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1986 S.H. No. 58607

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

B E T W E E N:

NAIM EL-ZAYED

PLAINTIFF
(Defendant by Counterclaim)

- and -

THE BANK OF NOVA SCOTIA

DEFENDANT
(Plaintiff by Counterclaim)

HEARD: at Halifax, Nova Scotia, before the Honourable Mr. Justice H.S. Nathanson, Trial Division, on May 4-6 and July 12, 27, 1988

DECISION: November 29, 1988

COUNSEL: S.G. Zatzman, Esq. - for the plaintiff (defendant by counterclaim)

R.G. Belliveau, Q.C.
C.C. Robinson, Esq.
B. Moore, A/C
) - for the defendant (plaintiff by counterclaim)

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NATHANSON, J.:

The plaintiff alleges that the defendant bank debited $250,000 U.S. funds from a term deposit in the principal amount of $513,621.83 U.S. funds without his signature or other authority. All amounts of money mentioned in this decision are stated in U.S. funds.

The plaintiff is a resident of Cairo, Egypt, who, through the branch of the defendant bank in that city, arranged to transfer money to the main branch of the defendant bank at Halifax where it was maintained in the form of a 30 day term deposit. Upon the maturity of each 30 day term,

in accordance with the instructions of the plaintiff, the principal and accumulated interest were rolled over automatically into a new term deposit. Over a period of time the amount on deposit eventually reached the sum of $513,621.83. On October 19, 1984, the Halifax branch issued to the plaintiff term deposit certificate no. 28448-77 in that amount, maturing 30 days later. On November 20, the Halifax branch debited $250,000 from the matured deposit certificate, and then issued a new deposit certificate, no. 90248-75, in the principal amount of $267,995.95. In debiting the deposit the bank was responding to a telex from the First Interstate Bank of Reno, Nevada, as follows:

> "PLEASE REMIT 250,000.00 USD PER REQUEST OF YOUR CUSTOMER NAIM ZAYED A/C 27432-72. IDENTIFIED HERE BY PASSPORT 493196 OF THE REPUBLIQUE OF ARABE SYRIENNE. REMIT TO:
>
> MORGAN BANK, NEW YORK 23 WALL ST NEW YORK, NY A/C DESERT PALACE, INC UID 222424 A/C 016-28-180 REF: NAIM ZAYED . . . ."

The number 27432-72 was the account number of one of the rolled-over term deposit certificates.

The plaintiff asserts that he did not sign any paper effecting such a debit and he did not authorize it.

The plaintiff's term deposit was subject to a number of terms which were printed on the reverse side of the

certificates. On the latest certificate, one of those terms was the following:

> "4. PAYMENTS:
>
> All payments of withdrawals and interest will be made
>
> (a) by transfer to a designated account maintained by the depositor at the receiving Branch or to such other account as the depositor may request in writing or,
>
> (b) if no such designation or request is made, by a bank draft sent by first class mail to the depositor at the address of the depositor recorded at the receiving Branch or at such other address as the depositor may request in writing, or by a bank draft delivered to the depositor at the receiving Branch."

Earlier certificates bore a different term which read:

> "3. Withdrawals may be made only at the Branch of record with the authority of the depositor."

The plaintiff submits that the defendant bank acted contrary to his instructions and to the terms of the term deposit and, therefore, he claims against the defendant bank in breach of contract or in negligence.

The defendant bank denies all allegations seriatim and specifically denies that it acted contrary to the instructions of the plaintiff or of the term deposit and, therefore, it denies that it breached the contract or acted negligently. It says that all amounts debited from the

term deposit certificate were debited on the express or implied direction of the plaintiff or his agent and, more specifically, that the plaintiff directed the First Interstate Bank of Reno to instruct the defendant bank on his behalf to transfer $250,000 to the Morgan Bank, to the account of Desert Palace Inc.

In addition, the defendant counterclaims as follows: first, that as a result of the express or implied direction of the plaintiff or his agent, the defendant bank is entitled to set off the monies advanced as monies had and received to the plaintiff's use and benefit; and, secondly, that if the plaintiff did not expressly or impliedly request the transfer of funds, such transfer was due to a mistake in fact as the defendant bank relied upon a telex received from First Interstate Bank of Reno as a request, instruction and direction from the plaintiff and, as a result, the defendant bank is entitled to a setoff with regard to any amounts it advanced to the account of Desert Palace Inc. and which were received to the plaintiff's knowledge, use and benefit.

The plaintiff was born in Damascus in 1936 and is of Syrian nationality, but has resided for approximately 30 years in Egypt. He operates a restaurant and night club in Cairo and has business interests in Syria and Lebanon. He estimates his income from all sources at between $200,000

and $300,000 per year. He has bank accounts in Cairo, London, Cannes, Luxembourg and Lebanon.

