

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GORDON VIOLA,

Plaintiff

v.

FLEET BANK OF MAINE,

Defendant

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Civil No. 95-141-P-DMC

MEMORANDUM DECISION ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT¹

The plaintiff brings this action to recover for alleged embezzlement, by the defendant’s and its predecessor’s employee, of funds from the plaintiff’s certificates of deposit (“CDs”). The plaintiff asserts common-law claims for breach of contract, negligence, conversion and punitive damages, as well as claims under the Maine Unfair Trade Practices Act (“MUTPA”), 5 M.R.S.A. § 205-A *et seq.*, and Uniform Fraudulent Transfer Act (“UFTA”), 14 M.R.S.A. § 3571 *et seq.* The defendant moves for summary judgment on all claims. For the reasons discussed below, I grant the defendant’s motion.²

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

² Each party has moved to strike the other side’s computation of interest on the plaintiff’s accounts. Plaintiff’s Motion to Strike (Docket No. 36); Defendant’s Motion to Strike (Docket No. 43). Because I have not relied on either submission, these motions are moot.

material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

II. Factual Context

On July 5, 1988 the plaintiff deposited \$60,000 into a CD account (#2209862930) at Maine Savings Bank (“MSB”). Affidavit of Gordon Viola (“Viola Aff.”) (Docket No. 39) ¶ 7. On April 5, 1989, after that CD matured, the plaintiff deposited the entire proceeds, including interest, totaling \$63,290.38 into a new CD account (#24141644). *Id.* ¶ 9.

Lisa Gore Bals (“Gore”) was an employee of MSB from 1986 until February 1, 1991 and of the defendant from February 1, 1991 until on or about August 3, 1991. Affidavit of Lisa Gore Bals (“Gore Aff.”) (Docket No. 32) ¶¶ 2, 16, 21. Sometime after April 5, 1989 Gore made unauthorized withdrawals

from the plaintiff's CD#24141644. *Id.* ¶¶ 5-6. The plaintiff later asked Gore to close out CD#24141644, deposit the proceeds into three new CDs of \$20,000 each, and deposit the excess in his checking/money market account. *Id.* ¶ 8. In April 1990 Gore deposited \$20,000 in CD#24603388, \$20,000 in CD#24359046 and \$9,041.83 in CD#24359053. *Id.* She also deposited \$3,574.02 into the plaintiff's checking/money market account to make it appear as if she had made no unauthorized withdrawals. *Id.* On August 3, 1990 CD#24359053 was closed out, Affidavit of Cristen L. Calder ("Calder Aff.") (Docket No. 35), Exh. D at 109, without the plaintiff's authorization, Viola Aff. ¶ 15.

On January 31, 1991 the bank records reflected the following balances in the plaintiff's CD accounts: \$20,527.48 in CD#24603388, and \$9,118.72 in CD#24359046. Calder Aff., Exh. D at 101, 121. The terms of those CDs were as follows: CD#24603388 was renewed on October 9, 1990 for a term of 182 days (maturing April 9, 1991) and paid interest at 8.1% per annum. *Id.* at 96. CD#24359046 was opened on April 9, 1990 for a term of twelve months (maturing April 9, 1991) and paid interest at 8.4% per annum. *Id.* at 111. On March 21, 1991 the plaintiff's CD accounts #24603388 and #24359046 were closed out. Gore Aff. ¶ 15; Calder Aff., Exh. D at 103, 123. On that date CD#24603388 had a balance of \$20,750.38, and CD#24359046 had a balance of \$9,221.43. Calder Aff., Exh. D at 103, 123.

On July 19, 1991, at the plaintiff's instructions, Gore transferred the balance of the plaintiff's savings account, \$27,101.80, to his checking/money market account. Gore Aff. ¶ 19; *see* Calder Aff., Exh. D at 126, 131. These funds represented proceeds (although not *all* of the proceeds) from the plaintiff's closed-out CD accounts #24603388 and #24359046. Gore Aff. ¶ 15; *see* Calder Aff., Exh. D at 124-26. On that same day, Gore deposited into the plaintiff's checking/money market account an additional \$30,506.80³ that she had taken from other customers' accounts. Gore Aff. ¶ 19; *see* Calder Aff., Exh. D

³ The bank records reflect that, in addition to the \$27,101.80 and \$30,506.80, nine more cents were deposited to the plaintiff's checking/money market account, bringing the total July 19, 1991 (continued...)

at 131.⁴ Gore resigned from her position with the defendant on or about August 3, 1991. Gore Aff. ¶ 21.

