

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - December 11,2008**

EVENT DATE: 12/12/2008 EVENT TIME: 10:30:00 AM DEPT.: C-61

JUDICIAL OFFICER: John S. Meyer

CASE NO.: 37-2008-00077333-CU-BC-CTL

CASE TITLE: LINSPIRE INC VS. COMERICA BANK

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Summary Judgment / Summary Adjudication (Civil)

CAUSAL DOCUMENT Motion for Summary Judgment and/or Adjudication, 10/29/2008

/DATE FILED:

Defendant Comerica Bank brings this motion for summary judgment. In this motion, defendant challenges plaintiff's breach of contract cause of action as well as a cause of action brought pursuant to Commercial Code section 11204.[1] Plaintiff concedes that it cannot maintain a cause of action for breach of contract, and has been granted leave to amend the complaint to allege only a cause of action under section 11204. Therefore, the Court will address the section 11204 cause of action only.

The Facts

The following facts are undisputed:

As of July 15, 2004, Kevin Carmony, Chad Olson, and William Long were listed as authorized representatives of Plaintiff Linspire, Inc., in the Global Wire Transfer Authorization and Security Agreement (the "GTA") between plaintiff and Defendant Comerica Bank. Pursuant to the GTA, all three individuals had authority to "initiate or confirm" wire transfers. [Exhibits A & B]

On July 30, 2007, Carmony instructed Long to wire severance pay funds to the accounts of three employees who were being terminated. [Carmony declaration, Long declaration, Exhibit D] On July 31, 2007, Long initiated the three wire transfers. [Long declaration, Exhibits D, E and G] On July 31, 2007, a representative from Defendant Comerica Bank called Long to confirm the wire transfers. [Long declaration, Exhibit G] This violated the GTA which required confirmation from someone other than the initiator. Long gave the confirmation and the wire transfers were completed. [Long declaration, Exhibit G]

Commercial Code Section 11204

Under section 11204, "[i]f a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Section 11202, or (ii) not enforceable, in whole or in part, against the customer under Section 11203, the bank shall refund any payment of the payment order received from the customer ..." [§11204(a)]

In order for a payment order to be "authorized," the bank must comply with section 11202(a). Section 11202(a) provides that "[a] payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law

of agency."

In order for a payment order to be "effective," the bank must comply with section 11202(b). Section 11202(b) provides that "[i]f a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. ..."

Defendant and plaintiff had agreed that the authenticity of payment orders would be verified pursuant to a security procedure.

Defendant contends that if defendant fails to follow the security procedure, but the payment orders were "authorized" under section 11202(a), then section 11202(b) does not apply. Plaintiff contends that section 11202(b) is the operative section.

According to the Official Comment:

"Section [11202] reflects the reality of the wire transfer business. A person in whose name a payment order is issued is considered to be the sender of the order if the order is "authorized" as stated in subsection (a) or if the order is "verified" pursuant to a security procedure in compliance with subsection (b). If subsection (b) does not apply, the question of whether the customer is responsible for the order is determined by the law of agency. ... If the customer is bound by the order under any of these agency doctrines, subsection (a) treats the order as authorized and thus the customer is deemed to be the sender of the order. In most cases, however, subsection (b) will apply. In that event there is no need to make an agency law analysis to determine authority. Under Section [11202], the issue of liability of the purported sender of the payment order will be determined by agency law only if the receiving bank did not comply with subsection (b)." ¶ If subsection (b) does not apply, each case is governed by subsection (a)." [Emphasis added]

...

"Subsection (b)(ii) requires the bank to prove that it accepted the payment order in good faith and 'in compliance with the security procedure. If the fraud was not detected because the bank's employee did not perform the acts required by the security procedure, the bank has not complied." [Official Comment to §11202]

It is undisputed that defendant bank did not comply with the security procedures. As a result, in order to avoid liability, defendant must show that the payment was "authorized" under section 11202(a).

"The issue is one of actual or apparent authority of the person who caused the order to be issued in the name of the customer. In some cases the law of agency might allow the customer to be bound by an unauthorized order if conduct of the customer can be used to find an estoppel against the customer to deny that the order was unauthorized. If the customer is bound by the order under any of these agency doctrines, subsection (a) treats the order as authorized and thus the customer is deemed to be the sender of the order." [Official Comment to §11202]

Carmony was plaintiff's President and CEO at the time the payment orders were made. Long was plaintiff's Controller. Undoubtedly, both were agents of Plaintiff Linspire, Inc., and were acting within the scope of their agency.

"An agent has such authority as the principal, actually or ostensibly, confers upon him." [Civ.C. §2315]
"Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." [Civ.C. §2316]

"[The] implied powers of a general agent or manager are very broad, embracing authority to do all acts customarily connected with the business in which he is engaged.' (Citations) Civil Code section 2319 in pertinent part provides: 'An agent has authority: 1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency; . . .'" [*Transport Clearings-Bay Area v. Simmonds* (1964) 226 Cal.App.2d 405, 425-426]

It is undisputed that Carmony authorized the payment orders and instructed Long to initiate the payment orders. It is undisputed that both were listed on the Deposit Agreement with defendant. They had actual and apparent authority to cause the payment orders to be issued in plaintiff's name.

The payment orders received by defendant bank were the authorized orders pursuant to section 11202(a).

THEREFORE, IT IS HEREBY ORDERED that the motion for summary judgment by Defendant Comerica Bank be GRANTED and judgment of dismissal be entered forthwith in favor of Defendant Comerica Bank and against Plaintiff Linspire, Inc.

Evidentiary Rulings

Plaintiff's objections are overruled.

Because virtually all of the substantive statements made in Mr. Robertson's declaration are irrelevant, the Court declines to issue individual rulings on each discrete objection.

[1] Statutory references are to the California Commercial Code unless otherwise identified.