IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1597
Summary Calendar

AMSTERDAM-ROTTERDAM BANK N.V.,

Plaintiff-Appellee,
Cross-Appellant,

versus

THE PERMIAN CORP., ET AL.,

Defendants,

MELLON BANK (EAST) N.A.,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Texas
(3:88-CV-0515-T)

(March 15, 1993)

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

Mellon Bank appeals a statutory conversion judgment entered against it for payment on forged endorsements on several checks. Amsterdam-Rotterdam Bank (AmRo) cross-appeals the district court's denial of prejudgment interest. Because Mellon Bank has failed to show that it was entitled to judgment as a matter of law,

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

we affirm the judgment of the district court, but we reverse the district court's determination that prejudgment interest was not warranted in this case.

BACKGROUND

In July 1979, Elaion I, N.V., a Netherlands Antilles corporation, hired Mole Operating Company to manage its oil and gas exploration business in this country. Mole was given broad authority to act for Elaion, including the authority to endorse checks payable to Elaion. In 1983, however, Elaion and Mole agreed to terminate the management agreement and executed an Agreement for Termination of the Management Contract, which left Mole with only limited authority during the transition to a new manager. Section 4(b) of the Termination Agreement specifically required Mole to deposit all proceeds received on behalf of Elaion in a specific account at the Mercantile Bank, Dallas.

Despite this provision in the Termination Agreement, over the next year Mole endorsed and deposited checks from The Permian Corporation totalling $160,404.19 into its own bank account styled "Adrata Trading Company" at First City Bank of Richardson.[1] First City accepted the checks for deposit and sent them through the banking system to the payor's bank, Mellon Bank,[2] for payment. Mellon Bank paid the checks in the usual course of its banking business.

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[1] First City Bank of Richardson later became part of First City-Dallas.

[2] Mellon Bank is actually the successor of Girard Bank, which processed and paid most of the checks.

AmRo, as assignee of Elaion, brought suit in federal court against Mole Operating Company, Mole Holding Company, and Permian in January 1986. In November, AmRo sued Mellon Bank for statutory conversion under section 3.419 of the Texas U.C.C. This second case was removed to federal court, where First City Bank of Richardson intervened. Shortly thereafter the two cases were consolidated. AmRo took a default judgment against the Mole entities and settled its claims against Permian and First City, leaving Mellon Bank as the sole defendant. While First City was still an intervening party in the lawsuit, Mellon Bank attempted to bring an indemnification claim against it, but the district court denied Mellon Bank's motion for leave to file against First City[3] and dismissed First City from the suit in August 1991 after it settled with AmRo. Permian also settled with AmRo.

The case went to trial with the only remaining claim, the statutory conversion claim against Mellon Bank. The jury found that the endorsements on the checks were forged, and the court entered judgment against Mellon Bank for $160,404.19 plus postjudgment interest. Mellon Bank sought a jnov, and AmRo moved to amend the judgment to include prejudgment interest. All postjudgment motions were denied. Both parties appealed.

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[3] This denial was precipitated by Mellon Bank's delay in bringing the claim and its failure to deliver proposed pretrial materials to AmRo before the deadline set by the district court's scheduling order.

DISCUSSION

We examine a jury verdict under the familiar Boeing standard: A jury verdict will not be overturned unless the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969); see LeBoeuf v. K-Mart Corp., 888 F.2d 330, 332 (5th Cir. 1989).

Mellon Bank principally argues that Mole retained either actual or apparent authority after the Termination Agreement as a matter of law.[4] To prove its conversion claim, AmRo needed to show that Mellon Bank paid the checks "on a forged endorsement." Tex. Bus. & Com. Code Ann. § 3.419(a)(3). Mole's endorsement of the checks was forged if it was unauthorized. See Continental State Bank v. Miles General Contractors, Inc., 661 S.W.2d 770, 773 (Tex. App.--Fort Worth 1983, no writ) ("[T]he Code makes no distinction between a forgery and an unauthorized endorsement."). Thus, Mole's endorsement of the checks constitutes a forgery if it lacked authority to deposit the checks in its own account. See Tex. Bus.

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[4] Mellon Bank also argues that it was entitled to judgment as a matter of law because there was no evidence that AmRo was entitled to the proceeds of the checks. We disagree. AmRo presented sufficient evidence at trial that it was entitled to the proceeds of the checks to support the judgment. The jury did not credit Mellon's unsupported challenges that the Permian checks might have represented some payments on wells, or interests in wells, that had been conveyed to Mole when the agency was terminated or in which Mole received an overriding royalty interest. Mellon's argument that AmRo had no standing to proceed as assignee of Elaion was untimely raised and will not be considered here.

& Comm. Code Ann. § 1.201(43); Haywood, Jordan & McCowan of Dallas, Inc. v. Bank of Houston, 835 S.W.2d 738, 741 (Tex. App.--Houston [14th Dist.] 1992, no writ). Under the Termination Agreement, Mole's actual authority was expressly limited to receipt of checks on behalf of Elaion and deposit of those checks in a specified account at Mercantile Bank. Although Mole had broad actual authority to deposit checks for Elaion prior to the Termination Agreement, that authority was severely and precisely restricted after the execution of the Termination Agreement.

In Texas, actual authority exists when the principal (1) intentionally confers authority upon the agent; (2) intentionally allows the agent to believe that it possesses authority; or (3) by want of due care allows the agent to believe that it possesses such authority. Currey v. Lone Star Steel Co., 676 S.W.2d 205, 209-10 (Tex. App.--Fort Worth 1984, no writ); Behring Int'l, Inc. v. Greater Houston Bank, 662 S.W.2d 642, 649 (Tex. App.--Houston [1st Dist.] 1983, writ dism'd). The Termination Agreement was introduced into evidence, and a reasonable juror could believe that Mole lacked actual authority.

