Tentative Rulings for May 2, 2023
Department 403

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)
The above rule also applies to cases listed in this "must appear" section.

21CECG02321 ***Mouktarian, et al. v. JDM Landscape, Inc.*** **(Dept. 403)**
21CECG02405 ***Lopez, et al. v. Mitchell, et al.*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(20) **Tentative Ruling**

Re: ***Patlan v. Community Regional Medical Center***
Superior Court Case No. 22CECG00739

Hearing Date: May 2, 2023 (Dept. 403)

Motion: Appoint Successor In Interest

Tentative Ruling:

To grant. The amended complaint shall be filed within 10 days of service of the order by the clerk.

If oral argument is timely requested, such argument will be entertained May 3, 2023, at 3:30 p.m. in Department 403.

Explanation:

Plaintiff, Yolanda Patlan, passed away on June 24, 2022. She is survived by her son David Patlan. Plaintiff's counsel moves for an order substituting decedent's successors in interest as plaintiffs.

"On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest." (Code Civ. Proc., § 377.31.)

Mr. Patlan signed a declaration complying with Code of Civil Procedure section 377.32. Accordingly, the court intends to grant the unopposed motion.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JS on 4/27/2023 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***DeSantis v. PNC Bank, National Association***
Superior Court Case No. 22CECG02130

Hearing Date: May 2, 2023 (Dept. 403)

Motion: Defendant's Demurrer to the Complaint

Tentative Ruling:

To overrule the demurrers to the First (Breach of Contract), Second (Financial Elder Abuse), Third (Negligence), and Fourth (Wrongful Dishonor of Checks) causes of action. To sustain the demurrer to the Fifth (Bailment) cause of action, without leave to amend. Defendant is granted 10 days' leave to file its answer to the complaint, with the time to from service of the minute order by the clerk.

If oral argument is timely requested, such argument will be entertained May 3, 2023, at 3:30 p.m. in Department 403.

Explanation:

On three separate days in July 2021, plaintiff, a customer of defendant bank's predecessor-in-interest, presented a Euro Check for deposit into his personal checking account: 1) Deposit 1 on July 13, 2021, for €7,000.00; 2) Deposit 2 on July 14, 2021, for €7,000.00; and 3) Deposit 3 on July 21, 2021, for €7,700.00. All were cashier's checks issued by Credem and drawn on Gruppo Bancario, an Italian bank. Plaintiff alleges that these deposits were never credited to his account, nor did he receive notice that they had been refused or rejected. This situation was never resolved despite plaintiff making numerous demands and inquiries about it. He alleges several causes of action, and defendant demurs to each of them.

Breach of Contract

"A statement of a cause of action for breach of contract requires a pleading of (1) the contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damage to plaintiff therefrom." (*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.App.3d 887, 913.) Defendant argues that plaintiff fails to adequately allege a breach of the Consumer Deposit Account Agreement, and specifically the ""Funds Availability Disclosure" provision. He alleges that this section provided that cashier's checks accepted for deposit would be available that same day, and if there was a delay in availability, notice would be provided, and that funds would generally be available no later than the seventh day after deposit. Defendant argues that plaintiff's deposits were accepted for collection, but additional verification was necessary, which is expressly provided for in the agreement. There was no implicit guaranty that the deposits would be deposited into plaintiff's account, since the agreement also expressly allowed the bank to refuse to accept a deposit. There was no breach of the contract, because the bank acted within its rights under the contract.

Defendant also takes exception to plaintiff's allegation that none of the exceptions to the "Funds Availability Disclosure" provision of the contract applied. (Compl., ¶ 8.) It argues that plaintiff is incorrect, since one exception is where the customer deposits one or more checks totaling more than $5,525 on any one day, and this applied since each check was worth more than this. However, the court disregards this argument, because defendant's point is supported only by a footnote stating the current exchange rates for €7,000.00 and €7,700.00. First, defendant did not request judicial notice of anything that would show this as a fact, as it should have done. (Evid. Code, § 452, subd. (h) (Court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.).) Second, the pertinent analysis for determining if the exception applied would be showing what the exchange rates were *on the dates of deposit* rather than the current rates.

The court finds that plaintiff has adequately alleged a breach of the account agreement. Defendant is correct that it was entitled to accept the deposit, *and/or* delay making funds available, subject the deposit to further review, *or* delay the availability and ultimately reject the deposit. But what plaintiff has alleged is that defendant never provided him notice that there would be a delay in availability of the funds, and he has never received notice that the deposits had been refused, rejected, or otherwise dishonored. (Compl., ¶¶ 8, 14.) No matter what option the bank chose among the things it was entitled to do with the deposits, it was obligated to give plaintiff notice, and he has alleged that it did not do so, and never has done so. The bank was obligated to *choose an option,* which under plaintiff's allegations it did not do. Further, he alleges that he tried over the course of a year to find out what happened with his deposits, but the bank stonewalled him. This adequately alleges a breach of the contract. The demurrer to the first cause of action is overruled.

