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BANKS AND BANKING: FLORIDA ADOPTS A DUTY OF SECRECY

Milohnich v. First National Bank, 224 So. 2d 759 (3d D.C.A. Fla. 1969)

Defendant bank divulged information concerning plaintiff's account to a third party. Acting on this knowledge, the third party sued plaintiff. Plaintiff later sued the defendant bank alleging damages arising from defending and settling the third party's suit. The circuit court dismissed the complaint, ruling that plaintiff had failed to state a cause of action. The plaintiff appealed, claiming that defendant had violated an implied contractual duty to keep the plaintiff's account secret. The Third District Court of Appeal HELD, the complaint stated a cause of action for breach of an implied contractual duty by the defendant bank's intentional disclosure of information about plaintiff's account to a third party.[1] Judgment reversed and remanded, Judge Pearson concurring specially.

This case considers the legality of a bank's disclosure of information concerning a customer's account. Clearly, a bank can divulge such information when the depositor expressly or impliedly authorizes, as when the customer seeks credit.[2] The bank must disclose facts when properly ordered by a grand jury,[3] a court,[4] or the Internal Revenue Service.[5] In all other situations, however, banks are under no *duty* to give the public any information concerning their depositors' accounts.[6] The instant case holds that the bank has no *right* to disclose details of a customer's account to third parties unless the depositor or the law so authorizes.

In spite of the large number of bank depositors, cases on this point are rare. In 1850 an English case first held that a bank may divulge information about a customer's account to a third party.[7] Twelve years later a different court reached a contrary result.[8] Less than a decade later a third court took the middle ground and ruled that a bank can divulge information concerning an account only upon a "reasonable and proper occasion."[9] In

1. 224 So. 2d 759 (3d D.C.A. Fla. 1969).

2. Hindman v. First Nat'l Bank, 98 F. 562, 567 (6th Cir. 1899); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 588, 367 P.2d 284, 290 (1961); Ritchie v. Arnold, 79 Ill. App. 406, 408 (1898).

3. Baker v. State, 183 Ind. 1, 4-5, 108 N.E. 7, 8-9 (1915).

4. Brex v. Smith, 104 N.J. Eq. 386, 390, 146 A. 34, 36 (Ch. 1929).

5. De Masters v. Arend, 313 F.2d 79, 86 (9th Cir. 1963), *appeal dismissed*, 375 U.S. 936 (1963); United States v. Peoples Deposit Bank & Trust Co., 112 F. Supp. 720, 723-24 (E.D. Ky. 1953).

6. Cunningham v. Merchants' Nat'l Bank, 4 F.2d 25, 30 (1st Cir. 1925); Sparks v. Union Trust Co., 256 N.C. 478, 481, 124 S.E.2d 365, 367 (1962); Peoples' Nat'l Bank v. Southern States Fin. Co., 192 N.C. 69, 77, 133 S.E. 415, 419 (1926).

7. Tassell v. Cooper, 9 C.B. 509, 533-35, 137 Eng. Rep. 990, 1000 (C.P. 1850).

8. Foster v. The Bank of London, 3 F. & F. 214, 217, 176 Eng. Rep. 96, 97-98 (N.P. 1862). This case ruled against disclosure despite the fact that the third party was the depositor's creditor, a situation in which disclosure is usually permitted. *See* text accompanying note 2 *supra*.

9. Hardy v. Veasey, [1868] L.R. 3 Ex. 107, 111-13.

1908 a Canadian court upheld this reasonable man standard, but, in dicta, leaned toward nondisclosure and indicated that if third parties could inspect the customer's account, public confidence in banks would be shaken.[10] The Canadian law was finally settled in *Tournier v. National Provincial & Union Bank.*[11] Plaintiff Tournier endorsed a check, payable to him, to a gambler. Learning this upon return of the check, defendant bank told plaintiff's employer who subsequently dismissed Tournier. The court, ruling for the plaintiff, held that the bank breached an implied contractual duty of secrecy.

The five American cases on point are more consistent than the English cases, primarily because four were decided after *Tournier.* All of the American decisions hold that a bank may not divulge customer information to third parties, basing their holding on implied contract, property, agency, or tort principles.

Three of the American cases rest on implied contract. North Carolina,[12] Idaho,[13] and now Florida[14] follow *Tournier* and hold privacy so necessary and inescapable in banking that the contract between the bank and customer calls for a duty of secrecy. The majority in the instant case based their ruling entirely upon implied contract and did not deal with principles of property, agency, or tort. Previously Florida had recognized that the bank-depositor relationship arises only out of express or implied contract.[15] In interpreting such a relationship, the courts will imply only those terms to which a reasonable man would have expressly agreed had he considered all possibilities.[16] The present case held that a prudent man and bank would have expressly contracted for privacy had they considered the issue.[17]