He testified with the aid of an interpreter. His education ended at the sixth grade. He speaks, writes and understands only Arabic. He testified that he does not speak, read or understand English, although he can write his name and say a few words in that language. He was unable to read the receipts which the Halifax branch of the defendant bank sent him via the Cairo branch with respect to the monthly rollovers at his term deposit. He was able to confirm the amounts on deposit with the help of employees of the Cairo branch; he was confident of the integrity of the bank. In addition, his wife checked other details of the receipts.

He acknowledged that he liked to gamble. When asked upon cross-examination whether he was a seasoned gambler, he stated that he gambled only incidental to travel. From his evidence, I find that he travelled several times each year and gambled on various occasions in casinos at Cannes, Monaco and Atlantic City.

In November, 1984, a group of 8 or 9 people from Cairo, including the plaintiff and his wife, travelled to Zurich, New York, Atlantic City and Las Vegas. At one point in his testimony the plaintiff referred to it as a gambling trip. In Atlantic City, the group stayed at Caesar's Palace

where the plaintiff gambled. He recalls that he used cash and lost approximately $10,000. The group then moved on to Las Vegas where they planned to stay at Caesar's Palace for 3 or 4 days but, in fact, the visit lasted some 9 days. They arrived on November 15 and left on November 24. They originally intended to continue on to San Francisco, New York and other locations, but the trip ended abruptly when one of the group, the organizer of the trip and a friend of the plaintiff, died suddenly while gambling at a table in the casino of Caesar's Palace. Everyone in the group was upset; the plaintiff was so upset that he abandoned chips on his table.

Upon arrival in Las Vegas the plaintiff was met by Robert Cotron, an assistant to the Executive Vice-President of Caesar's Palace, who was assigned to act as the plaintiff's casino host. Cotron spoke four languages including Arabic; his job was to assist designated guests and interpret for them. He assisted and interpreted for the plaintiff and, in the course of carrying out his duties, attended upon the plaintiff or was available to him throughout the nine day visit.

The plaintiff gambled in the casino for hours at a time and sometimes those hours stretched far into the night and the early hours of the morning. As the result of arrangements made upon his arrival and amended on several

occasions during his stay, the casino extended credit to the plaintiff. His original credit limit was $40,000, but that amount was increased and decreased several times. On two occasions - on November 20 and 24 - it was increased as high as $290,000. The records of the casino, which I accept, reveal that during the period of the plaintiff's visit he gambled in excess of $1,000,000; the casino issued to him 92 markers having an accumulated total face value of $1,155,000. In the end, he lost money. His losses cannot be quantified exactly because he repaid some markers out of periodic winnings before borrowing again and because he used some cash. However, I estimate that his net loss approached $500,000.

The records of the casino show that the plaintiff gambled during the late afternoon of November 18 and resumed before midnight. At 6:18 p.m., when his authorized credit limit was $90,000, he owed the casino $104,000. The next entry is at 11:22 p.m. when the amount he owed reached $110,000. At 11:29 p.m., his authorized credit limit was increased to $140,000. He appears to have continued gambling throughout the night until 9:06 a.m. on November 19 when the amount he owed stood at $42,000. He resumed after midnight on November 20; at 12:24 p.m. his credit limit was revised to $290,000, and by 2:41 p.m. he owed $197,000. The first entry on November 21 is at 2:37 p.m. when the

amount he owed reached $207,000. At 3:10 p.m. his authorized credit limit was lowered to $40,000, and at 3:16 p.m. his account shows a payment of $250,000, leaving a credit balance of $43,000. By 11:28 p.m. on November 22, he owed $120,000. At 12:49 a.m. on November 23, his credit limit was raised again to $140,000.

The crucial time period was the four days from November 18 to 21 inclusive. The $250,00 credited to the plaintiff's casino account on November 21 represented money debited by the Halifax branch of the defendant bank from the plaintiff's deposit certificate at the request of the First Interstate Bank of Reno for the benefit of Desert Palace Inc. The plaintiff testified as to the events of those four days. So did Robert Cotron, and his version of the events, particularly in one material respect, is substantially different from that of the plaintiff.

