

STATE OF NORTH CAROLINA
COUNTY OF JOHNSTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 02631

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

**MEMORANDUM OF LAW OF
DEFENDANT KS BANK, INC. IN
OPPOSITION TO PLAINTIFF'S
MOTION TO REMAND**

Defendant KS Bank, Inc. (“KS Bank”) designated this case as a mandatory complex business case because it falls within this Court’s mandatory jurisdiction over actions involving the law governing corporations. Plaintiff Mattress Now, Inc., f/k/a Mattress Now and Americas Mattress (“Mattress Now”) submitted an objection to KS Bank’s designation and requested that the case be remanded to Johnston County Superior Court. Because this case will turn upon a host of issues relating to corporate governance and because the outcome will significantly impact how banks conduct business in North Carolina, KS Bank respectfully requests that this Court retain jurisdiction over this case.

Factual Statement

As described in KS Bank’s Notice of Designation, Mattress Now asserts a conversion claim against KS Bank under Article 3 of North Carolina’s Uniform Commercial Code. Article 3 sets out a number of defenses that banks may interpose in response to such a claim, and, in this case, those defenses will necessarily put in dispute and before the Court issues of corporate governance. Far from representing an attempt on KS Bank’s part to “shift the focus off what it did,” these issues flow directly from Mattress Now’s invocation of Article 3, since

under Article 3 the payee's (here Mattress Now's) authorization or subsequent ratification of the deposits at issue, as well as a corporation payee's negligence in how checks were handled, may provide the bank of deposit with defenses to liability for conversion.

Mattress Now also claims in its Objection that KS Bank is attempting to “tether[] Vickers to her then spouse, co-owner Scott Green.” In fact, Mattress Now's own allegations make clear that the corporate checks were deposited into a KS Bank account Defendant Marie Vickers held jointly with her husband, Scott Green. Scott Green is the majority owner of Mattress Now, its president, bookkeeper and the person who runs its day-to-day operations. Thus, while Mattress Now may believe that the “complaint explains factually what Vickers' role was, and how and why it reposed trust in her to make deposits,” the company's untested allegations of fact cannot remove from this case corporate governance issues arising under Article 3 of the UCC, including how and in what manner Scott Green—through his wife or otherwise—took actions and acquired knowledge on the company's behalf. As explained below, those issues lie at the heart of why jurisdiction over this case falls well within the scope of G.S. § 7A-45(a)(1).

Argument

I. Mattress Now's Claims Turn Upon Material Issues Of Corporate Governance

In its Objection, Mattress Now begins by suggesting that KS Bank's Notice of Designation was somehow infirm because corporate governance, rather than other matters also listed in G.S. § 7A-45(a)(1), provided the basis for removal to this Court. Mattress Now offers no explanation for why corporate governance should represent a lesser basis for this Court's jurisdiction than would election or removal of directors, breach of directors' duties, mergers, corporate dissolution, shareholder agreements or derivative actions. To argue that KS Bank has not supplied a sufficient basis for mandatory jurisdiction under G.S. § 7A-45(a)(1) simply because it has not relied on items other than “governance” also listed therein would read the term

“governance” out of the statute altogether. Familiar canons of statutory construction, which require that every word in a statute be given a distinct and separate meaning and not be treated as mere surplusage, foreclose such a reading of the statute. See *Knight Publ’g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 494, 616 S.E.2d 602, 608 (2005) (“In the absence of contrary indication, it is presumed that no word of any statute is a mere redundant expression. Each word is to be construed upon the supposition that the Legislature intended thereby to add something to the meaning of the statute.”) (quotations omitted); *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706 (1984) (“[N]o part of a statute is mere surplusage, but that each provision adds something not otherwise included therein.”).

Mattress Now goes on in its Objection to cite Black Law Dictionary’s definition of “govern,” which is “to direct or control the actions of.” Far from supporting Mattress Now’s Objection, this definition underscores that material issues of corporate governance are squarely implicated by this case. Several of the defenses KS Bank anticipates raising under Article 3 of the UCC go directly to how Scott Green, as president and majority owner of Mattress Now, “direct[ed]” and “control[led] the actions or conduct of” the company. Although Mattress Now focuses on two of the five issues of corporate governance listed in KS Bank’s Notice of Designation because they employ the word “authority” or its variant, plainly this case involves much more than ordinary agency principles.

