

STATE OF NORTH CAROLINA  
LINCOLN COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
13 CVS 383

JOSEPH LEE GAY, Individually and on  
Behalf of All Persons Similarly Situated,

Plaintiff,

v.

PEOPLES BANK,

Defendant.

**ORDER**

**THIS MATTER** is before the Court on Peoples Bank’s (“Defendant”) Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure (the “Motion”).<sup>1</sup> Having considered the pleadings and exhibits attached thereto, the Court **DENIES** the Motion.

I.

PROCEDURAL BACKGROUND

1. On March 25, 2013, Joseph Lee Gay (“Plaintiff”) filed a Class Action Complaint in Lincoln County Superior Court seeking various forms of relief arising from Defendant’s alleged unfair, deceptive and unconscionable assessment and collection of overdraft fees on customer accounts.

2. On April 22, 2013, Defendant filed Notice of Designation to the North Carolina Business Court. On April 23, 2013, the case was designated a complex business case by the Chief Justice of the North Carolina Supreme Court and assigned to this court.

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<sup>1</sup> Although Defendant requests that this Court enter judgment in its favor pursuant to Rules 12(c) and 12(b)(6) because “[t]he pleadings in this action are closed and they establish that no material issue of fact exists and [it] is clearly entitled to judgment,” the Court considers this Motion solely pursuant to Rule 12(c), as Rule 12(b)(6) does not entitle parties in litigation to judgment. “[A] motion is treated according to its substance and not its label.” *In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159 (1992) (citations omitted).

3. Defendant filed its Verified Answer on May 30, 2013, and on June 6, 2013, Defendant filed the Motion now before the Court.

4. Plaintiff filed its Opposition to the Motion on June 27, 2013, and on July 8, 2013, Defendant filed its Reply Brief.

5. The court heard the Motion on October 1, 2013.

## II.

### FACTUAL BACKGROUND

6. On a motion for judgment on the pleadings, the Court does not make findings of fact, but may summarize the facts in the pleadings with all reasonable inferences to the non-moving party. *Erickson v. Starling*, 235 N.C. 643, 657, 71 S.E.2d 384, 394 (1952); *Tong v. Dunn*, 2012 NCBC 29 ¶ 12 (May 18, 2012), [http://www.ncbusinesscourt.net/opinions/2012\\_NCBC\\_29.pdf](http://www.ncbusinesscourt.net/opinions/2012_NCBC_29.pdf) (dismissing one plaintiff's claim through application of *res judicata*), *rev'd on other grounds*, 2013 N.C. App. LEXIS 1303 (N.C. Ct. App., Dec. 17, 2013).

7. Defendant is a North Carolina retail banking establishment that provides banking services to thousands of customers in North Carolina. (Compl. ¶ 2).

8. To receive banking services, Plaintiff entered into a written agreement with Defendant composed of several documents (the "Account Agreement") to cover account deposits, checking, ATM and debit card transactions (Compl. ¶¶ 42, 84).<sup>2</sup>

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<sup>2</sup> On a motion for judgment on the pleadings, "[o]nly the pleadings and exhibits which are attached and incorporated into the pleadings may be considered by the trial court." *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996) (citation omitted). Defendant attached and incorporated the Account Agreement into its Answer. (Ans., Exs. 1–8). Therefore, the Court considers the Account Agreement in its determination of the Motion.

9. An addendum to the terms and conditions of the Account Agreement between the parties reads:

**Payment Order of Items** – The law permits us to pay items (such as checks or drafts) drawn on your account in any order. To assist you in handling your account with us, we are providing you with the following information regarding how we process the items that you write. When processing items drawn on your account, our policy is to pay them according to the dollar amount. We pay the largest items first. The order in which items are paid is important if there is not enough money in your account to pay all of the items that are presented. Our payment policy will cause your largest, and perhaps more important, items to be paid first..., but may increase the overdraft or NSF fees you have to pay if funds are not available to pay all of the items. If an item is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item (NSF).

(Ans., Ex. 3). Another addendum provides that

[w]hen processing items drawn on your account we pay ATM and Debit Card transactions first in chronological order; checks that you have written are paid in check number order; and all other transactions are paid from the lowest amount to the highest amount. If any item is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item (NSF).

(Ans., Ex. 4).

10. In addition to the foregoing language, the Marketing Brochure included in the Account Agreement contained the following language: “[i]n the normal course of business, we generally pay electronic transactions first and then checks, high to low, per the bank’s policy.”