The plaintiff testified that he had been asked by one of his friends in his group whether he could count on him for some money should he need it, and the plaintiff approached Cotron as to whether it might be possible to obtain money from one of his bank accounts if he needed it. He had previously mentioned to Cotron that he had money on deposit in the Bank of Nova Scotia at Halifax. Cotron told the plaintiff that he knew of a bank where the plaintiff could obtain that information. They agreed to meet the

following day to go to the bank. On the following day, Cotron and another man, who apparently knew the bank manager, drove him to a bank. Cotron introduced him to the bank manager, who did not speak Arabic. Cotron asked for, and the plaintiff passed over, a deposit receipt for the Halifax branch of the defendant's bank showing an amount on deposit in excess of $500,000, together with the account number and other particulars of the deposit, and his passport. The plaintiff did not understand what the manager was saying. Cotron translated for both. The bank manager phoned, and Cotron explained that he was calling the bank at Halifax. The plaintiff received back the passport and the deposit receipt, he and the bank manager shook hands, and he returned with Cotron and the other man to Caesar's Palace.

It was the plaintiff's understanding of what had occurred that the bank manager had confirmed that it was possible for the plaintiff to come and arrange the transfer of funds if and when he needed them. No one explained to him what had transpired, but he was sure that he had not requested a transfer of funds to the casino or to himself.

Cotron testified that, on the evening of November 18, he informed the plaintiff that his credit limit would not be increased unless additional funds were made available, whereupon the plaintiff told him that he had bank accounts in Europe. With information supplied by the plaintiff,

he telephoned a bank in France but was unable to contact a particular person requested by the plaintiff. Later, in the plaintiff's suite, the plaintiff showed him a deposit receipt from Bank of Nova Scotia at Halifax and provided him with the account number. The plaintiff stated that he wanted to transfer some of the money so that he could continue to gamble. Cotron advised that he would talk to the accounting department the next day to discuss how a transfer could be effected. He did so, was informed by an assistant accountant that a transfer was possible, and so informed the plaintiff who then requested that both men accompany him to the bank on the following day.

The next morning they met the plaintiff in the casino where he was still playing baccarat. He told them that he was now winning and did not need additional funds, but he would go with them to the bank to arrange a transfer in order to show his good faith. At the bank, Cotron told the manager that the plaintiff wanted to transfer $250,000 from the Bank of Nova Scotia at Halifax. The plaintiff showed the manager his passport and his deposit receipt. The manager telephoned the Halifax branch and inquired about a transfer. At that point the plaintiff stated that he did not want to effect a transfer at that time. After speaking on the telephone, the manager informed those present that a transfer could be arranged, and hung up. The bank

manager had previously stated that a letter of authorization from the plaintiff would be required but, when the plaintiff changed his mind, that was forgotten. The three men then left the bank and returned to Caesar's Palace.

About an hour after their return, Cotron received a message from the plaintiff and, as a result, went to speak with him in the baccarat pit. The plaintiff told him that he was now losing and therefore wanted the funds transferred. Cotron reported the matter to his supervisors who authorized the plaintiff's credit to be increased to $290,000 pending the transfer from Halifax of additional funds. Cotron did not take the plaintiff back to the bank, nor did he speak to anyone at the bank. As far as he was aware, the plaintiff had no further direct contact with the bank. He assumed that the matter was handled by Brolick, the assistant treasurer of the casino. He was not sure whether he was present when Brolick contacted the bank. He was not asked to obtain a signed authorization from the plaintiff and did not do so. Brolick told him later that the transfer had been effected. The funds were credited to the plaintiff's account on the following day, after which the casino's computer records show that the account then had a credit balance of $43,000.

Some days later Cotron reminded the plaintiff that the bank required a letter of authorization. But he had

not signed such a letter by the time he left Caesar's Palace to return home after the death of his friend. Cotron telephoned him about a month later to inquire why he had not signed a letter; the plaintiff replied that it was his problem and not Cotron's, that Cotron should not worry about it and should not get involved. In another telephone call about the same time, the plaintiff requested Cotron to arrange for his markers to be returned to him. Cotron did so and was later told that the markers had been mailed to the plaintiff, but the plaintiff subsequently stated that he never received them.

Eleanor Jane MacDonald testified on behalf of the defendant. She was the accounting officer of investments at the Halifax branch of the defendant bank from 1982 to 1986. She was aware of the terms printed on the reverse side of the plaintiff's term deposit certificates. She testified that the practice of the branch at the relevant time was that payment of a term deposit would be effected upon receipt of verbal, written or telexed instructions from the customer or another branch of the Bank of Nova Scotia or telexed instructions from another bank. Upon cross-examination, she acknowledged that the bank changed its procedures about a year or more after this incident and now requires that a request for funds from a term deposit be checked by phone or other means and that a signed

authorization be obtained before funds are released. Ms. MacDonald also acknowledged that the terms printed on the plaintiff's term deposit certificate did not include any provision for verbal or telexed instructions, and that the transfer being contested by the plaintiff was not made to a designated account.