Mellon Bank alternatively argues that Mole had apparent authority as a matter of law. Apparent authority exists when "a principal knowingly permit[s] an agent to hold herself out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority." Ames v. Great Southern Bank, 672 S.W.2d 447, 450 (Tex. 1984); see FDIC v. Texas Bank, 783 S.W.2d 604, 607 (Tex. App.--Dallas 1989, no

writ). In Texas, "A prerequisite to a proper finding of apparent authority is evidence of conduct by the principal relied upon by the party asserting the estoppel defense which would lead a reasonably prudent person to believe an agent had authority to so act." Ames, 672 S.W.2d at 450 (citing Traylor v. Gray, 547 S.W.2d 644 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.); Ybanez v. Anchor Constructors, Inc., 489 S.W.2d 730 (Tex. Civ. App.--Corpus Christi 1972, writ ref'd n.r.e.)).

AmRo presented evidence that Mole had no apparent authority because the Termination Agreement cabined Mole's authority to deal with Elaion's checks, and Elaion never authorized Mole to deposit the checks other than as specified in the Termination Agreement. Further, a number of the converted checks are endorsed directly by Mole to Mole's account rather than to Mole as "agent for Elaion". Mellon counters that it had paid Elaion's checks through Mole for several years and had the right to assume that Mole continued to have authority to receive the proceeds, because Elaion never informed Mellon differently. See, e.g., Sorenson v. Shupe Bros. Co., 517 S.W.2d 861, 866 (Tex. Civ. App. -- Ama. 1974, no writ). The jury was properly instructed on the question of actual and apparent authority -- an instruction proffered by Mellon -- and found against the bank. Whether or not we would personally agree with the jury's decision,[5] we cannot

[5] Imposition of § 3.419 liability might make more sense if Mellon had been closer to the participants to the transaction, e.g. in the position of First City. Nevertheless, the U.C.C. fastens liability on Mellon as the drawee bank, and Mellon had statutory remedies against First City and other intermediary

gainsay that the facts presented an issue for the jury, and we will not disturb their verdict. The question of apparent authority will rarely lend itself to resolution as a matter of law. Texas cases interpreting banks' liability under § 3.419 have been founded on jury verdicts or judgments after trial to the court. See, e.g., Ames, supra; Haywood, Jordan, supra; Sorenson, supra. The result here is not so inconsonant with the evidence as to mandate reversal under Boeing.

B. Prejudgment Interest

In its cross-appeal, AmRo argues that the district court erred in denying its request for prejudgment interest. AmRo pleaded and prayed for prejudgment interest, and that request was repeated in the second pretrial order. The judgment did not contain an award of prejudgment interest. AmRo moved to amend the judgment to include prejudgment interest, but that motion was denied by the district court. The court relied on our opinion in Perkins State Bank v. Connolly, 632 F.2d 1306, 1319-20 (5th Cir. 1980), to state that section 3.419(b) does not allow recovery of prejudgment interest.

In Perkins, a case involving identical language in the Florida UCC, we refused to allow prejudgment interest on a section 3.419 claim in the absence of a showing that Florida would allow recovery of prejudgment interest. To do so, the court said, would

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banks. Except for the failed attempt to pursue First City on a cross-claim, the record does not show how these remedies were exploited by Mellon. See White & Summers, I Uniform Commercial Code § 15-9 (1988).

"radically develop[] and extend[] Florida law on pre-judgment interest and substantially alter[] the literal meaning of a Florida statute." Perkins, 632 F.2d at 1320. After Perkins, Florida directly addressed the issue and held that recovery of prejudgment interest was appropriate under section 3.419. See Landmark Bank of Brevard v. Hegeman-Harris Co., 522 So.2d 1051, 1053 (Fla. Ct. App. 1988).

Other states, too, have held that prejudgment interest is recoverable under U.C.C. § 3.419. See, e.g., Mohr v. State Bank of Stanley, 734 P.2d 1071, 1083 (Kan. 1987); Bullitt County Bank v. Publishers Printing Co., 684 S.W.2d 289, 294 (Ky. Ct. App. 1984); National Bank of Georgia v. Refrigerated Transport Co., 248 S.E.2d 496, 500 (Ga. Ct. App. 1978). It is now generally well established that section 3.419 does not preclude an award of prejudgment interest.

Moreover, the Texas Supreme Court has indicated a willingness to allow prejudgment interest awards on claims brought under section 3.419. In Ames, the Texas Supreme Court rendered judgment for the plaintiff on a section 3.419 claim and ordered that the plaintiff recover not only the face value of the instrument, but also both prejudgment and postjudgment interest. Ames, 672 S.W.2d at 451. The district court therefore erred in holding that Perkins required it to deny the request for prejudgment interest. AmRo is entitled to prejudgment interest under Tex. Rev. Civ. Stat. Ann. art. 5069-1.03. See Houston Cable T.V., Inc. v. Inwood West Civic Ass'n, Inc., 839 S.W.2d 497, 504-05

(Tex. App.--Houston [14th Dist.] 1992, writ requested) (noting that the ten percent prejudgment interest rate is available only when the amount of damages is not ascertainable from the face of the instrument); see also, Perry Roofing Co. v. Olcott, 744 S.W.2d 929, 930-31 (Tex. 1988).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment against Mellon Bank, but **REVERSE** the court's determination that prejudgment interest was not recoverable.