[Cite as *Gollihue v. Natl. City Bank*, 2011-Ohio-5405.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Tom Gollihue,	:	
Plaintiff-Appellant,	:	
		No. 11AP-150
v.	:	(C.P.C. No. 09CVH-11-17657)
National City Bank,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 20, 2011

Michael T. Gunner, for appellant.

Vorys, *Sater*, *Seymour & Pease LLP*, and *Daren S. Garcia*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Tom Gollihue ("Gollihue"), appeals the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendant-appellee, National City Bank ("NCB"). For the following reasons, we reverse the trial court's judgment.

{¶2} This case arises from allegedly unauthorized withdrawals from Gollihue's savings account (the "account") with NCB. Gollihue opened the account on January 17, 2004, at which time he signed a Consumer Signature Card and received a copy of the Personal Account Agreement ("Account Agreement") that governed the account. By signing the Consumer Signature Card, Gollihue acknowledged receipt of the Account Agreement and consented to be bound by its terms.

{¶3} Prior to opening the account, Gollihue had discovered that his wife, Patricia, had opened numerous credit card accounts and had accumulated over $100,000 in credit card debt in both of their names to support a gambling habit. As a result, Gollihue closed the couple's joint savings account and opened a new account solely in his name, using the remaining balance from the joint savings account as an initial deposit. Gollihue maintains that NCB assured him that Patricia would not be allowed to make withdrawals from the account. In February and March 2004, Gollihue withdrew $5,660 from the account to pay the remaining credit card balances Patricia had accumulated, but Gollihue did not make any further withdrawals from the account. As of April 1, 2004, the account balance was $15,683.40.

{¶4} In compliance with its obligations under the Account Agreement, NCB mailed periodic statements of account activity to Gollihue's home address. Gollihue does not dispute that NCB mailed the statements, but he did not recall receiving them. After Patricia's death on February 23, 2007, Gollihue discovered that Patricia had been hiding bills and mail from him. Gollihue suggested that Patricia had intercepted and hidden the NCB account statements. Gollihue conceded that he never reviewed the

account statements and testified that he did not check the account "because they told me [Patricia] couldn't touch it." (Gollihue Deposition at 19.)

{¶5} Shortly after Patricia's death, Gollihue and his daughter visited the NCB branch in London, Ohio, and, while there, they inquired about the balance in the account. They learned that Patricia had depleted the account balance by presenting withdrawal slips, purportedly signed by Gollihue, to NCB. Gollihue told the NCB branch manager that the withdrawals had been unauthorized and that the bank had made a mistake in allowing Patricia to withdraw funds from the account. He claims that the branch manager admitted a mistake by the bank but disclaimed liability, telling Gollihue it was "[his] problem now." (Gollihue Deposition at 29, 30; Gollihue Affidavit at ¶7.) Gollihue's daughter ordered the branch manager to "make it right." (Gollihue Deposition at 31.) According to Gollihue, he discovered the withdrawn funds in February 2007, after Patricia's death.

{¶6} Gollihue claims that Patricia made 32 unauthorized withdrawals from the account between June 29 and November 29, 2006, totaling $15,925. Each withdrawal is reflected on the account statements, which also included copies of 29 withdrawal slips, each of which Gollihue claims bears a forged signature. After February 2007, Gollihue had no further conversations with anyone at NCB, did not write to NCB, and did not personally do anything further with respect to having the withdrawn funds restored, prior to filing this action.

{¶7} Gollihue initiated this action on November 25, 2009, by filing a complaint against NCB in the Franklin County Court of Common Pleas. Gollihue alleged that NCB permitted Patricia to make unauthorized withdrawals totaling approximately $16,000

from the account, in contravention of the terms of the Account Agreement. He also alleged that NCB was negligent in permitting Patricia to withdraw funds from the account. Gollihue seeks relief only in the amount of the withdrawn funds.

{¶8} On December 1, 2010, NCB filed a motion for summary judgment, which the trial court granted on January 19, 2011. The trial court concluded that any claim for breach of contract was barred by Gollihue's failure to act within a valid and reasonable contractual limitations period established in the Account Agreement. The trial court also concluded that Gollihue's contract claims were barred by R.C. 1304.35(F), which precludes a bank customer from asserting unauthorized signatures or alterations against the bank when the customer does not discover and report the unauthorized signatures or alterations within one year after the statements or items are made available to the customer. The court further concluded that Gollihue could not maintain a tort claim against NCB because the parties' rights and duties are governed by contract and because a tort claim would be barred by the economic loss rule. Finally, the court determined that Gollihue's complaint did not state a tort claim of bad faith because independent bad faith claims may exist only in insurance coverage disputes. The trial court entered final judgment in favor of NCB on January 28, 2011.