To be sure, one of the issues in this case will be Marie Vickers’s authority to act on behalf of Mattress Now. Although Mattress Now characterizes that question as one of agency, it relates to an important question of corporate governance, namely who has authority to “direct or control the actions of” the company. But this is just one of a number of issues relating to the governance of Mattress Now that will be litigated in this case. Another will be whether Scott

Green’s knowledge of his wife’s actions and his knowledge of funds going into his account rather than the corporate account may be imputed to the company. Questions of corporate knowledge, particularly when imputed from the president and owner of a closely held corporation, relate to governance. Still another issue will be whether Scott Green, as president and majority owner, made corporate distributions to himself by having his wife deposit checks payable to the corporation into his account. Unquestionably the issue of a corporate officer making distributions to himself relates to his company’s governance, and Mattress Now does not suggest otherwise in its Objection. The issue of ratification by Mattress Now of the deposits at issue—through Scott Green or otherwise—is another defense enshrined in Article 3 and therefore still another issue of corporate governance implicated in this case. Finally, Article 3 provides a potential defense to a conversion claim if the corporate payee was negligent in how the checks were handled. This issue also relates to corporate governance because it will center upon the reasonableness of Mattress Now’s handling of accounts receivable and customer payments. Thus, in suggesting that liability in this case will turn on nothing more than ordinary agency principles Mattress Now simply ignores the range of issues related to Mattress Now’s governance that in fact will be at issue and determined by the Court.¹

Other cases before this Court support the notion that the material issues cited in KS Bank’s Notice of Designation are properly considered issues of corporate governance. In *A-1 Pavement Marking, LLC v. APMI Corp.*, 2008 NCBC 13, 2008 WL 2974103 (N.C. Super. 2008),

¹ Mattress Now makes the hyperbolic suggestion that accepting this case will mean that “any matter involving a corporation” falls within this Court’s mandatory jurisdiction. Of course, not every case involving a corporation—and in all likelihood precious few cases involving corporations—require determination of whether the actions and knowledge of the president and majority owner of a closely held corporation are binding upon and may be imputed to the corporate entity and whether the company acted unreasonably in how it handled corporate accounts receivable, among other issues raised in this case.

the Court dismissed an employee's claim for unfair and deceptive practices based on an employer's alleged accounting misdeeds that reduced the anticipated bonus compensation due to the employee. In its discussion, the Court stated that the "alleged accounting misdeeds arguably relate to matters of internal corporate governance." 2008 WL 2974103, at *6 (citing *Maurer v. SlickEdit, Inc.*, 2005 NCBC 1, ¶40 (N.C. Super. Ct. May 16, 2005)).

In *Maurer v. SlickEdit, Inc.*, 2005 NCBC 1, 2005 WL 1412496 (N.C. Super. 2005), the plaintiff based her unfair and deceptive trade practices claim on her firing, the failure to pay her a bonus, the failure to take meaningful actions to sell the company, the denial of meaningful opportunity for her to participate on the board of directors, and slander. This Court found that the claims sought to impose liability for matters of the "internal operations" and "corporate affairs" which involved "internal governance rather than extramural commerce." *Id.* at *7.

The discussions in *A-1 Pavement Marking* and *Maurer* reject the unduly narrow conception of corporate governance advanced by Mattress Now in its Objection, as does the very definition of "govern" Mattress Now cites. In addition, these issues of corporate governance are no less salient here simply because Mattress Now is a closely held corporation. *See e.g.*, *Battleground Veterinary Hosp., P.C. v. McGeough*, 2007 NCBC 33, 2007 WL 3071618 (N.C. Super. Ct. 2007) ([T]hese corporate governance principles do not evaporate merely because one person has sole control of a corporation.).

In short, the ultimate disposition of Mattress Now's claims in this case will turn upon a number of material issues relating to the company's internal corporate governance. These issues all relate to how Scott Green and his wife directed and controlled the actions of the company and include: (a) Marie Vickers's authority, actual or apparent, to act on behalf of Mattress Now, including her authority to endorse and deposit checks payable to Mattress Now; (b) Scott

Green's authority, actual or apparent, to act on behalf of Mattress Now, including his authority as president and majority owner to make or accept corporate distributions from Mattress Now to himself, through the endorsement and deposit into his personal account of checks payable to Mattress Now or otherwise; (c) Scott Green's knowledge of the deposits of the checks at issue, of the failure of checks payable to Mattress Now to be deposited into its business account and of Marie Vickers's 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 the deposits at issue and of Marie Vickers's actions, through Scott Green or otherwise; and (e) Mattress Now's and/or Scott Green's negligence in handling accounts receivable and checks payable to Mattress Now, in entrusting Marie 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 business account. Because each of these material issues relates to the governance of the corporate plaintiff in this case, mandatory jurisdiction lies in this Court pursuant to G.S. § 7A-45(a)(1).

