SECTION 4-406. Customer's Duty to Discover and Report Unauthorized Signature or Alteration

WUEST BROS., INC. v. LIBERTY NAT'L BANK & TRUST CO.
388 S.W.2d 364 (Ky. 1965)

Over a period of eighteen months, the plaintiff's bookkeeper forged seventeen checks totalling $19,900. These checks were drawn on the defendant bank which returned the cancelled checks to the plaintiff monthly. When an audit of the plaintiff's accounts uncovered the forgeries, the defendant refused to make good the loss. The plaintiff instituted this action alleging that the defendant had not exercised ordinary care in honoring the forged checks. A verdict was returned for the defendant. The plaintiff, however, was awarded the amount of the first check forged.

This court sustained the trial court's finding that the defendant had exercised reasonable care and its instruction to the jury to find for the defendant if it determined that the plaintiff had been negligent in examining the cancelled checks each month, but to award the plaintiff the amount of the first check forged even if the plaintiff were negligent.

The court noted that while the Uniform Commercial Code was not in effect when the forgeries occurred, Sections 4-406(1), (2)(a), (b) and (3) are in harmony with this result and would control similar cases in the future.

S.L.B.

ARTICLE 7: DOCUMENTS OF TITLE

SECTION 7-303. Diversion; Reconsignment; Change of Instructions

KORESKA v. UNITED CARGO CORP.
258 N.Y.S.2d 432 (App. Div. 1965)

The plaintiff, an Austrian manufacturer of thermographic copying paper, sold or contracted to sell four containers of the paper to a New York buyer, Parker Whitney. The defendant, an operator of a container delivery service between the United States and Europe, issued a negotiable bill of lading to Allgemeine, a forwarding agency, for the shipment of the four containers. The document named the plaintiff's collecting agent, Bankers Trust, as consignee, required that the arrival notice be sent to Parker Whitney and further provided that delivery was to be made only on surrender of the original bill of lading. When the goods arrived in New York, the defendant delivered them to Parker Whitney without requiring the original bill and before the plaintiff had received his purchase price. In a suit by the plaintiff against the defendant to recover the value of the copying paper, the defendant contended that it had been excused from requiring the original bill before delivering the goods by an oral waiver made by the plaintiff's agent, Allgemeine, and also by a trade custom and course of dealing. The defendant specifically alleged that Abbe, Allgemeine's representative in New York, had orally requested that delivery be made in the usual manner, *i.e.*, without requiring the original bill of lading; that for the convenience of both shipper and consignee, it had been the custom for the shipper to deliver goods without requiring the original bills; that the other nine containers in the instant shipment had been delivered without requiring the original bills; and that even though the defendant had delivered the four containers to Parker Whitney on November 21, 1963, the plaintiff had made no complaint until May 1964. The plaintiff moved for summary judgment, producing an affidavit by Abbe in which he stated that he and Allgemeine had acted as agent for the defendant, not for the plaintiff. The supreme court entered an order denying the plaintiff's motion.

In vacating the order and granting the plaintiff's motion for summary judgment, the present court held that the defendant had introduced no evidentiary facts to the effect that Allgemeine was the plaintiff's agent or had the power to bind the plaintiff in the alleged manner. However, even if the defendant had raised a triable issue of fact as to Allgemeine's agency, the court held that there were at least three reasons which supported its decision. First, under the Personal Property Law and Sections 7-303(1)(a) and -403 of the Code, only a consignee or other holder of the negotiable bill was entitled to authorize a diversion from the delivery terms. Since there was no showing that the bill had actually been indorsed to the defendant, under the Personal Property Law and Section 1-201(20), the defendant was never a holder. Moreover, the plaintiff, not being a consignee or holder, did not have the power to divert the goods without the cooperation of his consignee. It follows that Allgemeine, even if it were plaintiff's agent, had no power to divert the goods. Second, the waiver was merely oral, while the bill required that a waiver had to be expressly stated and signed by the plaintiff or his agent. Furthermore, ordinary prudence and Section 7-303(2) of the Code required that the waiver be noted on the bill itself. Third, the allegations as to trade custom were insignificant since under previous case law and Section 1-205(4) of the Code, the express term, which required delivery "in accordance with the consignee's order," controlled where the trade custom was inconsistent with it.

The dissent was of the view that summary judgment should not be granted since there were triable fact issues. If Abbe and his employer Allgemeine were the plaintiff's agent and if they had authorized delivery without surrender of the original bill of lading, then under Sections 7-302 and -303 there was no conversion.

The court did not cite the Code, which was not in effect at the time of the transaction, for purposes of authority, but only for the purpose of indicating that the Code was in accord with its reasoning.

R.G.K.

SECTION 7-403. Obligation of Warehouseman or Carrier to Deliver; Excuse

KORESKA V. UNITED CARGO CORP.

258 N.Y.S.2d 432 (App. Div. 1965)
Annotated under Section 7-303, supra.