{¶9} Gollihue filed a timely notice of appeal and raises the following assignments of error:

> 1. THE TRIAL COURT ERRED IN FINDING THAT R.C. §1304.35 (F) IS A ONE YEAR STATUTE OF LIMITATIONS OR THAT THERE IS A ONE YEAR LIMITATION TO BRING SUIT[.]

> 2. THE TRIAL COURT ERRED IN FINDING THAT [GOLLIHUE'S] CLAIMS ARE BARRED BECAUSE OF THE FAILURE TO TIMELY NOTIFY [NCB.]
>
> 3. THE TRIAL COURT ERRED IN FINDING THAT BAD FAITH CLAIMS ARE LIMITED TO CLAIMS AGAINST INSURANCE COMPANIES[.]

{¶10} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. This court applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶11} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶12} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. Id. at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶13} In his first assignment of error, Gollihue argues that the trial court erred by finding that R.C. 1304.35(F) and the Account Agreement both establish one-year limitations on the time to bring an action against NCB. R.C. 1304.35(F) states that, "[w]ithout regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer discover and report his unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration." As relevant to Gollihue's claims, the Account Agreement provides, in part, as follows:

> **Depositor's Duties and Liabilities**
> Depositor agrees to examine each statement (and enclosures) and any Account information provided to discover any alterations; unauthorized signatures, Items, Entries or indorsements; unauthorized transactions; or errors, and Depositor agrees to notify Bank in writing thereof

> without delay. If Depositor fails to meet any of the requirements of the previous sentence:
>
> * * *
>
> - within 60 calendar days after the statement or Account information was mailed or otherwise made available, Depositor shall be precluded from asserting against Bank any unauthorized signature, Item or Entry, or any alteration, without regard to Bank's care or lack of care.
>
> If Depositor fails to notify Bank in writing of any claim within one year after such claim accrues, Depositor shall be precluded from asserting such claim. * * *

According to the Account Agreement, a statement is "made available" when it is mailed to a depositor's last known address, as shown on bank records.

{¶14} The trial court found that, because Gollihue "did not file his Complaint until two and a half years after he discovered the unauthorized withdrawals[,] * * * [he] acted outside of the parties' valid, contractual limitations period." The trial court also found that R.C. 1304.35(F) barred Gollihue's claims. Gollihue maintains that neither the Account Agreement nor R.C. 1304.35(F) establishes a limitation on the time to bring an action and that the trial court erred in concluding that his claims were time-barred.

{¶15} The trial court cited *O'Brien v. First Natl. Bank of Pa.* (Sept. 29, 2000), 11th Dist. No. 99-T-0100, for the proposition that a bank customer who fails to file a claim within one year of discovering unauthorized transactions is barred by a statute of limitations from pursuing that claim. That case, however, was decided under former R.C. 1304.29, which was amended and recodified as R.C. 1304.35 by 1994 S.B. 147, effective August 19, 1994. Former R.C. 1304.29(F) stated that "[a]n *action* against a bank arising out of an unauthorized signature or indorsement of the item *must be*

brought within one year after the customer has notified the bank of his claim as required by the provisions of this section." (Emphasis added.) Pursuant to that section, the Eleventh District Court of Appeals correctly held that "[a] customer who fails to file his or her cause of action within that one year time limit, is barred by the statute of limitations from pursuing such claim." *O'Brien*. The statutory language of former R.C. 1304.29(F), however, is not included in R.C. 1304.35.

{¶16} R.C. 1304.35(F), relied on here, is based on former R.C. 1304.29(D), which precluded a customer's recovery based upon a forged signature if the customer failed to notify the bank within one year from the time the account statement and items were made available to the customer. Although the Eleventh District also characterized former R.C. 1304.29(D) as a statute of limitations in *O'Brien*, the court noted recognition of Ohio case law in Official Comment 5 to former R.C. 1304.29, stating that R.C. 1304.29(D) did not limit the time within which an action must be brought. See *Stauffer v. Oakwood Deposit Bank* (1969), 19 Ohio App.2d 68, 71-72 ("Examination of * * * the statute shows that it is not a statute of limitations at all, for [it] does not purport to limit the time within which an action may be brought but merely creates a condition to the assertion of a claim of unauthorized signature. The claim may not be asserted unless the customer discovers and reports the lack of authority within the statutory period of time."). Addressing the notice requirement in R.C. 1304.35(F), this court has stated that "[t]he one-year bar * * * does not act as a statute of limitations, but is, instead, a substantive element of a claim for payment of a forged check." *Woodbridge v. Huntington Natl. Bank*, 168 Ohio App.3d 722, 2006-Ohio-4784, ¶13. Here, we likewise conclude that R.C. 1304.35(F), unlike former R.C. 1304.29(F), does not act as a statute

of limitations. Instead, it establishes a condition precedent for a bank customer to maintain a claim based on an unauthorized signature.