2. This Court's Determination Of Novel And Complex Issues Under Article 3 Of The UCC Will Impact How Banks Conduct Business In North Carolina And Therefore Further Warrants Retaining Jurisdiction Over This Matter

In its Notice of Designation, KS Bank highlighted the novel and complex issues under Article 3 of the UCC that will be require consideration and determination in this case. Few appellate decisions in North Carolina address the issues and defenses KS Bank anticipates raising under Article 3, including Mattress Now's authorization of the deposits at issue, Mattress Now's ratification of the deposits at issue and Scott Green's negligence in conducting Mattress Now's business affairs and in handling checks payable to the company.² To KS Bank's

² For example, the annotations to Article 3 in the North Carolina General Statutes include only three cases addressing the current or prior version of Section 402, four cases addressing the

knowledge, no North Carolina case addresses the situation presented here, in which the allegedly converted checks were deposited into the president and majority owner’s personal bank account—held at the same bank as the company’s business account—by that person’s spouse. Despite the paucity of North Carolina case law under these provisions under Article 3, the provisions impact the manner in which banks conduct their deposit operations. The Court is currently considering other complex issues under Article 3 in the case of *Leiber v. Arboretum Joint Venture, LLC, et al.*, No. 05-cvs-18751 (Mecklenburg Co. Super. Ct.).

Moreover, the novelty and complexity of the Article 3 issues in the case will be heightened because Scott Green’s knowledge and the question of whether that knowledge may be imputed to Mattress Now will figure centrally in the disposition of those defenses. One of the few cases decided under Section 403 of Article 3 expressly found that ratification “may be express or implied, and intent [to ratify] may be inferred from failure to repudiate an unauthorized act . . . or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act.” *Am. Travel Corp. v. Cent. Carolina Bank & Trust Co.*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895 (1982) (second alteration in original) (quotations omitted). This Court is uniquely positioned to assess whether and under what circumstances to infer corporate knowledge from the knowledge, actions and inaction of the president and majority owner of a closely held company.

The complexity of these issues under Article 3 undercuts Mattress Now’s claim in its Objection that “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

current or prior version of Section 403 and two cases addressing the current or prior version of Section 405. Even Section 420, which is the provision under which Mattress Now has brought its conversion claim, has but three cases decided under its current or prior version.

Carolina’s competent Superior Court judges who rotate in the division including Johnston County.” In fact, the opportunity for this Court to render written decisions in this case addressing these claims and defenses under Article 3 will fulfill the second of the two fundamental goals for the creation for the North Carolina Business Court as explained by Chief Justice Lake:

Secondly, the business court was established to generate a body of case law in our State on corporate governance issues. ... [Cases] would be assigned to the business court so that opinions could be written which would provide uniform guidance on corporate governance issues for North Carolina companies.

Chief Justice I. Beverly Lake, Jr., March 7, 2001 Memorandum Re *Guideline for Assignment of Cases to the North Carolina Business Court*.

The issue is not the competence of the Superior Court Judges who hear cases in Johnston County—of course they are competent to preside over this or any other lawsuit. Rather, as Chief Justice Lake’s memorandum makes clear, the issue is whether the specialized expertise reposed in the Special Superior Court Judges for Complex Business Cases and the Court’s ability to render written opinions will help create a body of case law that gives guidance to North Carolina businesses on issues relating to corporate governance. The Court’s determination of the corporate governance issues raised in this case will provide guidance to all North Carolina businesses, and the Court’s determination of the novel and complex issues under Article 3 will provide special guidance to banks in North Carolina. These other factors therefore weigh heavily in favor of retaining this case as a complex business matter.

Conclusion

For the reasons set forth above and in KS Bank's Notice of Designation, KS Bank respectfully requests that Mattress Now's Objection be overruled and that the Court retain jurisdiction over this matter as a complex business case.

This the 29th day of August, 2008.

/s/ Benjamin R. Norman

Randall A. Underwood

N.C. State Bar No. 9012

Charles E. Coble

N.C. State Bar No. 25342

Benjamin R. Norman

N.C. State Bar No. 32852

BROOKS, PIERCE, MCLENDON,

HUMPHREY & LEONARD

Post Office Box 1800

Raleigh, NC 27602

Telephone: (919) 839-0300

Facsimile: (919) 839-0304

Attorneys for KS Bank, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document has been served by the Court's electronic notification system as well as in the manner specified below on the date set forth below:

Via Mail and Email

The Honorable Ben F. Tennille
Chief Special Superior Court Judge for Complex Business Cases
North Carolina Business Court
c/o Julie Holmes, Judicial Assistant to the North Carolina Business
Court
jholmes@businesscourt.net
clerk@ncbusinesscourt.net

Via Mail

L. Lamar Armstrong, Jr.
ARMSTRONG & ARMSTRONG, P.A.
602 S. Third St., P.O. Box 27
Smithfield, NC 27577

Marie Vickers
Post Office Box 715
Pine Level, NC 27578

This the 29th day of August, 2008.

/s/ Benjamin R. Norman
Benjamin R. Norman