SARROUF LAW LLP vs. FIRST REPUBLIC BANK & another.[1]

No. 19-P-31.

Suffolk. November 13, 2019. - May 20, 2020.

Present: Hanlon, Lemire, & Shin, JJ.

Bank. Negotiable Instruments, Forgery, Presentment, Dishonor. Negligence, Bank. Contract, Choice of law clause, Performance and breach. Uniform Commercial Code, Bank, Payment on negotiable instrument, Good faith.

Civil action commenced in the Superior Court Department on October 5, 2016.

The case was heard by Mitchell H. Kaplan, J., on a motion for summary judgment, and entry of separate and final judgment was ordered by him.

John B. Flemming for the plaintiff.
Douglas S. Brooks for First Republic Bank.

HANLON, J. The plaintiff, Sarrouf Law LLP (Sarrouf), was the victim of a fraud perpetrated by a person posing as a client

[1] H. Glenn Alberich. Alberich has not participated in this appeal.

trying to sell a piece of heavy construction equipment to a buyer in Quincy. A check, ostensibly from the buyer's agent, was delivered to H. Glenn Alberich, a lawyer who was "of counsel" to Sarrouf and in communication with the purported client. After the check was deposited in Sarrouf's account at First Republic Bank (First Republic or bank), the "client" sent Alberich instructions requiring that most of the check's proceeds be sent by wire transfer to two recipients, one in Cambodia and the other in Hong Kong. After the transfers had been made irretrievably, the check was revealed to be counterfeit; that amount was charged back to Sarrouf's account, resulting in a large deficit. As a result, Sarrouf sued First Republic and Alberich. A Superior Court judge allowed First Republic's motion for summary judgment and ordered entry of separate and final judgment, dismissing Sarrouf's claims against the bank. See Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974).[2] We affirm.

Background. In January 2012, Sarrouf opened an interest on lawyers trust account (IOLTA) with First Republic. On September 23, 2015, Alberich received an e-mail through his webpage from a person identifying himself as "Henny Biggelaar." The message stated, "I request the help of an attorney to draft a sale

[2] We treat the order entered on the docket as a judgment despite the failure to so designate it.

agreement. Respond if you are able to help and schedule a time to discuss details. Thank you for your prompt response." In a subsequent e-mail, the person seeking Alberich's assistance identified himself as "Henny van den Biggelaar," the chief executive officer of a company called "Big Machinery" in the Netherlands. Van den Biggelaar later wrote that he was "negotiating a transaction about selling a crawler crane to a purchaser living in Massachusetts" and that he needed assistance to draft a sales contract. Van den Biggelaar stated that the total sales price was more than $1.6 million, and he attached a six-page term sheet. On September 29, 2015, Alberich spoke on the telephone with van den Biggelaar, who told him that the buyer, a Quincy company, would be represented by a broker in the transaction. Alberich sent van den Biggelaar a fee agreement. Van den Biggelaar returned the signed fee agreement, stating in his e-mail that the buyer would be represented by its broker and the buyer's initial deposit would cover Alberich's retainer of $3,000.

On October 5, 2015, Alberich received at his home office a "letter of intent" and two checks purportedly sent by the buyer's insurance broker, Zurich North America. One of the checks was in the amount of $3,000 and was made payable to Alberich (retainer check). The other check was in the amount of $337,044 and appeared to represent the initial deposit for the

transaction (deposit check). The deposit check was made payable to Sarrouf.[3] The deposit check's maker appeared to be the Royal Bank of Canada, and the drawee bank was JPMorgan Chase Bank, N.A. (JPMorgan).