Financial Elder Abuse

Plaintiff alleges financial elder abuse as defined in Welfare and Institutions Code section 15610.30, subdivision (a)(1), which is when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." Subdivision (b) of section 15610.30 provides that the defendant's actions will be deemed to have been done for a "wrongful use" if the defendant person or entity "knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." Subdivision (c) further clarifies that the defendant "takes, secretes, appropriates, obtains, or retains" the elder's property when the elder is "deprived of any property right, including by means of an agreement[.]" "Elder" is defined as any person residing in California who is age 65 or older. (Wefl. & Inst. Code, § 15610.27.)

In *Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, the court considered what would be considered "wrongful use" of the elder's property, and although it was from an appeal of a summary judgment ruling, its language can still be helpful for understanding pleading requirements, especially when the breach of a

contract is at issue, as here.[1] The court said that "to establish a 'wrongful use' of property to which an elder has a contract right, the elder must demonstrate a breach of the contract, or other improper conduct." (*Id.* At p. 657.) Then, beyond this, plaintiff must allege (and ultimately prove) that defendant "knew or should have known that this conduct is likely to be harmful to the elder[.]" (*Id.* at p. 658, quoting Welf. & Inst. Code, § 15610.30, subd. (b).) The phrase "knew or should have known," the court concluded, "imposes a requirement in addition to the mere breach of the contract term relating to the property, as the existence of such a breach ordinarily does not hinge on the state of mind or objective reasonableness of the breaching party's conduct," and ultimately it concluded that "wrongful conduct occurs only when the party who violates the contract actually knows that it is engaging in a harmful breach, or reasonably should be aware of the harmful breach." (*Ibid.*)

Defendant argues this cause of action fails to allege sufficient facts because this statutory cause of action must be alleged with particularity the facts which show defendant (1) has taken, secreted, appropriated, or retained property of an elderly adult and (2) knew or should have known that the conduct was likely to be harmful to the elder. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 ("*Covenant Care*") (recognizing "the general rule that statutory causes of action must be pleaded with particularity").) It also argues that this count fails because plaintiff is required to allege "egregious" conduct, and the alleged actions of defendant are simply not egregious.

Taking the latter point first, defendant fails to adequately support the contention that plaintiff must allege "egregious" conduct. For this point, defendant cites only to a non-authoritative federal civil court opinion, which uses the word once, with citation to the *Covenant Care*, which did use this word several times in discussing the type of conduct which would allow a plaintiff to obtain the heightened remedies provided by the Elder Abuse Act. However, the *Covenant Care* opinion predated the major overhaul to the elder financial abuse statutes made in 2008, which constituted "a material change in the statutory definition of financial abuse." (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 736.) The amendments to the statutory scheme "were substantive, rather than procedural." (*Ibid.*)

The statement above from *Paslay v. State Farm General Ins. Co., supra,* 248 Cal.App.4th at pp. 657-658, accurately reflects what must now be alleged to state a claim of financial elder abuse. Namely, in the context of a contract, a breach or some other wrongful conduct must be alleged, and plaintiff must also allege that defendant knew it was engaging in a harmful breach, or reasonably should have been aware of the harmful breach. (*Ibid.*) Plaintiff has done so here. A demurrer admits the truth of all material factual allegations in the complaint. The question of plaintiff's ability to prove

[1] The court is aware that neither side cited to case, but defendant rather unhelpfully relied on two federal district court cases concerning elder financial abuse, which are not authority for this court, nor were they particularly helpful for analysis of this demurrer, and plaintiff did not site to *any* elder abuse case. For future reference, defendant should not place so much emphasis on non-authoritative cases, especially when there is sufficient authoritative case law available on a subject.

those allegations, or the possible difficulty in making such proof does not concern the reviewing court. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 922.)

As to the other issue, on balance, the court also finds that plaintiff has stated his claim with sufficient particularity. Defendant focuses on plaintiff's allegations of "fraudulent and wrongful conduct" carried out by "bank employees…and by branch managers" which included "failure to provide Plaintiff with information, and generally stonewalling Plaintiff over the court of the last year." (Compl., ¶ 20.) It argues that plaintiff failed to allege any details about how or when the bank failed to provide plaintiff with information or stonewalled him, or what information plaintiff sought, or how the bank stonewalled him. It seems clear to the court that plaintiff sought information about what had happened with his deposits: why had his account not been credited, and if they were refused, why had the cashier's checks not been returned to plaintiff? (Compl., ¶ 21.) Plaintiff alleges he made "numerous inquiries regarding PNC's failure to credit the account," which defendant ignored (*e.g.,* "stonewalled"). (Compl., ¶ 21.) This is sufficiently particular for the pleading stage.

