

RECENT DEVELOPMENTS

LANDLORD TENANT

JUSTICE COURT HAS JURISDICTION OVER EVICTION SUIT

It's the Berry's, L.L.C. v. Edom Corner, L.L.C., ___ S.W.3d ___ (Tex. App.—Amarillo 2008).

FACTS: Lessor, Edom Corner, and lessee, It's the Berry's, entered into a commercial lease. Berry's leased a retail space located in a building, which also housed Edom Bakery, LLC. Problems developed and escalated when Berry's owners purchased a nearby restaurant, which was Edom Bakery's direct competitor. About eighteen months after execution of the lease, Edom Corner's attorney notified Berry's by letter that because of multiple alleged breaches of the lease, it must vacate the premises by a specified date or face a forcible detainer suit.

When Berry's did not vacate, Edom Corner commenced a forcible detainer suit in a justice court. Edom Corner sought possession of the property, a writ of possession and attorney's fees. Before Berry's filed an answer, Edom Corner filed a motion to transfer to the district court. Edom Corner's motion was granted, and the case transferred from the justice court to the district court. Berry's responded by filing a counterclaim for declaratory relief and attorney's fees. The district court awarded Edom Corner possession of the leased premises, a writ of possession, costs and attorney's fees. Berry's appealed, and the appellate court concluded

that the trial court abused its discretion by not setting a bond for suspension of the entire judgment, and conditionally granted the writ of mandamus. After the trial court complied with the conditional grant requirements, the appellate court dismissed the original proceeding as moot. By docket equalization order, the supreme court transferred the appeal to the Amarillo court.

HOLDING: Dismissed in part, and affirmed in part.

REASONING: The Amarillo court reviewed whether the trial court possessed subject matter jurisdiction as question of law. The court explained that district courts in Texas are courts of general jurisdiction, presumably having subject matter jurisdiction over a cause, unless a contrary showing is made. The court noted that the Texas legislature committed exclusive jurisdiction of forcible detainer suits to justice courts, which are within the precinct where the property in question is located. TEX. PROP. CODE ANN. § 24.004 (Vernon 2000). The court reiterated that subject matter jurisdiction may not be conferred by consent, waiver or estoppel. The court did not find Berry's petition for writ of mandamus, alleging the district court's original jurisdiction as grounds for estoppel. As to the forcible detainer action, the court severed the issue, vacated the prior judgment, and dismissed the case. The court set aside and dismissed Edom Corner's statutory award, contractual attorney's fees and costs, but otherwise, affirmed the district court's judgment.

UNIFORM COMMERCIAL CODE

CHAPTER 33 DOES NOT APPLY TO ARTICLE 3 CLAIMS

COURT DISCUSS OPERATION OF UCC SECTION 3.406

Bank of Tex. v. VR Elec., Inc., ___ S.W.3d ___ (Tex. App.—Houston [1st Dist.] 2008).

FACTS: VR Electric, Inc. had a checking account with Bank of Texas. The bookkeeper for VR placed an unsigned check for \$8,276 on an open and publicly accessible counter. Anthony Burlew, a contractor working for VR, stole the check and forged the president's signature. He subsequently took the check to Mata, a used car dealer, and endorsed the check to Mata in exchange for a car and cash. Mata deposited the check into his account. The Bank processed the check without verifying the signature because the amount was less than

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\$100,000 and this was standard bank procedure. A month later, VR reported the missing check and requested the amount to be credited into its account. When Bank refused, VR filed suit to recover the funds, alleging breach of contract. The court found that Bank was jointly and severally liable with Mata for 86% of the damages. The bank appealed, contending that of the TEX. CIV. PRAC. & REM. CODE ch. 33 prevented the trial court from aggravating the bank's 15% liability with Mata's 70% liability in assessing damages against Bank.

HOLDING: Affirmed.

REASONING: The court held that Chapter 33, due to its plain language, governs only tort claims. Because recovery in the instant case was based on a breach of contract, Chapter 33 did not apply. The court ruled that all the elements of a breach of contract were conclusively established in the evidence. The court pointed out that the bank made no objection to VR's characterization of this claim as a breach of contract claim, noting, however, that in the bank's brief, VR's claim was referred to as a "tort" related claim.

Furthermore, even if VR's claim were in tort, Chapter 33 would not apply because UCC Article 3 was recently revised to create a discrete fault scheme, specifically allocating responsibility among the parties to a banking relationship. Therefore, applying Chapter 33's proportionate responsibility framework to claims involving revised Article 3 claims could disrupt the UCC's carefully allocated liability scheme. Both parties agreed that UCC §3.406 governed this case. To the extent that any proportionate responsibility provisions apply to VR's breach of contract claim against the bank, the specific provision of §3.406 would apply rather than the general statute in Chapter 33.

The court then discussed Section 3.406. Section 3.406 applies to a breach of contract claim when the claim is based on an agreement concerning negotiable instruments. Under § 3.406(a), Bank must prove that: (1) VR failed to exercise ordinary care that substantially contributed to the alteration of the check; and (2) Bank paid the check in good faith. Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing. Ordinary care is defined as the observance of reason-