A second line of cases, although now weak precedent, holds that a bank has a legal duty of secrecy arising out of customers' property rights. In *Brex v. Smith,*[18] a county prosecutor in New Jersey suspected corruption in the police force and sought to inspect each policeman's bank records. The court, in denying the prosecutor's request, held that the information contained in the books was the property of the depositors and to allow such a search would violate their property rights. The other case[19] holding that depositors have a property right in their bank records does not completely parallel *Brex v. Smith* because it involved an inspection by Internal Revenue Service agents; moreover, it was subsequently modified and condemned by later federal cases.[20] The present case did not touch the issue of whether property rights

10. Montgomery v. Ryan, [1908] 16 Ont. L.R. 75, 92-93, 99-100, 105, 107 (C.A.).
11. [1924] 1 K.B. 461, 12 B.R.C. 1021.
12. Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365 (1962).
13. Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961).
14. 224 So. 2d 759 (3d D.C.A. Fla. 1969).
15. McCrory Stores Corp. v. Tunnicliffe, 104 Fla. 683, 687, 140 So. 806, 807 (1932).
16. Bromer v. Florida Power & Light Co., 45 So. 2d 658, 660 (Fla. 1950); Rice v. First Fed. Sav. & Loan Ass'n, 207 So. 2d 22, 23 (3d D.C.A. Fla. 1968).
17. 224 So. 2d 759 (3d D.C.A. Fla. 1969).
18. 104 N.J. Eq. 386, 146 A. 34 (Ch. 1929).
19. Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936).
20. Zimmerman v. Wilson, 105 F.2d 583, 586 (3d Cir. 1939); United States v. Peoples

force a bank to keep its customers' accounts secret. Given the history of the federal tax cases, Florida courts seem unlikely to consider property rights as an issue in this area.

The court in *Peterson v. Idaho First National Bank*[21] substantiated its decision by finding an agency relationship between the bank and the depositor. There both Peterson and his employer had accounts at the defendant bank. The bank told the employer that Peterson frequently overdrew his account. Citing *Brex v. Smith*, the Idaho supreme court stated that although the bank and customer existed as debtor and creditor where the money deposited was concerned, they stood as agent and principal in reference to the bank's records. Therefore, the bank, as the customer's agent, should not disclose confidential information to third parties. Florida has always cast the typical bank-depositor relationship as debtor-creditor,[22] and the instant case, following precedent, did not consider the issue of an agency relationship.

Although the majority in the present case found the bank's duty of secrecy in implied contract, the concurring opinion relied solely on "a kind of business tort,"[23] without specifying which tort. Banks have been held liable for deceit[24] and malicious interference with contracts,[25] but these were cases in which the bank misled investors or urged another party to call in a loan—situations far removed from the facts in the principal case. Moreover, defendant bank in the instant case would not be accountable for defamation if it represented plaintiff favorably, perhaps by saying that the plaintiff had a bank account large enough to be attacked by a suit.[26]

Two cases, though, partially based their holdings on the tort of invasion of privacy.[27] An 1829 New York case held that a bank director who divulged plaintiff's trouble on the cotton exchange violated plaintiff's right to privacy.[28] Other authorities indirectly agree that the disclosure of any details of the customer's bank account invades his privacy.[29] Dean William Prosser listed the four types of violation of privacy:[30] (1) intrusion into private affairs,

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Deposit Bank & Trust Co., 112 F. Supp. 720, 723-24 (E.D. Ky. 1953); *In re* Upham's Income Tax, 18 F. Supp. 737, 738-39 (S.D.N.Y. 1937); McMann v. Engel, 16 F. Supp. 446, 448 (S.D.N.Y. 1936).

21. 83 Idaho 578, 367 P.2d 284 (1961).

22. Vassar v. Smith, 134 Fla. 346, 350, 183 So. 705, 706 (1938); Collins v. State, 33 Fla. 429, 439-41, 15 So. 214, 217-18 (1894); *In re* Thourez' Estate, 166 So. 2d 476, 478 (2d D.C.A. Fla. 1964).

23. 224 So. 2d 759, 763 (3d D.C.A. Fla. 1969).

24. Hindman v. First Nat'l Bank, 112 F. 931 (6th Cir. 1902).

25. Irby v. Citizens Nat'l Bank, 239 Miss. 64, 121 So. 2d 118 (1960).

26. The court's opinion does not state what information the bank disclosed to the third party.

27. Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (Ch. 1929); Sewall v. Catlin, 3 Wend. 291 (Sup. Ct. N.Y. 1829).

28. Sewall v. Catlin, 3 Wend. 291, 294-95 (Sup. Ct. N.Y. 1829).

29. Zimmerman v. Wilson, 81 F.2d 847, 849 (3d Cir. 1936); United States v. First Nat'l Bank, 67 F. Supp. 616, 624 (S.D. Ala. 1946); *In re* Pacific Ry. Comm'n, 32 F. 241, 260 (N.D. Cal. 1887); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 390 (1960). *Contra*, cases cited note 20 *supra*.

30. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

(2) public disclosure of private facts, (3) false light in the public eye, and (4) appropriation for advantage. Of the four, intrusion and disclosure seem applicable in the present case. Intrusion and disclosure both require the invasion of something secret, but only the latter requires publicity.[31] Florida has recognized the right to privacy,[32] but requires that widespread publicity accompany the tort except in cases of physical intrusion.[33] Moreover, the Florida supreme court has stated in dicta that mere spoken words cannot constitute an invasion of privacy.[34] Therefore, the tort of public disclosure of private facts was not applied in the instant case because the requisite widespread publicity was lacking; intrusion also did not fit the fact situation because mere words brought about the alleged invasion of privacy.

Refusing to apply tort liability to a bank that discloses information concerning a customer's account seems harsh, especially when one considers that Florida applies a reasonable man standard to the invasion of privacy.[35] Surely, if the majority in the instant case thought secrecy so necessary to banking operations that it implied an agreement of secrecy in a bank-depositor contract, the same majority should believe that a reasonable man would find disclosure an intrusion into the depositor's privacy. Since the majority, however, based its decision only on implied contract, tort liability and the possible punitive damages that accompany it do not yet follow in Florida.

The instant case will have little practical effect on day-to-day banking operations. Its potential ramifications, however, are enormous. Banks voluntarily act in confidence and pride themselves on this high ethical standard.[36] The banks' strict adherence to secrecy is the reason that there have been only ten cases on the issue of disclosure in Anglo-American jurisprudence. Prior to the present case this privacy was not legally guaranteed in Florida; the secrecy was enforced only by the operational policy of each bank. However, the banks enforced their ethics rigorously.[37] This strict enforcement of secrecy allowed the court to imply privacy into the contract between the bank and customer. The unusual aspect of the instant case is that because an industry enforced its ethics so conscientiously, these ethics have been made

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31. *Id.* at 407; Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 583-84, 367 P.2d 284, 287 (1961).

32. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 10-11 (5th Cir. 1962); Cason v. Baskin, 155 Fla. 198, 209-12, 20 So. 2d 243, 248-50 (1945); Patterson v. Tribune Co., 146 So. 2d 623, 626 (2d D.C.A. Fla. 1962); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386 (1960).

33. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 11 (5th Cir. 1962).

34. Cason v. Baskin, 155 Fla. 198, 217, 20 So. 2d 243, 251-52 (1945) (dicta).

35. *Id.* at 215, 20 So. 2d at 251.

36. Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 588, 367 P.2d 284, 290 (1961); Bank Wage-Hour and Personnel Service, Bank Wage-Hour and Personnel Report ¶¶3234, 3238, 3243 (1959).

37. Interview with T. Wade Harrison, President of First Federal Savings & Loan Association of Gainesville, in Gainesville, Fla., Oct. 13, 1969; Interview with H. Alan Rosenberger, Vice President & Cashier of First National Bank of Gainesville, in Gainesville, Fla., Oct. 14, 1969.

into law. Thus, before the instant case, banks were bound to secrecy only by ethics; the present case changed that morality into law.

The principal case adds Florida to the small list of states that hold a bank owes a legal duty of secrecy to its customers. Although the decision forces them to perform a duty, banks have been performing this duty voluntarily. The added financial risk for breach of this duty, however, may cause some discontent. A bank trying to avoid the responsibility of secrecy may attempt to do so in two ways. First, since the court relies on implied contract, a bank may place express waivers of this duty in its deposit contracts. These clauses, though, may not stand because Florida has enacted the Uniform Commercial Code, which renders unconscionable contracts or clauses unenforceable.[38] Thus, if such waivers cause unfairness, when viewed against the commercial background and needs of the banking industry, the courts will declare the clauses invalid.[39] Such a decision seems probable, especially since the instant case implied the responsibility of secrecy.

Second, a bank may try to avoid the impact of the present case by asking its depositors to *voluntarily* waive their right to secrecy. A bank may state that it will not divulge any information concerning the depositor's account unless that customer signs a waiver relieving the bank of liability for damages arising from such a disclosure. A bank adopting such a policy will probably be successful. Unlike the first plan, the waivers would not be required to open a bank account. Moreover, banks do not have a duty to supply to the public information concerning their depositors' accounts.[40] Such a policy, however, would work harshly on bank depositors. Most depositors would want information concerning their accounts released to certain third parties, but not to others. Under this voluntary waiver program, if the depositor does not sign the waiver, the bank will not release his account information to anyone; if he does sign the waiver, the bank can release this information to everyone. A better policy would allow depositors to specify the parties to whom information can be given and would apply the waiver only to disclosures to these parties. Such a plan would maintain the protection of bank depositors sought by the instant case.

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38. The Uniform Commercial Code and the corresponding Florida statute read in part: "If the court . . . finds the contract or any clause of the contract to have been unconscionable . . . the court may refuse to enforce the . . . clause . . . ." FLA. STAT. §672.2-302 (1967); UNIFORM COMMERCIAL CODE §2-302.

39. American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1946); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. N.Y. 1969); UNIFORM COMMERCIAL CODE §2-302, Comment 1.

40. *See* text accompanying note 6 *supra*.