The demurrer to the elder abuse cause of action must be overruled.

<u>Negligence</u>

"Actionable negligence involves 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. (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594.) Defendant argues that plaintiff did not sufficiently allege that defendant had a duty of care, or that there was a breach of any duty of care, or that the bank caused plaintiff any damages. It also argues that the negligence claim is barred because his action stems from a breach of contract.

- *Duty of Care*

Defendant cites to *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089 ("*Nymark*"), for the proposition that there is no duty of care between a financial institution and its customer unless there is a special relationship that exceeds the boundaries of a standard business relationship. However, as plaintiff correctly points out, *Nymark* and its progeny pertained to loan transactions. Defendant's quote from the case easily demonstrates this: "[A]s a general rule, a financial institution owes no duty of care to a <u>borrower</u> when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a <u>*mere lender of money*</u>." (*Id.* at p. 1096, emphasis added.) *Nymark* is not controlling.

Commercial Code section 4202 provides that a collecting bank must exercise ordinary care in dealing with deposits and whether to honor or dishonor a deposit. Defendant argues that citation to this statute is unavailing since this cause of action "does not plead recovery under this statute." It is true that plaintiff did not expressly mention this statute. However, it appears plaintiff based this cause of action on this statute. The relationship of a customer and his bank is "that of <u>*principal and agent*</u> with the Commercial Code imposing upon [the bank] a duty of ordinary care." (*Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, 1468 ("*Symonds*"), emphasis

and brackets added, citing Comm. Code, § 4202 and other cases.) "Any breach of that duty is recoverable under an action for negligence pursuant to [Commercial Code] section[s] 4103 and 4212." (*Ibid,* brackets added.) Here, in alleging duty, plaintiff stated: "As a customer of PNC, the relationship between Plaintiff and PNC was that of <u>*principal and agent*</u> under which PNC owed Plaintiff a duty of ordinary care." (Compl., ¶ 25.) This comports with the statement in *Symonds*. So duty is adequately alleged.

- *Breach of Duty*

Plaintiff alleges defendant breached its duty by failing to forward the checks to the payor bank or to a presenting bank, by failing to credit his account, and by never sending plaintiff notice of dishonor by the payor bank or giving him any other basis for defendant's failure to provide a provisional or final credit. Defendant argues this fails to allege a breach because the Account Agreement states that it did not have to accept and deposit every instrument presented for deposit, and in fact that it could refuse a deposit. However, as noted above in discussing the breach of contract cause of action, this point does not mean plaintiff has not adequately alleged breach (here, of the bank's duty of ordinary care). As reflected in Commercial Code section 4202 (just as in the Account Agreement), the bank had several options in handling plaintiff's deposit, but it was obligated to give plaintiff notice of dishonor or nonpayment, which plaintiff alleges it repeatedly failed and refused to do, despite plaintiff's numerous attempts to learn what had happened. (See Comm. Code, § 4202, subd. (a)(4).) Plaintiff has adequately alleged breach of the defendant's duty of ordinary care.

- *Causation of Damages*

Plaintiff alleges that defendant's breach caused him damages because he did not have the money in his account that he would have had if defendant had credited his deposits. (Compl., ¶¶ 28-28.) This alleges "but for" causation in simple terms, which is all that is required. The court does not understand defendant's arguments, since they are contradictory and circular. It argues that if the checks "were not deposited," then plaintiff would still have them to demand payment from whoever issued the checks. But according to the allegations they <u>*were*</u> deposited (i.e., deposited for collection) and never returned. So plaintiff does <u>not</u> still have them. Then, it argues that plaintiff notes in the opposition that if the deposits had been returned, he could have followed up with the payor to get replacement checks or a different form of payment. Defendant responds to this by arguing it in no way prevented plaintiff from contacting the payor to issue replacements. But in not returning the checks to him, how could he do so? What proof could he present to the payor that he had not already received cash from the checks? Defendant's argument is not persuasive. Causation and damages are adequately stated.