The first step in resolving this interesting legal problem is assessing the credibility of the two principal witnesses. The descriptions by the plaintiff and Robert Cotron of their visit to the bank coincide. But their testimony is directly contradictory on the point of whether the plaintiff subsequently authorized Brolick or someone else from Caesar's Palace to instruct the bank in Las Vegas to transfer funds out of the term deposit at Halifax into the casino's account at Las Vegas. If the testimony of the plaintiff is accepted, it would appear that he did not authorize the transfer of funds from his term deposit at the Bank of Nova Scotia, and that would have positive implications for his claims in contract and in negligence. If, however, the testimony of the plaintiff was not accepted or, alternatively, if the testimony of Cotron was accepted, it would appear that the plaintiff authorized the Bank to debit his account so that, therefore, the plaintiff's claims might come down to little more than an allegation that, although the Bank was authorized, it cannot prove its

authority which was allegedly made orally by the plaintiff.

I found it impossible to assess the credibility of the plaintiff while he was testifying. Every word he spoke was spoken in Arabic. Every question put to him in English had to be translated into Arabic before the plaintiff gave an answer in Arabic which had to be translated into English for the benefit of the Court and counsel. He was confronted in cross-examination with several apparently inconsistent answers previously given at discovery, but the inconsistencies were minor in nature and could well have been the result of slips of memory. I was left at the end of the plaintiff's testimony at trial with nothing that I could point to with some certainty as a falsehood.

During the time Robert Cotron testified I sensed that he was a truthful witness. But infinitely more important than that perception was the recognition that he had no apparent reason not to tell the truth. He is not related to or connected with either the plaintiff or the defendant. Moreover, he is no longer employed with Desert Palace Inc. and, instead, is now the president of a family-owned corporation in New York State.

I accept the testimony of Cotron in preference to that of the plaintiff. I therefore find that the plaintiff did authorize the transfer of funds.

The only direct evidence on the crucial point is found in the testimony of the plaintiff who stated that he did not request a transfer of funds and that he had no further contact with the bank.

However, there is some indirect and circumstantial evidence of an authorization by the plaintiff.

Evidence was given at trial by one Brian Manzell, who is currently Vice-President of Human Resources for Caesar's Palace and who in 1984 was Assistant Vice-President and Controller. He has no personal knowledge of the plaintiff or of the events which are the basis of this lawsuit. He testified that customers of Caesar's Palace either buy chips with cash or travellers cheques or use markers to draw against a balance which was established after cash or negotiable paper was deposited with the casino or credit was verified and approved. He also testified that a line of credit cannot be raised unless the customer requests it. The inference from that testimony is that the plaintiff, being an experienced gambler, undoubtedly was aware of casino practices and, in such case, must have known that he could not continue gambling without requesting an increase in his credit limit and supporting that request with proof of increased credit worthiness such as the infusion of additional funds. In the circumstances, it is probable that the plaintiff requested

the transfer of funds.

The plaintiff testified that he did not monitor whether he was winning or losing, and did not know at any particular point of time the state of his account with the casino. That testimony is at odds with the opinion of Manzell who testified that, in his experience, gamblers have close knowledge of their approximate winnings or losses at all times. Manzell's opinion in this regard seems quite understandable and common sensical.

One might believe that the plaintiff's complaint is not so much that the debit and transfer of his funds were effected without his authority but, rather, without his written authorization. In a letter to the Cairo branch of the Bank of Nova Scotia dated July 15, 1985, an English translation of which was exhibited at trial, the plaintiff stated:

> "Regarding the reply of your lawyer dated March 31, 1985 to my lawyer, copy of which is annexed with your a/m letter, I am very astonished that your Bank has transferred a part of my deposit kept therein, without receiving my written instructions.
>
> I hereby hold your branch responsible for having carried out the transfer via one of the U.S.A. Banks, to the account of Messrs. Desert Inns - Caeser's Palance Co., as the Banks may not dispose - in any way - of any of the clients' funds, unless by virtue of written instructions, an I have not issued any written instructions in that concern; therefore, your Bank should claim for whatsoever attest that written instructions were performed by me, otherwise the transfer proceedings shall be deemed null and

> void, effected inconformable to the Banking principles, and including fraudulence which I hold your Bank responsible therefor." (emphasis added)

In this letter, the plaintiff does not deny having given oral instructions to effect the transfer; he only denies having given written instructions. He does not accept that the bank is legally entitled to act upon oral instructions from him; he believes that the bank may only act upon his written instructions.

