

NORTH CAROLINA
JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 08 CVS 02631

MATTRESS NOW, INC., f/k/a)
MATTRESS NOW and AMERICAS)
MATTRESS,)
Plaintiff)
v.)
KS BANK, INC. and MARIE VICKERS,)
Defendants)

MEMORANDUM OPPOSING
DESIGNATION AS A MANDATORY
COMPLEX BUSINESS CASE

Pursuant to N.C. Gen. Stat. § 7A-45.4(e) and BCR 3.3, Mattress Now, Inc. (Mattress Now) submits this Memorandum Opposing Designation as a Mandatory Complex Business Case filed by KS Bank, Inc. (KS Bank).

I. INTRODUCTION

Contrary to KS Bank's effort to cast the claims as presenting novel or complex issues of law, this case involves factual issues of how and why KS Bank violated established banking practices and procedures and allowed an unauthorized person (defendant Vickers) to deposit checks made payable to the corporation Mattress Now into her personal account. It involves also claims against Vickers, the person KS Bank allowed to commit this fraud over months.

KS Bank apparently wants to shift the focus off what it did, and redirect it in a factual inquiry into the scope of Vickers' agency and forecasts its effort to avoid liability for its gross deviation from established standards by tethering Vickers to her then spouse, co-owner Scott Green.

These factual inquiries certainly involve the law of agency, but nothing novel or complex. Mattress Now's complaint explains factually what Vickers' role was, and how and why it reposed trust in her to make deposits. What all of this means invokes no novel legal or complex issues, and involves no inquiry into "corporate governance" issues that require the specialized skill and knowledge of the Business Court.

II. LEGAL ANALYSIS

The North Carolina Business Court was "created to provide judicial specialization in complex business litigation." Digital Recorders, Inc. v. McFarland, et al., 2007 NCBC 23, 2007 WL 2570250, * 8 (N.C. Super. June 29, 2007). "Complex business litigation" includes matters involving a "material issue" relating to the law governing corporations, securities law, antitrust law, intellectual property law and tax law. N.C. Gen. Stat. § 7A-45.4(a)(1)-(7).¹

In its designation removing this action from the Johnston County Superior Court to the Business Court, KS Bank through its counsel certifies its good faith reliance only upon the "law governing corporations" as its basis for designating this action as a mandatory complex business case.

N.C. Gen. Stat. § 7A-45.4(a)(1) provides:

(a) A mandatory complex business case is an action that involves a material issue related to:

(1) The law governing corporations, (. . .) including issues concerning governance, involuntary dissolution of a corporation, mergers and acquisitions, breach of duty of directors, election or removal of directors, enforcement or interpretation of shareholder agreements, and derivative actions.

¹ Notable in this case is the North Carolina Legislature's omission of laws governing banking and commercial transactions, relied upon by Defendants to support their Designation, as categories of "complex business litigation."

The limited (and improper) basis for KS Bank's designation is exposed by comparing the list of what does involve the "law governing corporations" to this case. In this case, there are NO CLAIMS OR ISSUES involving the involuntary dissolution of a corporation, a merger or an acquisition, a breach of duty of directors, the election or removal of directors, the enforcement or interpretation of a shareholder agreement, or a derivative action. The best that KS Bank can offer is that the claims herein invoke this Court's jurisdiction because they involve "corporate governance".

KS Bank's designation imaginatively converts the mole hill into the mountain by inventing "corporate governance" from what are merely factual issues applied to the established law of agency and provisions of the Uniform Commercial Code. KS Bank also indirectly argues that Mattress Now's Unfair and Deceptive Trade Practice Claim is relevant, even though N.C. Gen. Stat. § 7A-45.4(a)(4) suggests otherwise.

When determining whether or not to retain this case, this Court may consider factors such as the novelty of the issues involved, the amount in issue and the degree to which the interests of justice will be advanced by adjudication of the action under the Business Court's rules and procedures. See BCR 3.2.

KS Bank focus on "corporate governance" contradicts the plain meaning of these words. To "govern" means "to direct and control the actions or conduct of." BLACK'S LAW DICTIONARY, p. 695 (6th ed. 1990). "Corporate governance" means the law that directs and controls corporations and provides the rules that direct or control the internal conduct of corporations (such as corporate powers,

corporate officers and directors, dissolution, recordkeeping) and the corporation's relationship with its shareholders.

