

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA
Justice

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CANNADY SECURITY SERVICES, INC.,

Plaintiff, Index No.: 8437/04

- against -

BANCO POPULAR NORTH AMERICA,
f/k/a/ BANCO POPULAR DE PUERTO RICO,

Defendant.

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The following papers numbered 1 to 504 on this motion:

<u>Papers</u>	<u>Numbered</u>
Defendant's Notice of Motion	1-324
Defendant's Memorandum of Law in Support	325-352
Plaintiff's Affirmation in Opposition	353-450
Defendant's Reply Affirmation	451-470
Defendant's Reply Memorandum of Law in Further Support	471-504

Defendant, by notice of motion, seeks an order of the court pursuant to CPLR § 3212 granting summary judgment in favor of defendant and against plaintiff dismissing all claims in its complaint based upon, inter alia, plaintiff's failure to comply with the notice provisions in its account agreement with defendant. Plaintiff responds in opposition to defendant's motion and defendant replies.

Plaintiff commenced this action for money damages by filing a summons and complaint on or about April 5, 2004, arising out of claims for strict liability, negligence and breach of fiduciary duty resulting from an account agreement between the parties and a series of forged checks. In its complaint, plaintiff argues that strict liability should be imposed on defendant who charged plaintiff's account for the checks not properly payable and/or bearing a forgery of the president of Cannady Security. Plaintiff also contends that defendant's inspection procedures were

superficial and therefore negligent by failing to inspect plaintiff's statement and canceled checks with reasonable care and promptness. Further, plaintiff asserts that defendant abrogated its responsibilities to plaintiff by failing to exercise good faith and ordinary care by not making a proper inquiry on the forged checks when they were presented. Issue was joined thereafter by defendant by the service of a verified answer.

This action arises out of the forgery of plaintiff Cannady Security Service's checks by one of its employees, who allegedly forged the signature of Henry Cannady, president of Cannady Security, on 109 checks drawn upon plaintiff's checking account with defendant Banco Popular North America over an eight month period of December 2000 through August 2001. It is undisputed that the person who allegedly forged Mr. Cannady's signature was his own secretary, Metha Hadley; the payment of each forged check was reflected on monthly account statements plaintiff received from defendant; plaintiff did not report any allegedly forged checks to defendant until June or July 2001; and plaintiff agreed in its account agreement that if it failed to report an alleged forged item drawn against its account within sixty days after the account statements were presented, it would be barred from asserting a claim against defendant to recover on any allegedly forged checks.

The New York Supreme Court, Appellate Division, Second Department, has held that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form." Santanastasio v. Doe, 301 A.D.2d 511 (2d Dept. 2003). Where a question of fact exists as a result of conflicting evidence, summary judgment must be denied. Messena v. Manhattan & Bronx Surface Transit Operating Auth., 249 A.D.2d 280 (2d Dept. 1998); see also Skiadas v. Barsalis, 292 A.D.2d 593 (2d Dept. 2002). In the case at hand, defendant argues that because plaintiff received the first statement on which allegedly unauthorized items were drawn on plaintiff's account in February 2000, but did not report any items until June 2000, plaintiff failed to comply with a condition precedent to its assertion of claims against defendant. Therefore defendant argues plaintiff's claims must be dismissed. Plaintiff contends, however, that it reported irregularities on the statements fewer than sixty days after the receipt of the January statement. Plaintiff asserts, as set forth in the deposition testimony and accompanying affidavit of Mr. Cannady, that the irregularity resulting from the forged checks were brought to the attention of defendant's branch manager, Mr. Titus, in March 2000, within thirty days and certainly within

sixty days of receipt of the statement. In this regard, an issue of fact is raised as to the timeliness of notification to defendant that the funds were improperly debited.

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that defendant's motion for summary judgment is denied.

Dated: July 10, 2006
Jamaica, NY

JOSEPH P. DORSA, J.S.C.