On February 1, 1991 the Maine Superior Court (Cumberland County) found that MSB was insolvent and in such condition as to render its further proceedings hazardous to the public and therefore closed it. Affidavit of Myles Rice (Docket No. 13) ¶ 3 & Exh. A. The Federal Deposit Insurance Corporation (“FDIC”) was appointed as its Receiver.⁵ *Id.* Also on February 1, 1991, the defendant entered into a Purchase and Assumption Agreement with the FDIC whereby the defendant purchased certain assets and assumed certain liabilities and duties of MSB. Affidavit of Jere L. Armstrong (“Armstrong Aff.”)

³ (...continued)

deposit to \$57,608.69. Calder Aff., Exh. D at 131. This nine-cent discrepancy is irrelevant.

⁴ Because the source of these deposits is critical to my decision, I wish to make clear their basis in the summary judgment record. The defendant declared in its Statement of Material Facts: “On July 19, 1991, in addition to making a deposit of Mr. Viola’s funds from his closed out CD’s in the amount of \$27,101.80 into Mr. Viola’s checking/money market account #92931362, Ms. Gore reimbursed Mr. Viola \$30,506.89 by depositing into that account monies which she withdrew from other customers’ accounts. (Gore Aff. at ¶ 19; [Calder Aff.,] Ex. D at 126-27, 131-32).” Defendant’s Motion for Summary Judgment with Incorporated Memorandum of Law and Statement of Material Facts (Docket No. 31) at 6. Pursuant to Local Rule 19(b)(2), a statement of material fact, properly supported by record citations, is deemed admitted unless properly controverted by the non-moving party. This statement is properly supported by the defendant’s citations to the Gore Affidavit and the plaintiff’s bank records. The plaintiff has not controverted this statement in the Plaintiff Gordon Viola’s Statement of Material Facts in Dispute (“Plaintiff’s SMF”) (Docket No. 40). Instead, the plaintiff merely cites his own affidavit: “I do not understand what the July 19, 1991 deposit of \$57,608.69 represents. It does not represent full reimbursement to me in any event.” Viola Aff. ¶ 34 (cited in Plaintiff’s SMF ¶ B.8). This statement does not dispute that the \$27,101.80 were proceeds from his closed out CDs, or that the \$30,506.89 were funds taken from other customers.

⁵ The plaintiff named the FDIC as a defendant in this action as originally filed in state court. The FDIC removed the case to this court pursuant to 12 U.S.C. § 1819(b)(2)(A), (B) (civil suits in which FDIC is a party deemed to arise under federal law; FDIC may remove to federal court). Petition for Removal (Docket No. 1) ¶¶ 4, 6-7. I dismissed without prejudice the plaintiff’s claim against the FDIC because the plaintiff had failed to exhaust his administrative remedies as required by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1821(d)(13)(D). Order on Motion to Dismiss or to Stay (Docket No. 25) at 3-4. Both parties have urged the court to retain supplemental jurisdiction over the remaining state-law claims, and I have agreed to do so rather than remand them to state court. *See* 28 U.S.C. § 1367; *Mill Invs., Inc. v. Brooks Woolen Co.*, 797 F. Supp. 49, 52 (D. Me. 1992).

(Docket No.33) ¶ 2; Purchase and Assumption Agreement Among FDIC, Receiver of Maine Savings Bank, FDIC and Fleet Bank of Maine (“Agreement”), Exh. B to Armstrong Aff. The relevant portions of the Agreement read as follows:

2.1 *Liabilities Assumed by [the defendant]*. The [defendant] hereby expressly assumes at Book Value and agrees to pay, perform, and discharge all of the following liabilities of [MSB] as of Bank Closing, except as otherwise provided in this Agreement (such liabilities hereinafter referred to as “Liabilities Assumed”):

(a) demand Deposits, including outstanding cashier’s checks and other official checks, and time and savings Deposits

...

2.2 *Interest on Deposit Liabilities Assumed*. The [defendant] agrees that, from and after Bank Closing, it will accrue and pay interest on Deposit liabilities assumed pursuant to Section 2.1 in accordance with the terms of the respective deposit agreements between [MSB] and the depositors of [MSB]

...

9.2 *Correction of Errors and Omissions; Other Liabilities*.