{¶17} Similarly, the Account Agreement does not establish a contractual limitations period of one year in which a customer must bring an action on the contract. There is no dispute that contracting parties may reasonably limit the time within which a suit may be brought on the contract. See *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 429-30; *Globe American Cas. Co. v. Goodman* (1974), 41 Ohio App.2d 231, 237, citing *Order of United Commercial Travelers of Am. v. Wolfe* (1947), 331 U.S. 586, 608, 67 S.Ct. 1355, 1365 ("in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in a general statute of limitations provided that the shorter period itself shall be a reasonable period"). The language of the Account Agreement, however, contains no agreement to limit the time for bringing an action on the contract.

{¶18} As with R.C. 1304.35(F), the notice provisions in the Account Agreement do not purport to limit the time in which an action may be brought. There is Ohio case law distinguishing contractual notice provisions, such as those in the Account Agreement, from contractual limitations on the time in which to file an action. For example, the Second District Court of Appeals described a construction contract provision requiring written notice of all claims for additional compensation within ten days as a condition precedent to a party's ability to claim damages for default. See *Moraine Materials Co. v. Cardinal Operating Co.* (Nov. 13, 1998), 2d Dist. No. CA 16782. The court explained that the provision's "operation as a condition precedent

was evident from the language providing that '[u]nless such [written] statements are made, Contractor shall not be entitled to payment on account of the cost or damage.' " Id.

{¶19} The Account Agreement's provisions detailing the depositor's duties and liabilities are silent with respect to the time in which an action must be filed. Instead, they require a depositor to notify the bank of unauthorized signatures within 60 days after a statement was made available and to notify the bank of any claim against the bank within one year after it accrued. The Account Agreement establishes a condition, whereby compliance with the notification requirements is a prerequisite to Gollihue's maintenance of a claim against NCB based on unauthorized withdrawals. While the Account Agreement specifies that failure to comply with the notice provisions will preclude certain claims, this simply clarifies that compliance with those provisions is a condition precedent. Thus, we agree with Gollihue that the Account Agreement does not establish a one-year limitation in which he must bring an action against the bank. For these reasons, we sustain Gollihue's first assignment of error.

{¶20} In his second assignment of error, Gollihue asserts that the trial court erroneously found that he failed to timely notify NCB and that his failure to do so bars his claims. As previously stated, the Account Agreement validly requires a depositor to notify the bank of unauthorized signatures and transactions and of any claim against the bank. See *Tatis v. U.S. Bancorp* (C.A.6, 2007), 473 F.3d 672, 676 ("Ohio courts have upheld contractual limitations of the time in which a depositor must notify the bank of a forgery."). While Gollihue does not dispute the validity of the contractual notice requirements, he argues that those requirements do not preclude his maintenance of an

action. More specifically, he argues that, for purposes of summary judgment, the evidence establishes that he timely notified NCB of the unauthorized signatures and withdrawals and of his claims against the bank. We must, therefore, consider whether the trial court correctly determined that Gollihue did not satisfy his notification obligations under the Account Agreement.

{¶21} The Account Agreement unambiguously expresses the manner in which a depositor must notify the bank of unauthorized signatures or transactions and specifically requires the depositor to notify the bank in writing. NCB contends that Gollihue's deposition testimony that he never sent a written communication to NCB, either personally or through an agent, precludes Gollihue's claims because the Account Agreement requires notice in writing. Gollihue concedes that he did not submit a written document notifying NCB of the unauthorized signatures and unauthorized withdrawals, and Gollihue does not argue that he submitted a writing notifying NCB of his claims against the bank prior to filing his complaint, two-and-one-half years after discovering the withdrawals. Nevertheless, Gollihue contends that the record contains evidence that he appropriately complied with his notification obligations under the Account Agreement.