Alberich presented the retainer check for deposit into his account at Santander Bank. He sent the deposit check to Sarrouf by overnight mail, with a handwritten note to one of the firm's principals, Camille Sarrouf, Jr., asking him to deposit the check in the firm's IOLTA. The next morning, on October 6, 2015, Alberich sent an e-mail to Sarrouf's bookkeeper, Mary Bono, with a copy to Sarrouf, Jr., asking that Bono deposit the check into Sarrouf's IOLTA and that she scan and e-mail to him a copy of the deposit slip for the check. Later that day, Bono brought the deposit check to First Republic's branch in Post Office Square, Boston, for deposit. A bank representative accepted the check, gave Bono a receipt, and told her the funds from the check would be immediately available because First Republic does not put a "hold" on funds deposited into an IOLTA. The deposit receipt stated, "All items are credited subject to final payment. Any item may be charged back at any time before

[3] The deposit check was payable to Sarrouf, notwithstanding Alberich's prior instruction to van den Biggelaar to make the deposit check payable to "H. Glenn Alberich, as attorney for Big Machine."

final payment." Alberich forwarded a copy of the deposit slip to van den Biggelaar via e-mail.

On October 8, 2015, at 6:07 A.M., van den Biggelaar sent Alberich an e-mail requesting that Alberich make transfers of the proceeds from the deposit check on that day by 11 A.M. The e-mail instructed Alberich to wire $192,900 to "Kim Sreylot's" account at Union Commercial Bank PLC in Cambodia, and $118,650 to Odika Holding International Resources Co. Ltd.'s account at HSBC Bank in Hong Kong.[4]

At 11:27 A.M. on that same day, Alberich sent an e-mail to van den Biggelaar informing him that he had just emerged from two meetings and that the $3,000 retainer check had been returned as nonpayable. Notwithstanding the fact that the retainer check had been returned, Alberich forwarded van den Biggelaar's e-mail with the wire instructions to Sarrouf, Jr., asking him to instruct Bono to "take care of the transfers described below as quickly as possible." Sarrouf, Jr., forwarded the e-mail to Bono without comment; he and Bono both understood that as an instruction that she should place the wire transfer orders.

Bono did so, and the wire transfer orders triggered a "call back" procedure: a First Republic representative called Bono

[4] The two transfers represented a total of $311,550 of the funds available from the $337,044 deposit check.

and confirmed the amount of the wires, the fact that they were to be sent from the IOLTA, and the identity of the receiving banks. The bank representative then processed the orders, which triggered a "red flag" procedure: bank representatives reviewed the transaction for certain indicia of fraud, performed an Internet search, which did not reveal any information suggesting Sreylot was not a real person, and verified that Odika Holdings was a registered entity in Hong Kong. The wire transfers were then approved for release.

The wire transfer in the amount of $192,900 was released at 2:20 P.M. and the wire transfer in the amount of $118,650 was released at 2:23 P.M. on October 8, 2015. The transfers were credited to the recipients' accounts on the following day.

At 8:23 P.M. on October 8, 2015, First Republic received an electronic advance return notification system message stating that JPMorgan had returned the deposit check to First Republic as "Refer to Maker." Ultimately, the check was revealed to be counterfeit. At 12:03 P.M. on October 9, 2015, Sarrouf's "preferred banker" at First Republic e-mailed Sarrouf, Jr., Camille Sarrouf, Sr., Bono, and Sarrouf's legal secretary, Karen Beaudoin, about the returned check. At 1:51 P.M. that day, a different First Republic representative returned calls Beaudoin had made to the bank after receiving the e-mail. Bono joined the call and asked whether the wire transfers could be recalled.

Beaudoin was asked to e-mail the recall request to First Republic, which she did. Ultimately, however, the recall efforts were not successful.

Sarrouf was charged back the amount of the counterfeit check, resulting in its IOLTA being overdrawn by $259,312. On October 23, 2015, Sarrouf deposited $311,550 into its IOLTA to restore its previous balance of $52,238.[5] Approximately one year later, Sarrouf sued First Republic and Alberich, alleging two counts against First Republic -- count one for negligence, and count two for breach of the good faith and ordinary care provisions of California's Uniform Commercial Code (C.U.C.C.).[6] See Cal. Com. Code §§ 1304 and 4103; Uniform Commercial Code (U.C.C. or code) §§ 1-304 and 4-103. Sarrouf's claims against First Republic sought repayment of the $311,550 Sarrouf had deposited to restore the prior balance to its IOLTA.