...

(b) If the [FDIC as Receiver] discovers at any time subsequent to the date of this Agreement that any claim exists against [MSB] which is of such a nature that it would have been included in the liabilities assumed under Article II had the existence of such claim or the facts giving rise thereto been known as of Bank Closing, the [FDIC as Receiver] may, in its discretion, at any time, require that such claim be assumed by the [defendant] in a manner consistent with the intent of this Agreement.

...

14.1 *Indemnification of Indemnitees*. . . . [The FDIC] hereby agrees to indemnify and hold harmless the Indemnitees against any . . . expenses . . . reasonably incurred in connection with claims against any Indemnitee based on liabilities of [MSB] that are not assumed by the [defendant] pursuant to this Agreement or subsequent to the execution hereof by the [defendant], which unassumed liabilities remain with the [FDIC as Receiver]. . . .

...

APPENDIX I -- Definitions

...

“*Bank Closing*” means the close of business of [MSB] on the date on which the appropriate governmental authority closed such institution.

...

“*Book Value*” means the dollar amount stated on the accounting records of [MSB] as of Bank Closing . . . after adjustments made by the [FDIC as Receiver] for differences in accounts, suspense items, unposted debits and credits, and other similar adjustments or corrections. . . .

Agreement at 2, 3, 29, 37 & app. I at 1, 2, 4.

III. Discussion

A. The Agreement

The defendant argues that, pursuant to the Agreement, it only assumed liability for the deposits reflected on MSB’s February 1, 1991 accounting records. The plaintiff responds that the Agreement is ambiguous concerning what liabilities the defendant assumed.

In section 2.1 of the Agreement the defendant assumed liability for the outstanding deposits measured at book value, which is defined as the dollar amount stated on MSB’s accounting records at the close of business on February 1, 1991. Contrary to the plaintiff’s contention, there is nothing ambiguous about this language. It cannot reasonably be read to encompass liability beyond the book value of the deposits. And section 14.1 confirms that any liabilities not assumed by the defendant in the Agreement, or thereafter, remain with the FDIC.

The plaintiff further argues that its claim is precisely the type of claim envisioned by section 9.2(b) of the Agreement. Even if that is true, the plaintiff gains nothing from this argument. Section 9.2(b) merely gives the FDIC the discretion to require the defendant to assume claims that were unknown at the

time of the Agreement and are of such a nature that they would have been included in the liabilities assumed under Article II. Until the FDIC exercises this discretion, the defendant has not assumed liability. The summary judgment record reveals no evidence that the FDIC has, in fact, exercised its discretion regarding the plaintiff's claim. Accordingly, the defendant was only obligated to pay the plaintiff the value of his accounts, and interest thereon, as shown on the February 1, 1991 accounting records of MSB.

B. The Plaintiff's Claims

As of February 1, 1991⁶ MSB's accounting records reflected that the plaintiff had two CD accounts. CD#24603388 had a balance of \$20,527.48 (on January 31, 1991), paid interest at 8.1% per annum, and was to mature on April 9, 1991. CD#24359046 had a balance of \$9,118.72 (on January 31, 1991), paid interest at 8.4% per annum, and was to mature on April 9, 1991. Assuming, most favorably to the plaintiff, that interest was to be compounded daily, CD#24603388 would have been worth \$20,844.19 at maturity,⁷

⁶ I note that the available bank records show the balances as of January 31, 1991, not February 1. Calder Aff., Exh. D at 101, 121. Neither party has seen fit to include in the summary judgment record the close-of-business balances as of February 1, 1991, nor does either party suggest that the January 31, 1991 balances may not be relied upon by the court for purposes of deciding the issues raised by the summary judgment motion.

⁷ I have calculated the amount due at maturity based on the following formula: $P(1 + R/M)^n$, where P = Principal; R = annual interest rate; M = 365 days; and n = days until maturity. Thus, for CD#24603388, the value at maturity was $\$20,527.48(1 + .081/365)^{69}$, or \$20,844.19.

I take judicial notice of the foregoing compound interest formula pursuant to Fed. R. Evid. 201(b)(2). My source for the formula is E. Nikbakht & A.A. Gropelli, *Finance* 55 (Barron's Business Review Series, 2d ed. 1990).

