2017 IL App (1st) 153416-U
No. 1-15-3416 & 1-16-0974 (cons.)

THIRD DIVISION
June 21, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 14 L 1705
v.	)	
DONALD E. DOWN, THOMAS ALESSI, ROBERT ROGERS, ROBIN ROGERS VARGO, and FIRST AMERICAN BANK,	)	The Honorable Margaret Brennan, Judge Presiding.
Defendants	)	
(First American Bank, Defendant-Appellee).	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment was affirmed where the plaintiff was not prejudiced by the trial court's failure to instruct the jury on the good faith element of the defendant's defense under section 3-404 of the Uniform Commercial Code (810 ILCS 5/3-404 (West 1994)) and where the plaintiff invited and then waived any error in the trial court instructing the jury on the definition of sole proprietorship.

¶ 2 The plaintiff, National Union Fire Insurance Company of Pittsburgh, PA, appeals from a jury verdict in favor of defendant First American Bank ("First American") on the plaintiff's claim that First American failed to exercise ordinary care when it opened bank accounts in the name of fictitious businesses and accepted for deposit checks payable to those fictitious businesses. On appeal, the plaintiff argues that the trial court erred in failing to instruct the jury on the good faith element of First American's defense and in providing the jury with a definition of sole proprietorship. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 In April 2010, the plaintiff, as subrogee of American Airlines ("American") filed its Second Amended Complaint against First American and the other defendants. As is relevant here, the plaintiff alleged that defendant Donald E. Down ("Down") submitted invoices to American from two fictitious companies, Addison Business Supplies ("ABS") and A&D Supplies ("A&D"). These invoices requested payment for goods and services that were never actually provided to American. Gary Aumann ("Aumann"), an employee of American at the time, approved these invoices for payment, after which American issued checks to ABS and A&D in payment ("fraudulent checks"). Down then opened two bank accounts with First American, one in the name of ABS and one in the name of A&D. Down deposited the checks from American into these accounts and then distributed the proceeds to himself and/or Aumann.

¶ 5 With respect to its cause of action against First American, the plaintiff alleged that First American failed to exercise ordinary care when it failed to verify the existence and legitimacy of ABS and A&D prior to opening the accounts in their names and when it accepted the fraudulent checks for deposit into the accounts. According to the plaintiff, First American's failure to exercise ordinary care in these respects substantially contributed to American's loss, thereby

making First American liable to the plaintiff under section 3-404 of the Uniform Commercial Code ("section 3-404") (810 ILCS 5/3-404 (West 1994)).

¶ 6 Prior to the first trial in this case, the plaintiff voluntarily non-suited defendants Down, Thomas Alessi, Robert Rogers, and Robin Rogers Vargo. The case then proceeded to trial against First American, during which the trial court granted a directed verdict in favor of First American. The plaintiff appealed and we reversed and remanded for a new trial on the basis of evidentiary errors made by the trial court. *National Union Fire Insurance Co. of Pittsburgh, PA v. First American Bank*, 2013 IL App (1st) 120611-U.

¶ 7 On retrial, it was undisputed by the parties that Down and Aumann participated in the scheme to defraud American as alleged in the Second Amended Complaint. What was disputed, however, were the procedures followed by First American in opening the ABS and A&D accounts and accepting deposits into those accounts and whether First American exercised ordinary care in following those procedures.

¶ 8 To that end, Down testified that when he went to First American to open the ABS account, he was asked for a corporate resolution and an assumed name certificate. Because he did not have one at the time, Down applied for an assumed name certificate. Down provided to First American a copy of the application for the assumed name certificate and was then permitted to open the account. Although he received the actual assumed name certificate a couple of months after opening the account, First American never followed up with him to obtain a copy. As for the A&D account, Down testified that when he went to open the account, no one from First American asked him any questions about the business or asked for any documentation related to the business. When filling out the applications for the two accounts, Down provided his home address and a post office box. With respect to the ABS account, he provided First

American with his personal telephone number. He also used his home address in applying for the assumed name certificate for ABS.

¶ 9 Edward Potter, who testified as an expert on behalf of the plaintiff, testified that at the time that Down opened the bank accounts with First American, it was customary and reasonable in the banking industry to handle sole proprietorship account openings in the following manner: request an assumed name certificate for the business, review the account opening form completed by the business owner, and call and/or visit the business to verify its existence. Based on Potter's review of First American's files in this case, he did not see any indication that First American attempted to verify the existence of ABS or A&D before opening the accounts. This failure, in Potter's opinion, was not reasonable. On cross-examination, Potter testified that assumed name certificates do not prevent individuals from engaging in fraudulent business and that he was not saying that if First American had obtained assumed name certificates from Down prior to opening the accounts, American would not have suffered any losses.