Discussion. 1. Negligence. Sarrouf's first count against First Republic asserts that the bank was negligent in (1) failing to inspect the deposit check for signs that it was counterfeit and accepting it for collection; (2) informing

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[5] Sarrouf and First Republic agreed that the deposit would be made without prejudice to Sarrouf's litigation position.

[6] The business account disclosure and agreement applicable to Sarrouf's account states, "To the extent this agreement is subject to the laws of any state, it will be subject to the law of the State of California, without regard to its conflict of law provisions." The parties agree that California law applies.

Sarrouf that the proceeds from that check were immediately available for withdrawal; and (3) processing the wire transfer requests. "An order granting . . . summary judgment will be upheld if the trial judge ruled on undisputed material facts and his ruling was correct as a matter of law." Commonwealth v. One 1987 Mercury Cougar Auto., 413 Mass. 534, 536 (1992).

Under California law, "[a] plaintiff in a negligence suit must demonstrate 'a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury.'" Vasilenko v. Grace Family Church, 3 Cal. 5th 1077, 1083 (2017), quoting Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill LLP, 59 Cal. 4th 568, 573 (2014). Here, Sarrouf's negligence claim was properly dismissed for three reasons.

First, Sarrouf identified no source of any relevant duty of First Republic based on the common law of California or based on the parties' contractual arrangements. "The existence of a duty is a question of law, which we review de novo." Vasilenko, 3 Cal. 5th at 1083. Sarrouf points to no common-law principle or contract term that required First Republic to (1) discover that the deposit check was counterfeit, (2) refrain from making a true statement to Sarrouf that the check proceeds were

immediately available,[7] or (3) refuse to execute Sarrouf's valid and duly authorized wire transfer instructions.[8] Moreover, First Republic had no special duty to Sarrouf based on the parties' relationship. See Copesky v. Superior Court, 229 Cal. App. 3d 678, 694 (1991) ("[B]anks, in general and in this case, are not fiduciaries for their depositors; and . . . the bank-depositor relationship is not a 'special relationship'"). See also Symonds v. Mercury Sav. & Loan Ass'n, 225 Cal. App. 3d 1458, 1468 (1990) ("we note the relationship between [the depositor] and [the bank] was that of principal and agent with the Commercial Code imposing upon [the bank] a duty of ordinary care"); Dixon, Laukitis, & Downing, P.C. v. Busey Bank, 2013 IL App. (3d) 120832, ¶¶ 13, 15 (Dixon) ("The relationship between a bank and its account holders is contractual in nature and one of creditor and debtor. . . . Under the common law, a collecting bank does not owe a duty to its customer to inspect a check

[7] Sarrouf's theory ignores the undisputed fact that Sarrouf was given a deposit slip stating, "All items are credited subject to final payment. Any item may be charged back at any time before final payment." "[A] bank should not incur liability for simply telling a depositor that he or she may write checks against deposited funds where the depository bank has granted the depositor a provisional settlement and not yet received a notice of dishonor from the payor or intermediary bank." Holcomb v. Wells Fargo Bank, N.A., 155 Cal. App. 4th 490, 499 (2007).

[8] It is uncontroverted that First Republic followed Sarrouf's instructions precisely in making the wire transfers.

later determined to be counterfeit. . . . [T]he duty owed to [an account holder] by [a bank is] defined under the parties' account agreement and the U.C.C.").

