IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Antigua and Barbuda

Claim No: ANUHCV 2016 /0576

BETWEEN:

Wael Naddour
trading as Gold Star-Store

Claimant

and

Antigua Commercial Bank

Defendant

APPEARANCES:

Mr. George Lake for the clamant

Mr. Septimus A. Rhudd of counsel for the defendant /applicant

----

2019: November 11

2020: January 30

ORAL DECISION

1. **ACTIE J**: The claimant, a merchant trading as Gold Star-Store, is in the business of selling clothes, furniture and appliances. In 2015, the defendant bank approved an electronic date capture (EDC) for acceptance of Visa and Master Card transactions. The bank's representatives went to the claimant's place of business to provide training to the claimant and staff on the use of the machine.

2. On 12 April 2016, the bank was alerted of an unusual large transaction which was inconsistent with the claimant's authorization trend. The activity sheet also indicated that the transaction was conducted without the credit card. The bank contacted the claimant on 13th April 2016 informing him of the unusual transaction which he confirmed was legitimate. The bank cautioned

and advised the claimant of the implications of accepting payments without the card.

3. On 19th April 2016, the bank alerted the claimant of a second sales transaction processed with the same customer at a higher sum without the card being present. The claimant again informed the bank that the transaction was legitimate and, in that instance, had taken further precautions by obtaining a copy of the customer's identification card and the credit card. It is to be noted that a copy of the credit card did not form part of the evidence before the court.

4. The two transactions were discovered to be fraudulent and the holder of the credit card was arrested. The claimant was advised that his account would be charged back for the total sum of $13,040.87.

5. The claimant files a claim seeking the return of the total sum together with costs and interest. The claimant alleges that the defendant bank breached the contract in not providing the manual card imprinter of the credit card which would have enabled him to discover the fraud.

6. The defendant in response states that the claimant having been placed on notice of the first suspicious transaction was negligent when he proceeded to conduct a second transaction for a larger sum with the very same individual. The defendant bank insists that the activity report indicated that both transactions were done without the credit card in clear breach of the agreement and instructions given to the claimant.

Analysis

7. The contract entered by the parties on 15th October 2015 governed the terms of their agreement. The contract provides that the bank shall furnish the merchant with sales vouchers refund vouchers, Imprinters, POS devises and any other forms necessary for the operations of the card plan. The contract provides that the merchant shall imprint the card or sales voucher using the manual imprinter or point of sales electronic devise supplied or approved by the bank

8. It is also a term of the contract that the merchant agreed to pay the bank the amount of any sales voucher and the bank had a right to debit the merchant's account when circumstances surrounding the transaction constitutes a breach of any of the terms of the agreement.

9. The only issue to be determined is whether the bank in the circumstances should refund the claimant the sum debited from his account. In determining the issue, the court must take into consideration the terms of the agreement and the conduct of the parties.

10. he court accepts that the defendant bank failed to provide the manual card imprinter in breach of the agreement. The manual imprinter, as the term suggests, allows for a physical imprint of the card to be made at the point of purchase. However, it appears that neither the manual imprinter nor the electronic POS machine could have detected the fraud at the time of purchase. It was for the bank to alert the merchant of any fraudulent transaction once the payment had gone through at the point of purchase.

11. The manual imprinter in the court's view would have provided a back-up in case of a failure of the electronic POS machine. The claimant's sole witness and sole store employee of many years, Norica Dwyer, states that her attempts to swipe the card electronically failed and she had to enter the card digits manually for both transactions. Norica states that she attended to the customer on the first purchase and Mr. Nader attended to the customer on the second purchase. Norica states that she processed the credit card payments manually on both occasions. Curiously, Norica was unable to state the nature of the items purchased on the second transaction or the manner in which the items were removed from the store.

12. The evidence confirms the defendant's bank assertion that the credit card payments were done manually. However, the bank, other than a letter sent to the claimant, did not provide any evidence to buttress its assertion that the transactions were done without the credit card.

13. Having heard the evidence, the court is of the view that the first transaction can be said to have been an innocent transaction as there is not any evidence before the court that the claimant was aware of the fraud at the time of the first purchase. The court also takes into consideration that the card imprinter was not available to verify whether the card was presented at the time of the purchase. However, I agree with the defendant that the claimant was negligent with the second transaction for a much larger sum within two days of being placed on notice of the first suspicious transaction. The claimant as a businessman of many years should have been more astute and could have at least called the bank to verify the authenticity of the card considering the previous circumstances with the very same customer. It is also noted that the claimant himself who had been personally notified by the bank conducted the second sale with the very same individual.

14. The court is of the view that the claimant contributed to his loss on the second transaction. Taking all into consideration and for the reasons given above, the court will direct that the bank refunds the claimant the sum deducted for the first transaction with interest at the statutory bank interest rate, if any at the date of the withdrawal to the date of filing the claim and at the rate of 5% from the date of filing the claim until payment in full. The sum claimed for the second transaction is denied.

ORDER

15. In summary, the defendant shall pay the claimant the sum of $4200.00 together with the statutory bank interest rate, if any, at the time of the debit transaction until the date of filing the claim and at the rate of 5% from the date of filing the claim until payment in full

16. The defendant shall pay prescribed costs pursuant to CPR 65.5.

Agnes Actie

High Court Judge

By the court

Registrar