{¶22} Although courts generally should give effect to the plain meaning of the parties' unambiguously expressed intentions, in some circumstances courts will not strictly enforce contractual language requiring notice in writing. See *Hackman v. Szczygiel*, 10th Dist. No. 06AP-187, 2006-Ohio-5872. Thus, a failure to give notice in writing, as required by a contract, will not necessarily preclude recovery on the contract. For example, in *Adair v. Landis Properties, Inc.*, 10th Dist. No. 08AP-139, 2008-Ohio-

4593, this court considered a lease provision that required a tenant to give a 30-day written notice of an intent to surrender the premises to avoid a resultant month-to-month tenancy upon expiration of the lease term. Although the tenant did not give notice in writing of an intent to surrender, the record was replete with evidence that the lessor was fully aware of the tenant's intent to vacate the premises as soon as he could. There, we quoted our prior opinion in *McGowan v. DM Group IX* (1982), 7 Ohio App.3d 349, 352, as follows:

> The purpose of requiring written notice is not to be hypertechnical but, instead, to create certainty. Here, defendants were aware for several months of plaintiff's intent to terminate the tenancy as soon as possible. * * * At no time is there any indication that defendants advised plaintiff that they were going to insist upon written notice or a new month-to-month tenancy. To require same under the circumstances of this case would be unconscionable, even though the provision of the lease itself is not unconscionable. * * * In short, additional written notice would have served no purpose in this case. * * * [T]he overwhelming weight of the evidence requires a factual finding that, pursuant to actual notice received by defendants from plaintiff, even though not written, there was substantial compliance with the lease terms * * *.

Adair at ¶13. In *Adair*, which, unlike *McGowan*, was decided on summary judgment, the record contained competing affidavits regarding whether and when the tenants informed the lessor that they would be vacating the apartment. As a result, we concluded that genuine issues of material fact remained as to whether the tenants substantially complied with the lease provision, and we reversed the trial court's entry of summary judgment.

{¶23} The Seventh District Court of Appeals addressed a contractual requirement of written notice in another context, this time arising from a construction

contract. See *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Commrs.*, 152 Ohio App.3d 95, 2003-Ohio-1227. There, a contract extended the county a right to terminate the agreement upon ten days written notice to the contractor. The county argued that it had sent the equivalent of written notice when it returned the contractors-appellees' bonds, even though the letters accompanying the returned bonds did not expressly state that the county was terminating the contracts. The court stated that it was clear from the record that the appellees had actual and constructive notice of termination by the county and concluded that "[t]he failure to follow the 'written notice' provisions of a construction contract can be construed as harmless if there is evidence of constructive or actual notice." Id. at ¶76, citing *Roger J. Au & Son, Inc. v. Northeast Ohio Regional Sewer Dist.* (1986), 29 Ohio App.3d 284, 292.

{¶24} On summary judgment, both the trial court and the appellate court must examine the evidence in the light most favorable to Gollihue, as the non-moving party. Doing so here, the record demonstrates that Gollihue provided NCB with actual notice of the unauthorized signatures on the withdrawal slips and that he did not authorize the withdrawals made by Patricia. In response to interrogatories, Gollihue stated that the London branch manager was aware of the unauthorized signatures because he and his daughter "brought it to her attention" in February 2007. In his affidavit, Gollihue stated that, immediately upon learning of the unauthorized deposits, he confronted the manager, "who took a report." (Gollihue Affidavit at ¶7.) He testified that the branch manager admitted that the bank had made a mistake but stated that "it's [Gollihue's] problem now." (Gollihue Deposition at 29, 30; Gollihue Affidavit at ¶7.) Gollihue further testified that, during this meeting, his daughter ordered the bank to "make it right."

(Gollihue Deposition at 31.) Unlike in *Adair*, there is no evidence in the record to contradict Gollihue's testimony that he notified NCB of the unauthorized signatures and withdrawals immediately upon learning of them after Patricia's death. Although Gollihue did not provide written notice to NCB, the evidence of substantial compliance with the notice requirements of the Account Agreement precludes summary judgment in favor or NCB based on Gollihue's failure to give written notice. Nevertheless, we must consider whether Gollihue's notice was timely under the terms of the Account Agreement.

{¶25} The Account Agreement required Gollihue to notify NCB of any unauthorized signatures or transactions "within 60 calendar days after the statement or Account information was mailed or otherwise made available" to preserve the right to assert the unauthorized signature or transaction. It also required Gollihue to notify NCB of any claim "within one year after such claim accrues" to preserve the right to assert that claim. The unauthorized withdrawals occurred between June 29 and November 29, 2006.