Second, even if First Republic had violated a contractual obligation, Sarrouf's claim would be for breach of contract, not negligence, in accordance with the economic loss rule. See Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 988 (2004), quoting Rich Prods. Corp. v. Kemutec, Inc., 66 F. Supp. 2d 937, 969 (E.D. Wis. 1999) ("The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise[, and] . . . 'prevent[s] the law of contract and the law of tort from dissolving one into the other'"). "[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." Robinson Helicopter Co., supra at 989, quoting Erlich v. Menezes, 21 Cal. 4th 543, 551 (1999). Here, Sarrouf does not claim that First Republic's actions amounted to tortious conduct under any common-law tort principles independent of the U.C.C. or the parties' contracts. See Dixon, 2013 IL App. (3d) 120832, ¶¶ 20-21.

Third, the specific provisions of the U.C.C., including those invoked in Sarrouf's second count, displace the common law

of negligence in this context. Section 1103 of the C.U.C.C. provides: "Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions" (emphasis added). See U.C.C. § 1-103. Thus, "the UCC expressly displaces common law, to the extent that its 'particular provisions' apply." Chino Commercial Bank, N.A. v. Peters, 190 Cal. App. 4th 1163, 1170 (2010). Here, as discussed infra, there are "particular provisions" of the U.C.C. that apply to First Republic's role in the subject transactions. As stated in the U.C.C.'s official comment:

> "[T]he Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may supplement provisions of the Uniform Commercial Code, they may not be used to supplant its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies."

Official Comment 2 to U.C.C. § 1-103. See Gossels v. Fleet Nat'l Bank, 453 Mass. 366, 370 (2009) ("Where a UCC provision

specifically defines parties' rights and remedies, it displaces analogous common-law theories of liability. . . . Otherwise, banks would face a motley patchwork of liability standards from State to State"); Prestige Imports, Inc. v. South Weymouth Sav. Bank, 75 Mass. App. Ct. 773, 784 n.13 (2009) ("the common law does not roam freely over and through specific Code provisions but supplies a loss-allocation framework only when specific Code provisions do not").[9]

Under California law, U.C.C. principles apply to a bank's acceptance of a check for deposit and collection of that check. See Chino, 190 Cal. App. 4th at 1172. Likewise, as to the wire transfers, Article 4A of the U.C.C. has been adopted in California, and its provisions govern.[10,11] See Cal. Com. Code §§

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[9] California courts consider cases from other jurisdictions in interpreting the U.C.C. -- we do the same here. See Fariba v. Dealer Servs. Corp., 178 Cal. App. 4th 156, 166 n.3 (2009) ("Case law from other jurisdictions applying our Commercial Code, the UCC, or the uniform code of other states, [is] considered good authority in litigation arising under the California act").

[10] "In the drafting of Article 4A, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment." Official Comment to U.C.C. § 4A-102.

[11] Section 11212 of the C.U.C.C. provides that the liability of a "receiving bank" based on acceptance of a "payment order" is "limited to that provided in this division." See U.C.C. § 4A-212. "'Receiving bank' means the bank to which the sender's instruction is addressed." Cal. Com. Code § 11103(a)(4). A "[p]ayment order" is "an instruction of a sender to a receiving

11101, et seq.; Chino, supra at 1173. Accordingly, we must view Sarrouf's claims through the lens of the U.C.C. See Chino, supra at 1170-1176. See also Dixon, 2013 IL App. (3d) 120832, ¶ 13 ("Provisions such as section 4-202[12] of the UCC displace common law negligence principles; UCC compliance is nonnegligent as a matter of law").

2. C.U.C.C.-based claims. Sarrouf's second count against First Republic seeks recovery under C.U.C.C. §§ 1203 (now § 1304) and 4103. See U.C.C. §§ 1-304 and 4-103. Section 4103(a) of the C.U.C.C. states as follows:

> "The effect of the provisions of this division may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by

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bank . . . to pay . . . a fixed or determinable amount of money to a beneficiary" if (1) "[t]he instruction does not state a condition . . ., [2] [t]he receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender[, and (3) t]he instruction is transmitted . . . directly to the receiving bank or to an agent [for the same]." Cal. Com. Code § 11103(a)(1). "A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this division or by express agreement." Cal. Com. Code § 11212. Here, First Republic "'accept[ed]' the wire transfers by executing them . . . . Thus, the [b]ank's liability for that acceptance is limited to its liability, if any, under Article 4A." Chino, 190 Cal. App. 4th at 1174, quoting Cal. Com. Code § 11209(a).