Contrary to KS Bank's assertion, this case does not involve any issues of corporate governance. Indeed, KS Bank's position that it does is belied by a review of what KS Bank identifies as issues of "corporate governance", all of which are merely issues of *agency*. See Notice of Designation, ¶ 1 ("(a) whether a person who presented corporate checks for deposit had *actual or apparent authority* to do so; (b) whether knowledge of that person's actions may be imputed to the corporate plaintiff; (c) whether the corporate plaintiff subsequently ratified the actions at issue or acted negligently with respect to the actions at issue; and (d) whether an owner of the corporate plaintiff *authorized* distributions to be made from the corporation to him through the endorsement and deposit of checks payable to the plaintiff") (emphasis added)).² These agency issues are certainly not novel as the law on issues of actual or apparent authority, imputation, and ratification involved established precedent in North Carolina.

² See also Notice of Designation, ¶ 5, which states:

This case will turn upon legal issues of significance to the law of corporate governance North Carolina. Among these issues will be: (a) Ms. Vickers authority, actual or apparent, to act on behalf of Mattress Now, including to endorse and deposit checks payable to Mattress Now; (b) Mr. Green's authority, actual or apparent, to act on behalf of Mattress Now, including his authority to make corporate distributions from Mattress Now to himself, including through endorsement and deposit of checks payable to Mattress Now; (c) Mr. Green's knowledge of Ms. Vickers' actions and the extent to which that knowledge may be imputed to Mattress Now or otherwise may constitute knowledge of Mattress Now; (d) Mattress Now's ratification of Ms. Vickers' actions, through Mr. Green or otherwise; and (e) Mattress Now's and/or Mr. Green's negligence in entrusting Ms. Vickers with corporate checks for over a year and in failing to account for over \$180,000 in funds they contend should have been deposited in Mattress Now's account but were not.

Again, each of these issues deals simply with issues of agency and will turn on the facts of this case (i.e., they are not novel). Moreover, while the amount at issue is substantial to Mattress Now, by "complex business litigation" standards, the amount in controversy is not such that this factor weighs in favor of retention by this Court.

KS Bank's argument that the conversion claim involves "corporate governance" is equally misplaced. The issue determinative for liability concerns agency, not "corporate governance". See Notice of Designation, ¶ 3 ("... a bank is not responsible for instruments bearing authorized endorsements . . . or ratified endorsements . . . , and an employer may bear responsibility for fraudulent endorsements caused by an employee, or those acting in concert with the employee, in whom the company entrusted the instrument . . .").

KS Bank's reference to North Carolina's Uniform Commercial Code concerning "negotiation of instruments, claims against banks for conversion of instruments, and defenses to such claims" (Notice of Designation, ¶ 1) does not support KS Bank's designation. The North Carolina Legislature did not include in the list of matters within the scope of a "complex business case" the law of banking or the law of commercial transactions.

The agency issues identified by KS Bank as potential defenses do not convert this matter into a complex business litigation merely because they involve a corporation. If this were so, the designation of a matter as a complex business litigation case based upon "the law governing corporations" would, as a practical matter, be appropriate for any matter involving a corporation.

Of course, this is not what the North Carolina Legislature intended when establishing a business court dedicated to providing "judicial specialization" in complex business litigation. Superior Court judges holding court in Judicial District 11-B (Johnston County) are more than capable of understanding agency law and dealing with the claims asserted in Mattress Now's complaint. The amount of damages at issue does not in itself invoke any need to abandon the

Superior Court in favor of the Business Court. KS Bank has shown no other reason that “interests of justice” are “advanced by adjudication” in this Court in any way such interests cannot be advanced equally by North Carolina’s competent Superior Court judges who rotate in the division including Johnston County. In fact, retention of this matter would be counter to the interests of justice where this Court would be required to expend judicial resources (including an extensive jury trial) on a case involving agency issues rather than using its specialized knowledge on a case involving novel issues in truly complex areas of the law.

III. CONCLUSION

Mattress Now respectfully requests that this Court enter an Order denying designation of this case as a Mandatory Complex Business Case.

Respectfully submitted,

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Certificate Of Service
BCR Rule 15.8 Certification

I, L. Lamar Armstrong, hereby certify on 14 August 2008 that this Memorandum does not exceed seven thousand five hundred (7,500) words.

I, L. Lamar Armstrong, certify also that on 14 August 2008 I served a copy of this Memorandum Opposing Designation as a Mandatory Complex Business Case by depositing a copy of each in the United States mail, first-class postage pre-paid, upon the following addressed as follows:

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