobile Ins., 36 F. Supp. 2d 666, 672 (E.D. Pa. 1999) (citing Pennsylvania cases). See also Electron Energy Corp v. Short, 408

Pa. Super. 563 (Pa. Super. Ct. 1991); General State Auth. v. Coleman Cable & Wine Co., 27 Pa. Commw. 385 (Pa. Cmmw. Ct. 1976).

As indicated by the Corporate Resolutions and Signature Authorization cards, Ex. D., there was a contract between Mr. Winokur and vBank. This contract expressly incorporated all banking laws and recognized banking practices and customs.

The plaintiff alleges that such laws and practices and customs includes an implied contract between the bank depositor and the bank that the depositor will not take credit for deposits made on insufficient funds.

The plaintiff, however, has not articulated sufficient facts to demonstrate that these practices and customs, **or** any other aspect of the contract, specifically required Mr. Winokur to refrain from depositing checks for which there were insufficient funds. While the plaintiffs may be correct that this is the case, the plaintiff has not provided the Court with sufficient facts to make such a determination.

#### D. Unjust Enrichment

The plaintiff also seeks summary judgment on their unjust enrichment claim. Unjust enrichment is a quasi-contractual doctrine based in equity. Wiernak v. PHH U.S. Mortgage Corp., 1999 Pa. Super. 193, 736 A.2d 616, 622 (1999). Unjust enrichment occurs when 1) a benefit is conferred on the

defendant by the plaintiff, 2) appreciation of the benefit by the defendant, and 3) the circumstances are such that it would be unjust or inequitable for the defendant to retain the benefit without payment. Id.

The plaintiff has proved these elements of unjust enrichment. The plaintiff conferred the benefit **of** the excess funds created by the fraudulent checks to which the defendant had no legal right. The defendant appreciated this benefit, using it to advance his business and consciously obtaining more illegal funds from vBank. Thus the first two elements of unjust enrichment are present.

This Court finds that the third element to be present as well. Under the circumstances of Mr. Winokur's admitted fraudulent activity, it would be unjust for Mr. Winokur to keep the funds that he procured from the plaintiff through fraud and deception.

#### E. Fraud

The plaintiff also seeks summary judgment on their common-law fraud claim. Under Pennsylvania law, actionable fraud occurs where the defendant makes (1) a misrepresentation that is material to the transaction at hand, (2) with an intention by the maker that the recipient will thereby be induced to act, (3) there is justifiable reliance by the recipient upon the

misrepresentation, and (4) the recipient is damaged as the proximate result. Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882 (1994); see also Scaife Co. v. Rockwell-Standard Corp., 446 Pa. 280, 285 (1971).

The undisputed facts support a finding for the plaintiff on this issue. Winokur has admitted that he misrepresented to the bank that he had sufficient funds to cover the amount of the checks when in fact he knew that he did not. Such a misrepresentation was material to the bank's issuance of credits and funds to Mr. Winokur's account based on the deposit of the fraudulent checks. Mr. Winokur also has admitted that he intended the bank to rely on this misrepresentation, so that they would provide him with funds to which he was not entitled.

vBank justifiably relied on Mr. Winokur's representations, accepting checks drawn on other banks as it usually did in its normal course of business. Mr. Winokur and Check Express were established customers of vBank, and there was no reason for vBank to suspect that **Mr.** Winokur and Check Express were engaging in the illegal activity of check kiting.

vBank suffered a loss of \$2,742,881.29 because of that reliance, when the checks were returned unpaid to vBank and it was unable to obtain full reimbursement from Mr. Winokur or Check **Express.**

111. Damases

A. RICO Damases

The plaintiff seeks treble damages to which it is entitled under 18 U.S.C. § 1964(c). The plaintiff is also seeking, and is entitled to, reasonable attorneys fees and costs. Accordingly, the plaintiff is awarded \$8,228,643.87 for its RICO claims.<sup>6</sup> Additionally, the plaintiff may provide the Court with a petition for attorney's fees and costs.

B. Conversion

The measure of damages in a conversion case is the market value **of** the converted property at the time and place **of** conversion. Bank of Landisburs v. Burruss, 362 Pa. Super. 317 (1987). The converted property in this case was money, with a value of \$2,742,881.29; the plaintiff is awarded \$2,742,881.29 on the conversion claim.

C. Unjust Enrichment

Under Pennsylvania **law**, the amount **of** restitution to be awarded for unjust enrichment is the amount of the enrichment to the defendant. Wingert v. T.W. Phillips Gas & Oil Co., 398 Pa.

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<sup>6</sup> Although the Court finds that the plaintiff is entitled to damages in the amount **of** \$8,228,643.87 on counts one and two, and \$2,742,881.29 on the other counts on which summary judgment is granted, the plaintiff will, of course, be entitled to only one recovery.

100, 157 A.2d 92 (1960). Thus the amount **of** restitution in this case would be \$2,742,881.29.

D. Fraud

Under Pennsylvania law, the amount of damages awarded in a fraud case are based on the actual loss **to** the plaintiff. GMH Assoc. Inc. v. The Prudential Realty Group, et. al., 2000 Pa. Super. 59 (2000). The actual loss in this case was \$2,742,881.29. Accordingly the plaintiff is awarded \$2,742,881.29 on its fraud claim.

An appropriate order follows.



count six in the amount of \$2,742,881.29. The plaintiff is, however, limited to a single recovery of damages.

BY THE COURT:

  
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MARY A. McLAUGHLIN, J.