[12] Section 4-202 of the U.C.C. governs First Republic's handling of the counterfeit check, as discussed at length infra. See Cal. Com. Code § 4202.

> which the bank's responsibility is to be measured if those standards are not manifestly unreasonable."

Relying on C.U.C.C. § 4103, count II of Sarrouf's complaint alleges that First Republic breached its U.C.C.-based obligations to exercise good faith and ordinary care in accepting and submitting for collection the $337,044 deposit check "without inspecting the check for signs that the item was . . . counterfeit."[13]

a. Good faith. First Republic was required to perform its contracts with Sarrouf in good faith. Section 1304 of the C.U.C.C. provides that "[e]very contract or duty within this code imposes an obligation of good faith in its performance and enforcement." See U.C.C. § 1-304. The official comment provides, however that "[t]his section does not support an independent cause of action for failure to perform or enforce in good faith." Official Comment 1 to U.C.C. § 1-304. The comment goes on to state, "[T]he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and

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[13] We need not consider the wire transfers any further, not only because Sarrouf's U.C.C.-based count does not mention them, but also because "nothing in article 4A makes a receiving bank liable for its negligence in accepting a duly authorized and error-free wire transfer." Chino, 190 Cal. App. 4th at 1174. Here, as stated by the motion judge, the uncontroverted evidence shows that First Republic sent the wire transfers "exactly as [Sarrouf] had instructed it to do so."

does not create a separate duty of fairness and reasonableness which can be independently breached."[14]

Sarrouf points to no contractual provision that First Republic failed to perform in good faith. On the contrary, the parties' contracts plainly disclaim any liability based on the facts asserted here. The business account disclosure and agreement applicable to Sarrouf's account states, "Any item that we cash or accept for deposit is subject to later verification and final payment." The agreement then goes on to say, "We may deduct funds from your account if an item is . . . returned to us unpaid . . . ."[15] The agreement also states, "Please keep in mind . . . that after we make funds available to you, and you have withdrawn the funds, you are still responsible for checks you deposit that are returned to us unpaid and for any other problems involving your deposit." Moreover, the relevant funds transfer agreement and client authorization states, "We are authorized to execute Funds Transfers issued by you or any Authorized Person, without inquiry into the circumstances of the

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[14] The term "good faith" is defined in the C.U.C.C. as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Cal. Com. Code § 1201(b)(20).

[15] The agreement also states, "If we accept an item for collection, we will send it to the institution upon which it is drawn, but will not credit your account for the amount until we receive the funds from the other institution. If we elect to credit your account before then, we may charge the amount back against your account if we do not receive payment for any reason."

transaction . . . ." Judgment was properly entered for First Republic on Sarrouf's "good faith" theory because Sarrouf has identified no way in which First Republic failed to exercise good faith in performing its contractual and U.C.C.-based obligations.

b. Ordinary care in connection with the deposit check. To examine whether First Republic exercised the ordinary care required of it in connection with the deposit check, we must first identify the bank's role under the code at the time of the relevant transaction. By invoking C.U.C.C. § 4214 as a basis for its claim that First Republic owed a statutory duty of ordinary care, Sarrouf concedes that First Republic was acting as a "collecting bank."[16] Under C.U.C.C. § 4214, the right of a "collecting bank" to charge back an item is not affected by a "[f]ailure by any bank to exercise ordinary care . . ., but a bank so failing remains liable."[17] Cal. Com. Code § 4214(d)(2). See U.C.C. § 4-212.

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[16] "'Collecting bank' means a bank handling an item for collection except the payor bank." Cal. Com. Code § 4105(5).