Does the law require a bank to release funds from a term deposit only upon written authorization of the customer? Does the law preclude a bank from releasing term deposit funds upon oral instructions from a customer? The answer to both questions is: no.

Looking first at the particular law - the law of the contract - that is, the terms printed on the reverse side of the term deposit certificate, it will be seen that there is no requirement that a withdrawal of funds be authorized in writing. Therefore, a withdrawal may be effected orally or in writing.

In passing, I note that term 4 authorizes all withdrawals to be made by transfer to a designated account or to another account requested in writing by the depositor or, if no designation or request is made, by bank draft

to the depositor. That language appears to be sufficiently broad to include the present fact situation. But even if it is not, it should not be overlooked that this term of the contract exists for the benefit of the Bank of Nova Scotia, which may waive it as it sees fit. In this regard, see Halsbury's Laws of England, 4th ed., Vol. 16, p. 992, para. 1471, as follows:

> "A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist."

The predecessor of term 4 was term 3 which read as follows:

> "3. Withdrawals may be made only at the Branch of record with the authority of the depositor."

At least the first part of this term existed solely for the benefit of the Bank of Nova Scotia and, like term 4, may be waived by that bank. The second part of the term may exist for the benefit of the bank or the depositor; if the former, the bank may waive it; if the latter, it does not require that the authority for the withdrawal be in writing.

Let us turn from the particular law to the general law.

It is trite but true that the burden of proof normally rests upon the plaintiff. Here, the plaintiff had the heavy burden of proving a negative, namely, that he did not authorize the transfer of funds from Halifax to Las Vegas. My previously stated finding as to credibility means that the plaintiff has not carried that burden of proof.

There is also a burden on the defendant. Long-standing authority indicates that there is a burden on a bank to prove the authorization of the owner for the removal of money held on deposit. In this regard, see Stewart et al v. Royal Bank and Fraser, [1930] 4 D.L.R. 694 (S.C.C.)

The principle is expressed well in Crawford and Falconbridge, Banking and Bills of Exchange, 8th ed., Vol. 1, p. 770, as follows:

> "Unless shifted by contract, the onus is upon the bank to show that changes it makes to a customer's account are authorized or otherwise justified by law . . . .
>
> Even though the liability of its customer on an instrument appears to be clear, the bank is justified in debiting the account only where the customer has expressly or impliedly authorized the bank to pay." (emphasis added)

The issue is therefore whether the defendant bank has proved that the plaintiff expressly or impliedly authorized the bank to debit his term deposit and to transfer the funds to the bank in Las Vegas. I find that the defendant

bank has proved such authorization. I further find that neither the law of the particular contract nor the general law governing the duty of banks to customers requires a bank to release funds from a term deposit only upon the written authorization of the customer, nor precludes a bank from releasing such funds upon the customer's oral instructions.

In view of my findings, there does not appear to be any need to deal with the issue of whether there was any negligence on the part of the defendant bank. A finding of authorization by a customer precludes any question as to negligence. But, if it were necessary, I would have found that the defendant bank did not act negligently. The scope of the duty of care that rested upon the bank in the present circumstances is able to be defined according to the terms of the contract (i.e. the term deposit certificate) in existence between the bank and its customer. I have already held that the bank did not breach that contract. It follows that it did not act negligently in accordance with the terms of the same contract.

It might be argued that the fact that the defendant bank changed its standard operating procedures and, in particular, began to require written authorization of all withdrawals, about a year and a half after the incidents outlined at the beginning of this decision, proves or at

least strongly suggests that its original procedure was wrong and its release of the plaintiff's funds without his written authorization was an act of carelessness. Such an argument cannot be accepted. Subsequent experience does not necessarily prove negligence. As is stated in Salmond and Hueston on the Law of Torts, 18th ed., 1981, pp. 220-21:

> "On the other hand, the fact that experience subsequent to the alleged negligence proves that some additional precaution was necessary does not in itself prove negligence at the earlier date. People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident, I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before. For it is easy to be wise after the event, and nothing is so perfect that it cannot be improved."

In my opinion, the subsequent changes in the bank's procedure does not prove that it was negligent when it released funds from the plaintiff's term deposit.

A bank takes a risk when it debits a customer's term deposit without the customer's signed authorization. The danger to the bank is that the customer may deny an alleged oral authorization. If the bank cannot prove that the debit was authorized, it will be liable. Here, the bank satisfied the Court that it was authorized. In another case it might not be able to do so.

In the result, the claim of the plaintiff is not maintained. It is unnecessary to consider the defendant's counterclaim. The defendant will have its costs of the proceeding after taxation in the usual manner.

J.

Halifax, Nova Scotia
November 29, 1988