¶ 10 Sara Santinelli, a former employee of First American, testified that the ABS and A&D accounts were sole proprietorship accounts. Although she was not personally present for the opening of these accounts and did not speak to the employees who opened the accounts, upon review of the account documents, Santinelli testified that the employees who opened the accounts followed First American's procedures for opening sole proprietorship accounts. Under those procedures, employees were to identify the individual opening the account by obtaining the business address and name and the individual's name, address, phone number, social security number, and identification. First American would also run a credit check on the individual opening the account and conduct a search of the individual on ChexSystems, a service that reported negative banking information. In this respect, First American verified that Down was

who he said he was, *i.e.*, Down. First American's procedure did not require verification of the business's existence. The only time that First American would do a drive-by of a business was when the applicant indicated that the business was located somewhere other than in the applicant's home. Where the business was located in the applicant's home, First American would simply make a telephone call. Nothing in the files for the ABS and A&D accounts indicates that anyone from First American drove by the business addresses, telephoned the businesses, sent them letters, or required assumed name certificates.

¶ 11 Santinelli also testified that at the time the ABS and A&D accounts were opened, First American was aware of the risk of banks being used to embezzle money and of new account fraud. She defined new account fraud as involving situations where someone assumes the identity of another to establish a bank account.

¶ 12 Thomas Fitzgibbon, who testified as an expert on behalf of First American, testified that during the time period when the ABS and A&D accounts were opened, banks would, in opening accounts for sole proprietorships, request the personal information of the individual applying for the account on behalf of the sole proprietorship. This would include the individual's name, social security number, address, telephone number, and photo identification. Banks would also obtain the name and address of the business. After that, banks would then run a credit check on the individual to verify the name, address, and social security number of the individual, and they would conduct an inquiry on the individual on ChexSystems. In Fitzgibbon's opinion, an assumed name certificate would not be helpful to a bank in opening a sole proprietorship account, because anyone could apply for an assumed name certificate without any third-party validation. It was not usual and customary at the time for banks to request an assumed name certificate or to take any additional steps to verify the existence of a sole proprietorship.

¶ 13 Fitzgibbon testified that the Uniform Commercial Code required banks, when opening new accounts, to follow a standard of good faith and fair dealing and to exercise ordinary care. In other words, banks were required to follow the commercial standards in the area in a fair manner. Fitzgibbon opined that First American's account opening procedures at the time the ABS and A&D accounts were opened met the standard of good faith and fair dealing and ordinary care. He also opined that First American followed these procedures when it opened the ABS and A&D accounts and that First American acted fairly in opening the accounts.

¶ 14 Finally, Fitzgibbon testified that new account fraud was a known risk throughout the country at the time that the ABS and A&D accounts were opened.

¶ 15 According to the record, the testimony of multiple witnesses was presented to the jury by way of videotaped evidence depositions. The record, however, does not contain transcripts of these witnesses' testimony or copies of the videos played to the jury.[1]

¶ 16 The jury found in favor of First American. In response to special interrogatories, the jury stated that it did not find that "First American's conduct was a contributing cause to American Airlines' losses" and that it did not find that "First American's conduct was a substantial factor in bringing about American Airlines' losses."

¶ 17 Following an unsuccessful motion for a new trial, the plaintiff filed this timely appeal.

¶ 18 ANALYSIS

¶ 19 On appeal, the plaintiff argues that the trial court erred in failing to instruct the jury on the good faith component of First American's defense and in providing the jury with a definition of sole proprietorship. We conclude that neither of these contentions has merit.

[1] For future reference, the plaintiff would be well advised to include in the record on appeal all trial evidence when it seeks review of an issue related to the trial.

¶ 20 Our review of the propriety of the trial court's instructions to the jury is governed by the following principles:

> "In Illinois, the parties are entitled to have the jury instructed on the issues presented, the principles of law to be applied, and the necessary facts to be proved to support its verdict. The decision to give or deny an instruction is within the trial court's discretion. The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law."

Dillon v. Evanston Hospital, 199 Ill. 2d 483, 505 (2002). Even where an incorrect jury instruction is given, reversal is not warranted unless the error resulted in serious prejudice to a party's right to a fair trial. *Doe v. University of Chicago Medical Center*, 2014 IL App (1st) 121593, ¶ 87.