[17] When it first took the check, First Republic was serving as a "depositary bank," which "means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter." Cal. Com. Code § 4105(2). See Cal. Com. Code § 4104(a)(9) (an "item" is "an instrument or a promise or order to pay money handled by a bank for collection or payment"). The record does not disclose whether First Republic presented the check for payment directly to JPMorgan or to an "intermediary bank," see Cal. Com. Code

Under the U.C.C., when a bank credits the depositor's account in the amount of a check, this is merely a provisional credit. See Cal. Com. Code § 4201(a) ("Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies . . . even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn"). In Symonds, a California court summarized the system of collection and payment succinctly as follows:

> "When a customer deposits a check drawn on another bank, the customer receives a provisional credit for the amount of the check. The collecting bank, acting as the customer's agent, then forwards the check to the payor bank or a presenting bank which gives the collecting bank a provisional credit. If the check is forwarded to a presenting bank, the presenting bank in turn presents the check to the payor bank from which the check is to be drawn and receives a provisional credit. If the payor bank does not promptly dishonor the check, the provisional

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§ 4105(4), but either way, First Republic acted as a "collecting bank" when it forwarded the check to another bank for payment. See Garnac Grain Co. v. Boatmen's Bank & Trust Co. of Kansas City, 694 F. Supp. 1389, 1394 n.5 (W.D. Mo. 1988) ("A depositary bank is also a collecting bank"); In re Hudson Valley Meats, Inc., 29 B.R. 67, 71 n.11 (Bankr. N.D.N.Y. 1982). See also Greenberg, Trager & Herbst, LLP v. HSBC Bank USA, 17 N.Y.3d 565, 575 (2011) ("In a typical check presentation scenario, a bank customer deposits a check at its bank, the depositary bank. After deposit by the customer, the depositary bank either presents the check to the payor bank, or as is more commonplace, the depositary bank sends the check to a clearing house, which acts as an intermediary bank").

> settlements through this chain of banks become final." (Citations omitted.)

Symonds, 225 Cal. App. 3d at 1464.

If, however, a check is dishonored by the payor bank, the provisional settlements[18] may be revoked and the collecting bank that originally took the check (i.e., the depositary bank)[19] may charge back the amount of the check to its customer. See Cal. Com. Code § 4214; Chino, 190 Cal. App. 4th at 1172. "The UCC is clear that, until there is final settlement of the check, the risk of loss lies with the depositor" (citation omitted). JPMorgan Chase Bank, N.A. v. Freyberg, 171 F. Supp. 3d 178, 184 (S.D.N.Y. 2016). Stated another way, "a collecting bank has a superior right over the item's owner to a setoff if an item does not settle." Dixon, 2013 IL App. (3d) 120832, ¶ 11. See

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[18] "A provisional credit is not an advance payment of the presented check; rather, it is similar to a loan." Gossels, 453 Mass. at 374.

[19] The code distinguishes between depositary banks and collecting banks -- but not in ways that are relevant here. "The depositary, or 'first bank' to process a check in the check clearing system, bears a special role." HH Computer Sys., Inc. v. Pacific City Bank, 231 Cal. App. 4th 221, 225 (2014). "The theory is that the first bank in the chain has a duty to make certain all endorsements are valid; banks subsequently taking the paper have a right to rely on the forwarding bank." Id. at 229, quoting Feldman Constr. Co. v. Union Bank, 28 Cal. App. 3d 731, 736 (1972). Under the C.U.C.C., an "indorsement" is a "signature other than that of a signer as maker, drawer, or acceptor [made for the purpose of] negotiating an instrument . . . ." Cal. Com. Code § 3204(a). Here, no question has been presented about whether Sarrouf properly indorsed the counterfeit check as its payee.

Gossels, 453 Mass. at 370 (referring to U.C.C.'s "bedrock principle" that "the bank customer remains the owner of the check throughout the collection process and bears the risk of collection").