(Ans., Ex. 7 p. 4).

11. The Terms and Conditions of the Account Agreement and Electronic Funds Transfer Agreement (the “EFT Agreement”) contained therein further provide that “[y]ou should treat all banking card transactions as immediate withdrawals from your account and reflect them as such in your personal records,” that the use of debit cards “will constitute a simultaneous

withdrawal . . . from your checking account,” and that “[y]ou authorize us to deduct these charges directly from the account balance as accrued.” (Ans., Exs. 2, 5).

12. Plaintiff alleges, however, that the Account Agreement was “ineffective, ambiguous, deceptive, unfair, and misleading” in that it: (a) “failed to disclose [Defendant’s] policy to always reorder debits from highest dollar value to lowest”; (b) failed to disclose that Defendant “would always process debits to an account before processing credits”; and (c) failed to disclose that Defendant “would delay posting certain transactions, or would process them ahead of, or behind, transactions from different days, in order to post multiple debits on a single day or create multiple overdrafts,” all for the purpose of maximizing overdrafts and overdraft fee revenues. (Compl. ¶¶ 43, 67).

13. According to Plaintiff, even if Defendant’s policy regarding the ordering of payments contained clear and unambiguous language, such notice or authorization would have been inadequate and ineffective, and Defendant’s reservation of discretion to reorder transactions and assess overdraft fees was subject to an obligation to deal fairly and in good faith with its customers. (Compl. ¶ 47).

14. By way of example, Plaintiff alleges that on September 14, 2009, Defendant reordered transactions in Plaintiff’s account and thereby assessed eleven insufficient funds charges of \$33.00 each to the account, for a total of \$363.00. Plaintiff takes the position that he was charged more overdraft fees than he would have been charged had Defendant processed the transactions in the order of occurrence. (Compl. ¶ 9).

15. By (i) reordering transactions in Plaintiff’s account to maximize overdraft charges; (ii) failing to provide Plaintiff with accurate balance information; (iii) failing to notify Plaintiff of overdrafts or to block transactions that would result in an overdraft; (iv) manipulating

data in Plaintiff's account; and (v) employing unfair and egregious overdraft policies, Plaintiff argues that Defendant has (a) breached its contract with Plaintiff and breached the covenant of good faith and fair dealing; (b) converted Plaintiff's funds, (c) been unjustly enriched; and (d) engaged in unfair and deceptive trade practices. (Compl. ¶¶ 48–119).

16. Plaintiff's claims focus particularly on Defendant's practices with respect to debit card and ATM transactions, and not paper checks. (Pl.'s Resp. Mot. 1).

### III.

#### LEGAL STANDARD

17. The burden is on Defendant to establish that there is no material issue of fact left to be resolved and that it is entitled to judgment as a matter of law. *American Bank & Trust Co. v. Elzey*, 26 N.C. App. 29, 32, 214 S.E.2d 800, 802 (1975) (citations omitted). And, the Court liberally construes Plaintiff's pleading. *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 162 (1976) (citations omitted).

### IV.

#### ANALYSIS

##### A.

#### BREACH OF CONTRACT AND BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

18. Plaintiff alleges that Defendant's reordering of debit card transactions from largest dollar value to smallest in order to maximize overdraft charges constituted a breach of the contract. (Compl. ¶ 85). According to Plaintiff, Defendant had no authority to reorder debit card transactions. In support of his position, Plaintiff cites to language in the EFT Agreements that instructs cardholders to treat all card transactions as immediate withdrawals and further provides

that use of debit cards “will constitute a simultaneous withdrawal . . . from your checking account.” (Pl.’s Resp. Mot. 11–12). Plaintiff also emphasizes language in the Terms and Conditions that authorizes Defendant to deduct debit transactions as accrued, and argues that the Payment Order of Items 2008 Terms and Conditions Addendum that discusses Defendant’s policy of paying *items* from largest to smallest does not address electronic debit card transactions. (Pl.’s Resp. Mot. 11–12) (emphasis added). According to Plaintiff, the Account Agreement is ambiguous, at best, and should be construed against Defendant. (Pl.’s Resp. Mot. 12).