¶ 21 Good Faith

¶ 22 The plaintiff first argues that the trial court erred in refusing to instruct the jury on the good faith element of First American's defense under section 3-404 that it accepted the indorsed fraudulent checks in good faith. According to the plaintiff, the burden of proving that it accepted the checks in good faith belonged to First American and if First American failed to carry that burden, it would have been strictly liable to the plaintiff. Therefore, by refusing to instruct the jury on the good faith element of the defense, the trial court (1) deprived the plaintiff of the opportunity to argue that the jury should award the plaintiff judgment if it found that First American consciously disregarded a known risk of fraud (*i.e.*, did not act in good faith), and (2) ignored the terms of section 3-404, which required First American to prove good faith or else face liability.

¶ 23 Section 3-404 provides in relevant part:

"(a) If an imposter, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the imposter, or to a person acting in concert with the imposter, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who *in good faith*, pays the instrument or takes it for value or for collection.

(b) If (i) a person whose intent determines to whom an instrument is payable *** does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder.

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who *in good faith*, pays the instrument or takes it for value or for collection.

***

(d) With respect to an instrument to which subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from

> the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss."

(Emphasis added). 810 ILCS 5/3-404.

¶ 24 In reliance on section 3-404, the plaintiff submitted several proposed jury instructions referencing the good faith requirement of section 3-404's defense. More specifically, the plaintiff tendered three instructions that included the following language:

> "First American alleges that American Airlines substantially contributed to its loss by failing to exercise ordinary care in the operations of its business. [The plaintiff] denies that First America[n] has established that American Airlines failed to exercise ordinary care or that the alleged failure to exercise ordinary care substantially contributed to the loss. [The plaintiff] also denies that First American can assert this defense because First American lacked good faith."
>
> "[The plaintiff] has the burden of proving all of the following propositions by a preponderance of the evidence:
>
> 1. That either that [*sic*] American Airlines did not intend that the Addison Business Supplies and A&D Supplies have an interest in the fraudulent checks, or that Addison Business Supplies and A&D Supplies were fictitious entities[;]
>
> 2. That American Airlines suffered a loss;
>
> 3. That First American failed to exercise ordinary care in opening the accounts for Addison Business Supplies and A&D Supplies;
>
> 4. That First American's failure to exercise ordinary care substantially contributed to the loss suffered by American Airlines[;]

5. American Airlines assigned its claims to [the plaintiff].

If you find from your consideration of all the evidence that [the plaintiff] has failed to prove any of these propositions, then your verdict shall be for First American.

If you find from your consideration of all the evidence that [the plaintiff] has proven all of the propositions required to be proved by [the plaintiff], you must then allocate a portion of the loss to each party if you find that First American acted in good faith. Any loss you allocate to American Airlines shall be allocated to [the plaintiff]."

"When I use the term 'good faith', I mean honesty in fact and the observance of reasonable commercial standards of fair dealing."

The trial court declined to give any instructions referencing good faith, concluding that all of the evidence presented indicated that the accounts belonged to the businesses and that the checks were issued to and deposited by the businesses.

¶ 25 The doctrine of waiver applies here. Despite basing its claims of prejudice on the proposition that First American would be automatically liable absent proof of its good faith, the plaintiff did not offer any proposed instructions to that effect. Rather, as will be discussed, the instructions proposed by the plaintiff stated that the jury was to consider First American's good faith defense only after it found that the plaintiff had established all the elements of its cause of action against First American. Moreover, during the jury instruction conferences, the plaintiff did not argue that the jury should be instructed on good faith because absent good faith, First American would be subject to strict liability. Instead, the plaintiff argued simply argued that good faith was an element of First American's affirmative defense on which First American had the burden of proof. Accordingly, the plaintiff has waived any contention that instructions on

good faith were necessary because absent proof of good faith, First American would be strictly liable. *Deal v. Byford*, 127 Ill. 2d 192, 202-03 (1989) (a party claiming error in the giving of a certain jury instruction must both specify the defect claimed and tender a correct version of the instruction).

¶ 26 Even putting waiver aside, we conclude that any error by the trial court in refusing to instruct the jury on the good faith element of First American's defense did not cause serious prejudice to the plaintiff. The plaintiff bases its claims of prejudice on the proposition that absent First American proving good faith in accepting the fraudulent checks, it would have been strictly liable for American's losses. There are multiple problems with this premise. First, the plaintiff does not cite any authority that imposes strict liability on a bank under such circumstances, absent a showing of good faith. Although, section 3-404 includes a good faith element to its defense, nowhere in its language does section 3-404 state that absent that showing, strict liability is imposed.

