

IN THE CIRCUIT COURT OF THE  
SEVENTEENTH JUDICIAL CIRCUIT IN  
AND FOR BROWARD COUNTY,  
FLORIDA

CASE NO. 17-006059 (09)

NSH ENTERPRISES, LLC, a Florida  
Limited Liability Company,

Plaintiff,

v.

NEWPORT WHOLESALERS, INC., a  
Florida profit corporation; PNC BANK, a  
National Association; and WELLS FARGO  
BANK, a National Association,

Defendants.

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**MOTION TO DISMISS COUNT IV OF COMPLAINT**

**(As Against Wells Fargo Bank, N.A.)**

Defendant Wells Fargo Bank, N.A. ("Wells Fargo") moves to dismiss Count IV of Plaintiff NSH Enterprises, LLC's ("NSH") Complaint in this action, and states:

**I. BACKGROUND**

The alleged facts underlying this case are simple. Plaintiff sold Newport Wholesalers, Inc. ("Newport") goods valued at \$65,700.00. (Cplt., ¶ 9) Plaintiff provided Newport with an invoice, but did not provide payment instructions. (Cplt., ¶ 12; Ex. B) Newport then received an email purporting to be from NSH with payment/wiring instructions. According to Plaintiff, the email was not from NSH, but rather from an unknown individual, and the wiring instructions included an account number that did not belong to Plaintiff. (Cplt., ¶ 14)

After receiving the email, Newport issued a “Wire Request/Confirmation” in the amount of \$65,700.00 to its bank, PNC, which identified NSH as the beneficiary, but included the incorrect account number contained in the email noted above. (Cplt., ¶ 17, Ex. D) Wells Fargo allegedly received the payment order from PNC, and applied the funds to the account number included in the Wire Request. (Cplt., ¶ 23) Thus, the only conduct attributable to Wells Fargo in the Complaint is the allegation that it followed the instructions in the payment order it received, by applying the funds to the account number identified therein.

Based on these facts, Plaintiff purports to assert a single cause of action against Wells Fargo (Count IV)<sup>1</sup> under Fla. St. § 670.207, which is entitled “Misdescription of Beneficiary.” In support of this claim, Plaintiff avers that the payment order received by Wells Fargo identified the beneficiary as NSH, but the account number referenced in the order did not belong to NSH. (Cplt., ¶¶ 44-45). Plaintiff then concludes -- without any underlying supporting facts whatsoever -- that Wells Fargo “knew that the identifying name and account number did not match.” (Cplt., ¶ 46). As explained below, Count IV against Wells Fargo should be dismissed.

## **II. LEGAL STANDARD**

### **A. Standard for Motion to Dismiss**

When deciding a motion to dismiss, the trial court is confined to the four corners of the complaint. Fla. R. Civ. P. 1.140(b)(6); *Fresh Capital Fin. Servs., Inc. v. Bridgeport Capital Servs., Inc.*, 891 So. 2d 1142 (Fla. 4th DCA 2005). The facts alleged must be

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<sup>1</sup> The remaining causes of action are only asserted against other co-Defendants. Only Count IV is asserted against Wells Fargo. Thus, the remaining causes of action are not addressed herein.

accepted as true, and all reasonable inferences must be drawn in favor of the pleader. *Id.* at 1445. Florida is also a fact-pleading jurisdiction. Rule 1.110(b)(2), Florida Rule of Civil Procedure, requires NSH to make "a short and plain statement of the *ultimate facts* showing that the pleader is entitled to relief." *Clark v. Boeing Co.*, 395 So. 2d 1126, 1229 (Fla. 3d DCA 1981) (emphasis supplied). Thus, pleadings must contain ultimate facts supporting each element of the cause of action—simple conclusions are insufficient. *Id.*; *Continental Baking Co. v. Vincent*, 634 So. 2d 242 (Fla. 5th DCA 1994) ("Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort."). A party does not properly plead a cause of action by alleging conclusions of law that merely track the language of the statute and lack factual allegations. *See Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 501 (Fla. 3d DCA 1994).

**B. Plaintiff's Claim for Violation of § 670.207 Fails.**

Section 670.207(2)<sup>2</sup>, Florida Statutes, provides in relevant part:

- (2) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:
  - (a) Except as otherwise provided in subsection (3), if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.
  - (b) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the

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<sup>2</sup> Section 670.207 is Florida's codification of 4A-207 of the UCC.

beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

Fla. St. § 670.207(2)(a)(Emphasis added).