19. Defendant counters, arguing that it was authorized to pay items in that order by the express terms of the Account Agreement and that the term “items” should be given its plain and broad meaning to include debit card transactions. (Def.’s Br. Supp. Mot. 11); (Def.’s Reply Supp. Mot. 3–4). In support of its position, Defendant cites to provisions in the EFT Agreement, Terms and Conditions Addenda, and the Marketing Brochure that include the term “items” when referencing debit card transactions. (Def.’s Reply Supp. Mot. 4–5).

20. When a contract is ambiguous and the intention of the parties is unclear, contract interpretation is a question for a jury. *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citation omitted). “An ambiguity exists in a contract when either the meaning of the words or the effect of provisions is uncertain or capable of several reasonable interpretations.” *Id.* (citation omitted).

21. The Court agrees that the Account Agreement is ambiguous as to Defendant’s authority to pay debit card transactions from largest to smallest. Specifically, the Terms and Conditions Addendum designated as Exhibit 4 to Defendant’s Answer states that “[w]hen processing items drawn on your account, we pay ATM and Debit Card transactions first in

chronological order; checks that you have written are paid in check number order; and all other transactions are paid from the lowest amount to the highest amount.” (Ans., Ex. 4). The EFT Agreement also authorizes Defendant to deduct debit card transactions “directly from [Plaintiff’s] account balance as accrued.” (Ans., Ex. 2). Although the Terms and Conditions Addendum designated as Exhibit 3 to Defendant’s Answer does state Defendant’s policy of paying largest items first, when read in conjunction with the EFT Agreement and the Terms and Conditions Addendum designated as Exhibit 4, Defendant’s authority to pay the largest debit card transactions first, instead of in chronological order, is unclear. As such, the Court concludes that at this stage of the case judgment is not proper on Plaintiff’s breach of contract claim.

22. As a companion to his breach of contract claim, Plaintiff also includes allegations that Defendant breached the covenant of good faith and fair dealing. In addition to its express terms, “[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.” *Governor's Club Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 251, 567 S.E.2d 781, 789 (2002) (citation omitted) (internal quotation marks omitted). Here, the duty of good faith would require the Defendant to “exercise discretion reasonably and in a manner consistent with the parties’ expectations.” *Westpoint Stevens, Inc. v. Panda-Rosemary Corp.*, 1999 NCBC 11 ¶ 34 (N.C. Super. Ct. Dec. 16, 1999), <http://www.ncbusinesscourt.net/opinions/1999%20ncbc%2011.htm> (granting the plaintiff’s motion for partial summary judgment) (citation omitted).

23. On this point, Plaintiff does not argue that the language of the Payment Order of Items provision in the Terms and Conditions Addendum is ambiguous, rather that Defendant has the *discretion, not an obligation*, to pay debit transactions before other transactions and to return

items for insufficient funds. (Pl.’s Resp. Mot. 13). In Plaintiff’s view, this discretion obligated Defendant to exercise its discretion utilizing principles of good faith and fair dealing. (Pl.’s Resp. Mot. 13–14).

24. Although Defendant contends that it had no discretion in paying debit card transactions before other transactions, Defendant does not address Plaintiff’s contention that it had discretion as to whether it returned items for insufficient funds. (*See* Def.’s Reply Supp. Mot. 6). According to the “Payment Order of Items” provisions in both of Defendant’s Terms and Conditions Addenda, “[i]f any item is presented without sufficient funds in your account to pay it, *we may, at our discretion*, pay the item (creating an overdraft) or return the item (NSF).” (Ans., Exs. 3–4). By the explicit terms of the Account Agreement, Defendant reserved its discretion to create overdrafts or return transactions where there were insufficient funds in Plaintiff’s account.

25. Without determining whether Defendant had discretion to pay debit card transactions before other transactions, the Court concludes that Defendant did have discretion in determining whether to create overdrafts or return transactions due to insufficient funds. Accordingly, any time Defendant exercised that discretion, it was obligated to do so in good faith.

26. Ordinarily, what is in good faith is a question of fact to be developed through discovery, and should not be resolved on a motion for judgment on the pleadings. Because Defendant’s authority to pay debit card transactions from largest to smallest and Defendant’s good faith in exercising its discretion in creating overdrafts or returning transactions for insufficient funds present questions of fact, the Court **DENIES** the Motion as to Plaintiff’s breach of contract and breach of covenant of good faith and fair dealing claim.

B.