¶ 27 Similarly, none of the cases cited by the plaintiff stand for the proposition that strict liability applies in this context. See *Continental Casualty Co. v. Fifth/Third Bank*, 418 F. Supp. 2d 964, 972 (N.D. Ohio 2006) (in a suit for conversion against the defendant bank, the court held that the bank bore the burden of demonstrating good faith, but made no mention of strict liability absent that showing); *Hartford Fire Insurance Co. v. Maryland National Bank, N.A.*, 341 Md. 408, 428 (1996) (holding only that a drawer may bring a claim for conversion against a bank that accepts unendorsed checks or checks in violation of restrictive indorsements); *Pvex, Inc. v. York Federal Savings and Loan Association*, 716 A.2d 640, 646 (Pa. Super. Ct. 1998) (although holding that the defendant failed to carry its burden of demonstrating good faith in order to invoke the defense, the court did not state that the defendant was strictly liable as a result);

McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 762 (in a suit for conversion, holding that the bank's failure to demonstrate good faith resulted in a bar on its defense, but not holding that it resulted in strict liability); *Kraftsman Container Corp. v. United Counties Trust Co.*, 169 N.J. Super. 488, 497 (denying the bank's motion for summary judgment on the issue of good faith, but not holding the bank strictly liable as a result). As these cases demonstrate and legal logic dictates, a defendant's failure to make out an affirmative defense does not result in liability being automatically imposed on the defendant; rather, the plaintiff is still under an obligation to make out its initial case, even before the issue of whether the defendant has successfully proved its affirmative defense is addressed. The record indicates that the plaintiff was aware of this, as one of its proposed instructions directed the jury to first consider whether the plaintiff made out all the elements of its case against First American *before* considering whether to allocate American's losses between the plaintiff and First American; *only if* the plaintiff proved all of the elements of its case against the defendant could the jury allocate the losses pursuant to section 3-404.

¶ 28 Given that the plaintiff has offered no legal basis for its claim that First American would have been strictly liable for American's losses if First American failed to prove it accepted the fraudulent checks in good faith, the plaintiff cannot be said to have been prejudiced by its deprivation of the opportunity to argue that First American was strictly liable absent good faith. Similarly, the plaintiff cannot have been prejudiced by the trial court's alleged ignorance of section 3-404's requirement that First American prove good faith or else face liability, when section 3-404 does not impose strict liability in the absence of good faith.

¶ 29 Finally, we cannot say that even if the trial court had given the precise instructions requested by the plaintiff, that it would have had any effect on the outcome. Again, as discussed

above, the instructions requested by the plaintiff directed the jury to first consider whether the plaintiff had proved its cause of action against First American. Only if the jury found that the plaintiff had proved all of its required elements could it consider whether First American acted in good faith and, thus, allocate the loss between the parties.

¶ 30 According to the plaintiff's proposed instructions, one of the elements that the plaintiff had to prove was that "First American's failure to exercise ordinary care substantially contributed to the loss suffered by American Airlines." The jury's response to special interrogatories specifically stated that it did not find First American's conduct to be a contributing cause to or a substantial factor in bringing about American's losses. These responses make clear that the jury found that the plaintiff failed to make out an element of its claim, namely, causation. Accordingly, even under the directives of the plaintiff's own proposed instructions, the jury would never have reached the issue of whether First American acted in good faith. Therefore, even if the trial court did err in failing to give the requested instructions on good faith, the plaintiff cannot have been prejudiced by that error.

¶ 31 Sole Proprietorship

¶ 32 The plaintiff also argues that the trial court erred in instructing the jury on the definition of a sole proprietorship. The trial court gave the following instruction:

> "American Airlines is a corporation and can act only through its officers and employees. Any act or omission of an officer or employee within the scope of his or her employment is the action or omission of the corporation.
>
> A sole proprietorship has no legal identity separate from that of the individual who owns it. The sole proprietor may do business under one or more fictitious names if he or

> she chooses. However, doing business under another name does not create an entity distinct from the person operating the business."

According to the plaintiff, there was no evidence produced at trial that ABS and A&D were sole proprietorships; in fact, the plaintiff contends that it was "undisputed" at trial that ABS and A&D were not sole proprietorships. Moreover, the plaintiff argues that Down had not obtained assumed name certificates for ABS and A&D at the time the accounts were opened, in violation of the Assumed Business Name Act, which provided in relevant part:

> "No person or persons shall conduct or transact business in this State under an assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the County Clerk of the County in which such person or persons conduct or transact or intend to conduct or transact such business, a certificate setting forth the name under which the business is, or is to be, conducted or transacted, and the true or real full names of the person or persons owning, conducting or transacting the same, with the post office address or addresses of such person or persons and every address where such business is, or is to be, conducted or transacted in the county."