- *Whether Negligence Claim is Barred by Contract Cause of Action*

Pursuant to *Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490 ("*Holcomb*"), a plaintiff can bring both a breach of contract and a negligence cause of action against a bank. There, plaintiff brought both of these causes of action, among others. (*Id.* at p. 494.) The trial court had sustained demurrer to the breach of contract cause of action, with leave to amend, which plaintiff declined to do so judgment could

be entered and the appeal could be pursued. (*Id.* at p. 495.) The appellate court found that the trial court did not err in sustaining demurrer to this cause of action with leave to amend, because plaintiff did not specify whether the contract was written, oral, or implied by conduct. (*Id.* at p. 500.) While plaintiff argued on appeal that he had sufficiently alleged a contract implied by conduct, the court disagreed; instead, the complaint alleged "an express contract from which certain terms may be implied." (*Ibid.*) Thus, this case demonstrates that the parties had an express contract, just as we have in the case at bench.

As for the negligence cause of action, the appellate court held that the trial court's sustaining of demurrer was correct because it was merely duplicative of plaintiff's negligent misrepresentation cause of action. (*Holcomb, supra,* 155 Cal.App.4th at p. 501.) However, it concluded that, from the facts pleaded, this "does not foreclose the possibility that Wells Fargo acted negligently in its handling of the cashier's check." (*Id.* at p. 502.) Moreover, it noted that the trial court had sustained the demurrers "based on its *mistaken impression that a depositor could not bring a negligence cause of action against a bank*," and it ordered that on remand plaintiff should be given an opportunity to amend. (*Ibid*, emphasis added.)

Therefore, the court in *Holcomb* found that a negligence cause of action could be stated even when plaintiff brought a breach of contract claim. One paragraph in particular appears to describe the interplay between a claim founded on an express contract between a bank and its customer, and a negligence action based on the Commercial Code statutes:

> [California Uniform Commercial Code] division 4 governs bank deposits and collections, including the care a bank is required to exercise when handling deposited checks and the damages available when a bank fails to exercise such care. But the CUCC also allows a bank and its customers to alter the terms by agreement, within certain limits. Specifically, section 4103, subdivision (a), provides: "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 which the bank's responsibility is to be measured if those standards are not manifestly unreasonable."

(*Holcomb, supra,* 155 Cal.App.4th at pp. 500-501, brackets added.)

The demurrer to the negligence cause of action must be overruled.

Wrongful Dishonor of Checks

While the statute is not referenced in the complaint, it seems clear (and even defendant assumes) that this cause of action is brought pursuant to Commercial Code section 4402. Defendant argues this cause of action is subject to demurrer because a bank is not liable for wrongful dishonor when it complies with the Account Agreement. However, the court has found that plaintiff has sufficiently alleged defendant breached

the Account Agreement, which is taken as true on demurrer. Plaintiff has also alleged that the cashier's checks were properly payable, and section 4402 provides that a check is wrongfully dishonored if the bank refused to honor a check that was properly payable. Defendant's reliance on *AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, does not change this analysis, since that was an appeal from an order granting summary judgment in favor of a bank because the court considered the evidence and found the bank had complied with the account agreement. (*Id.* at p. 1064.) Here, we are only analyzing the pleadings. So the demurrer to this cause of action must be overruled.

<u>Bailment</u>

Plaintiff alleges that when the deposits were made defendant became a bailee with the duty to preserve the Euro checks and return them to plaintiff in the event they were not negotiable. Defendant breached its duty by, among other things, losing the checks.

Bailment is giving an item to another for a specified purpose and typically, at the end of the bailment, the same item is returned to the bailor. (*H. S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 643.) "No bailment can be implied where it appears it was the intention of the parties, as derived from their relationship to each other and from the circumstances of the case, that the property was to be held by the party in possession in some capacity other than as bailee." (*Id.* at p. 644.) Here, the Account Agreement between the parties expressly defined their relationship as debtor-creditor (i.e., the bank as debtor and customer as creditor). Indeed, this is the standard relationship between a bank and its depositor in California. (*Morse v. Crocker National Bank* (1983) 142 Cal.App.3d 228, 232 ("It is axiomatic that the relationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor.").)

No bailment can be created without the assent of both parties. (*H. S. Crocker Co. v. McFaddin, supra,* 148 Cal.App.2d at p. 644.) Plaintiff argues that defendant assented to the bailment relationship by accepting the deposits for collection. However, this action was entirely in keeping with the standard debtor-creditor relationship. There was nothing in the Collection Receipts the bank gave plaintiff that establishes a bailment. Plaintiff has not alleged that the parties agreed to change their debtor-creditor relationship, nor would the facts alleged support a conclusory allegation to that effect. The weight of the law is that there can be no bailment cause of action stated under the facts as alleged. The demurrer to this cause of action must be sustained, without leave to amend.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: <u>JS</u> on <u>4/27/2023</u>.
(Judge's initials) (Date)