In checking the formula against the plaintiff's bank records for the period from January 31, 1991 through March 21, 1991 (the date the two CDs were closed out), the formula yielded slightly different monthly interest amounts than the bank records showed. These discrepancies ranged from \$-1.80 to \$3.31 per period. However, as explained above, these discrepancies are of no consequence.

and CD#24359046 would have been worth \$9,264.66 at maturity.⁸ Thus, the book value of the plaintiffs' accounts as of February 1, 1991, entitled him to receive \$30,108.85 on April 9, 1991. Even assuming, again most favorably to the plaintiff, that the \$30,108.85 could have been redeposited in a CD account paying interest at 8.4% per annum, compounded daily, that CD account would have had a value of \$30,816.81 on July 19, 1991.⁹

On July 19, 1991 Gore deposited into the plaintiff's money market account \$30,506.80, taken from the accounts of other customers. On that same day, Gore transferred what remained of CDs 24603388 and 24359046, \$27,101.80, from the plaintiff's savings account into his checking/money market account. Thus, the plaintiff received from the defendant \$57,608.60, far more than he was entitled to receive *from the defendant* based on the January 31, 1991 accounting records. Because he received more money from the defendant than the defendant was obligated to pay, the plaintiff's claims must fail. Any claims based on Gore's pre-February 1, 1991 conduct must be pursued against the FDIC.

It is noteworthy that the plaintiff's two state statutory claims would not, in any event, survive summary judgment. First, financial institutions that are subject to the provisions of Chapter 24, "Anticompetitive or Deceptive Practices," 9-B M.R.S.A. §§ 241-244, are exempt from the MUTPA, *id.* § 244. The plaintiff's equal protection and due process challenges to this exemption are meritless.¹⁰

⁸ Again, for CD#24359046, the value at maturity was $\$9,118.72(1 + .084/365)^{69}$, or \$9,264.66.

⁹ Given the 101 days from April 9 until July 19, the value on July 19 would have been $\$30,108.85(1 + .084/365)^{101}$, or \$30,816.81.

¹⁰ The plaintiff concedes that his constitutional challenges depend on a showing that the exemption either is not rationally related to the end it seeks to achieve, or is arbitrary and capricious. Chapter 24 deals with anticompetitive or unfair practices, 9-B M.R.S.A. § 241, deceptive advertising, *id.* § 242, tie-in arrangements, *id.* § 243, electronic terminals, *id.* § 243-A, and transaction fees and records, *id.* § 243-A. The legislature could rationally have concluded that, because Chapter 24 adequately regulates anticompetitive or unfair practices, financial institutions

(continued...)

Second, the UFTA does not apply in these circumstances. Under the UFTA, a transfer is fraudulent (and thus actionable) if the debtor made the transfer with the actual intent to hinder, delay or defraud any of its creditors. 14 M.R.S.A. § 3575(1)(A).¹¹ The UFTA does not define hinder, delay or defraud. The Law Court, however, has explained that “[t]he UFTA was designed to prevent debtors from transferring assets in order to avoid creditors.” *Leighton v. Fleet Bank of Maine*, 634 A.2d 453, 458 (Me. 1993). The plaintiff has not alleged, nor does the summary judgment record suggest, that Gore’s intent was to deplete the defendant’s assets and prevent the plaintiff from collecting on his claims (his CDs). Gore’s conduct was simply part of an embezzlement scheme intended to put money in her own pocket. The facts of this case do not fall within the UFTA.

IV. Conclusion

For the foregoing reasons, the defendant’s motion for summary judgment is **GRANTED**.

Dated at Portland, Maine this 27th day of February, 1996.

¹⁰ (...continued)

subject to Chapter 24 should be exempt from the MUTPA. Moreover, the exemption is part of a complex administrative scheme to regulate financial institutions. *See* 9-B M.R.S.A. § 111 (declaration of policy that financial institutions shall be supervised by Bureau of Banking in manner to assure strength, stability and efficiency of financial institutions, to assure reasonable and orderly competition, and to protect consumers against unfair practices by financial institutions that provide consumer credit) (consumer protection provision added by P.L. 1995, ch. 309, § 14 (effective Jan. 1, 1996)).

¹¹ A transfer may also be fraudulent if it was not given in exchange for reasonably equivalent value, and the debtor: (1) was engaged or about to engage in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction; or (2) intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as the debts became due. 14 M.R.S.A. § 3575(1)(B)(1), (1)(B)(2). This subsection does not apply to the defendant.

David M. Cohen
United States Magistrate Judge