The comments to § 670.207 further clarify the application of subsection 2(a)—including the lack of any duty on the part of the beneficiary's bank to determine if there is a conflict between the name of the beneficiary and the account number provided:

[Subsection (2)(a)] . . . deals with the problem of payment orders in which the description of the beneficiary does not allow identification of the beneficiary because the beneficiary is described by name and by an identifying number or an account number and the name and number refer to different persons. A very large percentage of payment orders issued to the beneficiary's bank by another bank are processed by automated means using machines capable of reading orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the order by the beneficiary's bank and the crediting of the beneficiary's account are done by use of the identifying or bank account number without human reading of the payment order itself. The process is comparable to that used in automated payment of checks. The standard format, however, may also allow the inclusion of the name of the beneficiary and other information which can be useful to the beneficiary's bank and the beneficiary but which plays no part in the process of payment. If the beneficiary's bank has both the account number and name of the beneficiary supplied by the originator of the funds transfer, it is possible for the beneficiary's bank to determine whether the name and number refer to the same person, but if a duty to make that determination is imposed on the beneficiary's bank the benefits of automated payment are lost. Manual handling of payment orders is both expensive and subject to human error. If payment orders can be handled on an automated basis there are substantial economies of operation and the possibility of clerical error is reduced. [Subsection (2)] allows banks to utilize automated processing by allowing banks to act on the basis of the number without regard to the name if the bank does not know that the name and number refer to different persons . . . Although the clear trend is for beneficiary's banks to process payment orders by automated means, [§ 670.207] is not limited to cases in which processing is done by automated means. A bank that processes by semi-automated means or even manually may rely on number as stated in [§ 670.207] . . . If Beneficiary's Bank did not know about the conflict between the name and number, [subsection (2)(a)] applies. Beneficiary's Bank has no duty to determine whether there is a conflict and it may rely on the number as the proper identification of the beneficiary of the order. When it accepts the order, it is entitled to payment from Originator's Bank.

In short, § 670.207 allows the beneficiary's bank like Wells Fargo to rely only upon the identifying number provided in a payment order, without regard to the name of the beneficiary, unless the beneficiary's bank knows that the name and number identify different persons.<sup>3</sup> By statutory definition, a person "knows" or has "knowledge" of a fact when the person has actual knowledge of it. Fla. Stat. § 671.201(25)(c).<sup>4</sup> Thus, in order to assert liability against Wells Fargo under § 670.702, the bank must have possessed actual knowledge that the identifying number and name did not match at the time it received the payment order.

While Plaintiff concludes in Count IV that Wells Fargo "knew that the identifying name and account number did not match," it offers no underlying facts whatsoever in support of this conclusion. Plaintiff fails to explain how the transaction was processed, how and why Wells Fargo is alleged to have possessed actual knowledge that the name and account number did not match, or even the name of the person that ultimately received the funds. This missing information is significant because, as seen above, the text and comments to § 670.207 make it clear that there is no duty on the part of the beneficiary's bank to determine if there is a conflict between the account number and identifying name. Rather, the beneficiary's bank is entitled as a matter of law to rely solely on the number provided.

A claim fails where, as here, a plaintiff's allegations track the language of the statute but lack underlying factual allegations. *See Ginsberg*, 645 So. 2d at 501. Count IV should be dismissed because Plaintiff does not (and cannot) sufficiently allege that

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<sup>3</sup> In fact, § 670.702 evidences a clear preference that the beneficiary bank rely only upon the identifying number as opposed to the name.

<sup>4</sup> This section is specifically referenced in the comments to § 670.702.

Wells Fargo had actual knowledge, when it processed the wire, that a conflict existed between the account number and identifying name.<sup>5</sup>

### **III. AT A MINIMUM, THE COURT SHOULD REQUIRE PLAINTIFF TO PROVIDE A MORE DEFINITE STATEMENT**

In the event Count IV is somehow not dismissed, Plaintiff should, at a minimum, be required to plead more specific facts in support of its bare averment that Wells Fargo “knew” that the identifying name and account number did not match. (Cplt. ¶ 46). Rule 1.140(e), Florida Rules of Civil Procedure, allows a party to move for a more definite statement in response to a vague or ambiguous pleading prior to filing an answer or reply thereto. The function of a motion for more definite statement is to require that a vague, indefinite or ambiguous pleading to be amended so as to enable the responding party to intelligently discern issues to be litigated and to properly frame an answer or reply. *See Conklin v. Boyd*, 189 So. 2d 401, 403-04 (Fla. 1st DCA 1966). If the Court does not dismiss Count IV outright, Plaintiff should be required to plead facts sufficient to explain exactly how and when Wells Fargo allegedly required knowledge that a conflict existed between the account number and identifying name.

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<sup>5</sup> The allegation in paragraph 46 of the Complaint, that Wells Fargo “knew” that the name and account number did not match, is a sham designed to circumvent the statutory protection afforded Wells Fargo by Fla. St. § 670.207(2)(a). If Count IV is not dismissed, Wells Fargo reserves the right to move to strike this allegation as a sham pursuant to Fla.R.Civ.P. 1.150 and Fla. St. 57.105, which will entail the need for a full evidentiary hearing on the merits.

**RELIEF REQUESTED**

WHEREFORE, Defendant, Wells Fargo Bank, N.A., respectfully requests an order dismissing the Plaintiff's Complaint or, in the alternative, requiring the Plaintiffs to provide a more definite statement as described above, and any such other and further relief the Court deems appropriate.

**GRAYROBINSON, P.A.**

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*/s/ Alissa M. Ellison*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the forgoing was filed with the Clerk via the Florida e-portal, and served via U.S. Mail and/or email on the following this 10<sup>th</sup> day of May, 2017:

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*/s/ Alissa M. Ellison*

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**GRAYROBINSON, P.A.**