805 ILCS 405/1 (West 1994).

¶ 33 As with the plaintiff's previous contention, we find this argument to be without merit for several reasons. First, the sole proprietorship instruction to which the plaintiff objects was included in the proposed instructions submitted by the plaintiff. In addition, the record does not indicate that the plaintiff at any point offered a corrected version of the instruction. A party claiming error in the giving of a certain jury instruction must both specify the defect claimed and

tender a correct version of the instruction. *Deal*, 127 Ill. 2d at 202-03. In addition, under the invited-error doctrine, a party is not permitted to complain of an error that it induced the trial court to make or to which the party consented. *Colella v. JMS Trucking Co. of Illinois, Inc.*, 403 Ill. App. 3d 82, 95 (2010). By submitting the allegedly erroneous instruction in its proposed jury instructions and failing to offer a corrected version, the plaintiff invited any error by the trial court and then waived any right to complain about it.

¶ 34 We also note that the plaintiff invited any error in the giving of the sole proprietorship instruction by injecting into the trial the sole proprietorship status of ABS and A&D. Throughout trial, plaintiff's counsel made clear through his questioning of the witnesses that the plaintiff did not contest the notion that Down had represented to First American that ABS and A&D were sole proprietorships.[2] In fact, the plaintiff's entire case was directed toward establishing the reasonable care that should be taken in opening sole proprietorship accounts and the various ways in which First American failed to exercise such reasonable care. The following excerpts from the plaintiff's questioning of Potter and Santinelli are but a few examples that make this apparent:

> "Q. When Don Down walks into the door, he opens the door to the bank, he shows up and he's sitting down and he says 'I'm the sole proprietor of A&D Supplies,' walk us through the '94 time frame your opinion of what the bank should have done?"

> "Q. In your experience working in banking in the 1994 time frame, was it customary for banks to open an account in the name of a sole proprietor without first obtaining an assumed name certificate?

[2] At the risk of pointing out the obvious, because ABS and A&D did not actually exist—they were fictitious companies, after all—the relevant issue is the type of business Down represented them to be.

***

THE WITNESS: In my experience, it was not.

BY MR. SCHMOOKLER:

Q. In your experience, was it customary for a bank in the 1994 time frame when opening an account for a sole proprietor, even when it received an assumed name certificate, to not at least make a phone call thereafter or a visit?

A. It was not.

Q. In your experience in the 1994 time frame, were there any types of red flags a bank should be aware of when opening an account for a sole proprietor?

A. Yes."

"Q. In this case, Donald Down purported to be the sole proprietor of two entities, correct?

A. Donald Down said he was the owner of two businesses.

Q. The first time Mr. Down sat in the chair and said he was the sole proprietor of two businesses, First American Bank didn't do anything to make sure that Mr. Down was who he said [he] was, namely, the sole proprietor of those businesses?

A. Mr. Down said he was Donald Down. He is who he said he was.

Q. Is he the sole proprietor of two businesses?

A. I know that he's not because of these proceedings, but I don't think anyone knew that at the time.

Q. And they didn't know it because they didn't look, right?

A. What would they have looked at?"

The plaintiff cannot spend the entire trial seeking to impose liability on First American for failing to exercise reasonable care in opening sole proprietorship accounts for ABS and A&D, offer an instruction defining sole proprietorships, neglect to offer a corrected instruction, and then claim that the trial court erred in instructing the jury on the definition of a sole proprietorship using the exact definition submitted by the plaintiff. We find such actions to be the very definition of invited error.

¶ 35 We find equally disingenuous the plaintiff's argument that the sole proprietorship instruction should not have been given because First American did not prove that ABS and A&D were actually sole proprietorships. The entire basis of the plaintiff's claim against First American was that it opened accounts in the name of fictitious businesses (*i.e.*, businesses that did not exist) and then accepted for deposit into those accounts checks written to those fictitious, non-existent businesses, all without making any effort to verify the existence or non-existence of those businesses. Despite the plaintiff's case being based entirely on the non-existence of ABS and A&D, the plaintiff faults First American for not proving that the businesses were sole proprietorships. We cannot help but question how one would go about proving that non-existent businesses were, in fact, sole proprietorships. After all, if Down had actually opened the businesses and complied with all requirements for establishing a sole proprietorship, the bottom would fall out of the plaintiff's case, as the accounts would then have been opened in the name of legitimate businesses.

¶ 36 In sum, we conclude that any error in failing to instruct the jury on the good faith element of First American's defense did not seriously prejudice the plaintiff and, thus, was not reversible. In addition, we conclude that any error in instructing the jury on the definition of sole proprietorship was invited and then waived by the plaintiff.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 39 Affirmed.