{¶26} Pursuant to the Account Agreement, the time for Gollihue to notify NCB of unauthorized signatures or transactions was measured from when NCB mailed or otherwise made available the statement of account information. Although NCB submitted the affidavit of Keith Hershberger, a Vice President of Deposit Products, who states that Gollihue "was sent quarterly statements reflecting all Savings Account activity" at his home address, the copies of statements in the record establish different statement periods. Specifically, the statements in the record covering the withdrawals made by Patricia establish the following periods: (1) April 4 to July 3, 2006; (2) July 4 to August 1, 2006; (3) August 2 to October 2, 2006; (4) October 3 to November 1, 2006;

and (5) November 2, 2006 to January 2, 2007. More importantly, however, the account statements neither indicate the date they were created nor the date they were mailed to Gollihue, and Hershberger neither stated when the statements were mailed nor described the bank's normal times for generating and mailing account statements. NCB concedes that there is no record of the date upon which Gollihue received the account statements, but there is also no record of the date upon which NCB mailed those statements. Gollihue contends that, without such evidence, the court could not determine when his obligation to provide notice was triggered.

{¶27} There is no dispute that NCB mailed each of the relevant account statements to Gollihue's address prior to Patricia's death. There is also no dispute that Gollihue alerted NCB to the unauthorized signatures and withdrawals within 60 days after Patricia's death. Without evidence of when the account statements were made available to Gollihue, however, questions of fact remain as to whether Gollihue's notification was timely with respect to some or all of the withdrawals made by Patricia. For example, even assuming that the final account statement listing unauthorized withdrawals was mailed on January 2, 2007, the day the statement period closed, and accepting Gollihue's testimony that he notified NCB of the unauthorized withdrawals in February 2007, there is evidence that Gollihue provided timely notice with respect to the withdrawals listed on that statement. Likewise, crediting Gollihue's testimony that he notified NCB of the unauthorized withdrawals, and thus his claims against the bank, in February 2007, there is evidence that Gollihue fulfilled the requirement in the Account

Agreement that he notify NCB of any claim within one year of its accrual, because less than one year had elapsed since the earliest of the unauthorized withdrawals.[1]

{¶28} Viewing the evidence in the light most favorable to Gollihue, we conclude that genuine issues of material fact remain as to whether Gollihue complied with the notice requirements of the Account Agreement. Therefore, the trial court erred in granting summary judgment in favor of NCB based on a failure to timely notify NCB of the unauthorized signatures and withdrawals and of Gollihue's claims against the bank.

{¶29} In a final argument under Gollihue's second assignment of error, NCB argues that, even were Gollihue's contract claims not barred by a failure to give required notice, those claims were properly disposed of by summary judgment because Gollihue cannot establish a prima facie case for breach of contract. Specifically, NCB states that Gollihue cannot establish either a breach of the Account Agreement by NCB or performance by Gollihue. We have already determined that genuine issues of material fact remain with respect to Gollihue's performance of his obligations under the Account Agreement. Nevertheless, NCB argues that there is no evidence of a breach of the Account Agreement by NCB because it was not required to check maker and/or indorser signatures. Even though the Account Agreement does excuse NCB from checking maker and/or indorser signatures, the Account Agreement contemplates a depositor having a claim against the bank for unauthorized transactions or payment of items based on unauthorized signatures. Otherwise, the notification requirements discussed above would be rendered meaningless. Accordingly, we reject NCB's

[1] We reject NCB's contention that Gollihue's notification of unauthorized signatures and withdrawals was insufficient to also notify NCB of Gollihue's claims against NCB.

argument that Gollihue cannot, as a matter of law, establish a prima facie case for his contract claims. For these reasons, we sustain Gollihue's second assignment of error.

{¶30} Gollihue's third and final assignment of error, states that the trial court erred by stating that tort claims of bad faith are limited to claims against insurance companies. We need not address that assignment of error, however, because Gollihue's counsel conceded at oral argument before this court that Gollihue raises exclusively contract claims in this action. Therefore, because this action involves no tort claims, discussion of such claims is unnecessary to the adjudication of Gollihue's claims, either in the trial court or on appeal. Accordingly, Gollihue's third assignment of error is moot.

{¶31} In conclusion, we sustain Gollihue's first and second assignments of error, and we conclude that Gollihue's third assignment of error is moot. For the reasons expressed in this decision, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter for further proceedings consistent with this decision and the law.

Judgment reversed;
cause remanded.

BROWN and DORRIAN, JJ., concur.