CONVERSION

27. Conversion is defined as “an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.” *Wall v. Colvard, Inc.*, 268 N.C. 43, 49, 149 S.E.2d 559, 564 (1966) (citation omitted) (internal quotation marks omitted). “[T]he general rule is that there is no conversion until some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property.” *Gallimore v. Sink*, 27 N.C. App. 65, 67, 218 S.E.2d 181, 183 (1975) (citation omitted) (emphasis in original). “[T]wo essential elements are necessary in a complaint for conversion -- there must be ownership in the plaintiff and a wrongful conversion by [the] defendant.” *Id.* (citation omitted).

28. Defendant argues that Plaintiff's conversion claim is without merit because overdraft fees were explicitly authorized in the Account Agreement. (Def.'s Br. Supp. Mot. 13). Plaintiff does not challenge Defendant's general right to charge overdraft fees, rather Plaintiff alleges and contends that Defendant's actual practice of charging overdraft fees was wrongful and, therefore, unauthorized. (Compl. ¶¶ 94–101).

29. Because questions of fact remain as to whether Defendant's payment of debit card transactions from largest to smallest was authorized by the Account Agreement and whether Defendant exercised in good faith its discretion to create overdrafts or return transactions for insufficient funds, determining whether it was wrongful for Defendant to charge overdraft fees to Plaintiff's account in this situation is likewise a function of fact-finding.

30. The Court is of the opinion, therefore, that Defendant's Motion as to Plaintiff's conversion claim should be **DENIED** at this point.

C.

UNJUST ENRICHMENT

31. “In order to properly set out a claim for unjust enrichment, a plaintiff must allege that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received . . . .” *Norman v. Nash Johnson & Sons’ Farms, Inc.*, 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000) (citation omitted).

32. As a matter of equity, Defendant “should not be permitted to enrich [itself] unjustly at the expense of another.” *Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 473, 473 S.E.2d 382, 385 (1996) (citation omitted) (internal quotation marks omitted). A claim under this theory is not rooted in tort or contract law but “is described as a claim in quasi contract or a contract implied in law.” *Id.* (citation omitted) (internal quotation marks omitted). But, where an actual contract exists between the parties and it governs the dispute at issue, the law will not imply a contract. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (citation omitted). Put differently, the theory of unjust enrichment “does not operate to alter the terms of an enforceable contract.” *Rongotes v. Pridemore*, 88 N.C. App. 363, 368, 363 S.E.2d 221, 224 (1988).

33. While Plaintiff relies on the express terms of a written agreement as the basis of his breach of contract and breach of covenant of good faith and fair dealing claim and the equitable principle of quasi contract as the basis of his unjust enrichment claim using essentially the same facts, he is not foreclosed from pleading alternate claims in a single action. N.C.G.S. § 1A-1, Rule 18(a) (2014) (“A party asserting a claim for relief as an original claim . . . may join,

either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.”).

34. Although the law will not permit Plaintiff to simultaneously prevail on both theories – legal and equitable – it is premature at this stage of the proceedings to limit Plaintiff’s opportunity to explore which of the claims may be best supported by the facts or is most appropriate to proceed upon, especially in light of the ambiguity regarding Defendant’s authority to pay debit card transactions from largest to smallest. Accordingly, the Court **DENIES** the Motion as to Plaintiff’s unjust enrichment claim.

D.

UNFAIR AND DECEPTIVE TRADE PRACTICES

35. To prevail on a claim for unfair and deceptive trade practices (“UDTP”) under section 75-1.1 of the North Carolina General Statutes (the “Act”), Plaintiff must demonstrate the existence of three factors: “(1) an unfair or deceptive act or practice . . . , (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business.” *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 9, 472 S.E.2d 358, 362 (1996) (citations omitted) (internal quotation marks omitted). Under the Act, the term “unfair” means “a practice which offends established public policy, and which can be characterized by one or more of the following terms: ‘immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.’” *Id.* (citation omitted). “[I]t is a question for the jury as to whether [a party] committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice.” *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988) (citation omitted).

36. Acts of conversion may constitute unfair and deceptive trade practices. A determination of whether Defendant committed conversion, however, requires specific findings of fact. *See Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1977). Because Plaintiff's claim for conversion survives, the Court **DENIES** the Motion as to Plaintiff's UDTP claim.

V.

#### CONCLUSION

37. For the foregoing reasons, the Court **DENIES** the Motion.

**SO ORDERED**, this the 15th day of April, 2014.

/s/ Calvin E. Murphy  
Calvin E. Murphy  
Special Superior Court Judge