Section 4202 of the C.U.C.C. spells out clearly the obligations of a collecting bank in handling a check. A collecting bank must "exercise ordinary care" in four areas: "(1) [p]resenting an item or sending it for presentment[,] (2) [s]ending notice of dishonor or nonpayment or returning an item . . . to [its] transferor after learning that the item has not been paid or accepted . . . (3) [s]ettling for an item when the bank receives final settlement[, and] (4) [n]otifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof." Cal. Com. Code § 4202(a)(1)-(4). See U.C.C. § 4-202. See also Symonds, 225 Cal. App. 3d at 1464 ("In handling the check, the collecting bank must use ordinary care in presenting the check for collection or for sending it for presentment").

"A collecting bank exercises ordinary care under [C.U.C.C. § 4202(a)] by taking proper action before its midnight deadline[20] following receipt of an item, notice, or settlement."

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[20] A bank's "midnight deadline" is "midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later." Cal. Com. Code

Cal. Com. Code § 4202(b). See U.C.C. § 4-202; Dixon, 2013 IL App. (3d) 120832, ¶ 16. If a collecting bank exercises ordinary care in presenting an item or sending it for presentment, it is "not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in the possession of others or in transit." Cal. Com. Code § 4202(c). See Symonds, 225 Cal. App. 3d at 1464. Moreover, a collecting bank may charge back the amount of an item that is not paid even if it has failed to exercise ordinary care as required by C.U.C.C. § 4202(a). See Cal. Com. Code § 4214(d)(2). See also Symonds, supra at 1467-1468 (U.C.C. bars right to recover for charge back).

In summary, timely performance of the four duties set forth in C.U.C.C. § 4202(a) meets the ordinary care requirements of a collecting bank. Sarrouf does not, however, complain of any lack of ordinary care with respect to First Republic's enumerated duties. Instead, Sarrouf attempts to impose on First Republic an obligation to detect the counterfeit nature of a check drawn on another bank,[21] deposited by Sarrouf. This

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§ 4104(a)(10). There is no allegation here that First Republic missed any midnight deadline.

[21] For context, it is worth noting that in the U.C.C.'s loss allocation system, a payor bank has obligations different from those of a depositary bank or a collecting bank. A payor bank may charge its account holder only for an item "that is properly payable from [the specified account]. An item is properly payable if it is authorized by the customer and is in accordance

obligation does not appear in the code or the parties' agreements.[22] See Dixon, 2013 IL App. (3d) 120832, ¶ 15. "If there is a policy implicit in the UCC's rules for the allocation of losses due to fraud, it surely is that the loss be placed on the party in the best position to prevent it. A party is in the best position to guard against the risk of a counterfeit check by knowing its 'client,' its client's purported debtor and the recipient of the wire transfer." (Quotations and citations omitted.) Freyberg, 171 F. Supp. 3d at 184. Accordingly, judgment properly entered for First Republic on count two of the complaint. See Greenberg, Trager & Herbst, LLP v. HSBC Bank USA, 17 N.Y.3d 565, 581 (2011) (summary judgment properly granted where depositary bank that was also collecting bank did not violate any duty owed depositor). See also Dixon, supra at

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with any agreement between the customer and bank." Cal. Com. Code § 4401(a). See Cal. Com. Code § 4406.

[22] First Republic's internal policies regarding handling of checks and wire transfers do not create a duty where none otherwise existed. See Fireman's Fund Ins. Co. v. Security Pac. Nat'l Bank, 85 Cal. App. 3d 797, 829 (1978) ("While in some situations violation of a company rule may be used as evidence of breach of duty, it cannot be used to establish the existence of such a duty when contrary to both statutory and common law" [emphases omitted]). See also Gossels, 453 Mass. at 375, quoting G. L. c. 106, § 1-102 ("Elevating a bank's internal manuals to a set of affirmative disclosure requirements on par with the requirements of the UCC would vitiate the goal of 'mak[ing] uniform the law among the various jurisdictions'").

¶¶ 15-19 (complaint properly dismissed where collecting bank satisfied responsibilities under U.C.C. § 4-202).

Judgment affirmed.