

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

Chapter 33, due to its plain language, governs only tort claims.

\$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-

RECENT DEVELOPMENTS

able commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. There was some evidence supporting the jury's finding that the Bank acted in good faith because the check was processed through a widely-used automated system of the federal reserve and there was no evidence to suggest that anyone at Bank was aware of any problem with the check prior to VR's request. As to the second element, the court upheld the jury's determination that VR was 15% responsible because it left the check out unattended. VR did not appeal this finding.

The court addressed whether Bank was liable under §3.406(b) for failing to exercise ordinary care. The court stated Bank had no procedures to guide its employees on when the sig-

nature of a check should be manually verified, and the procedures used to process checks and review signatures must be reasonably related to the detection of unauthorized signatures to be in accordance with reasonable commercial banking standards. Here, Bank's policy was to review signatures only on checks 100 times that of the average check processed. Based on this evidence, the court stated that the jury could find that Bank's verbal policy was not reasonably related to the detection of unauthorized signatures, which would be a failure to exercise ordinary care. The consequence of this determination was that the loss was allocated between the person precluded and the person asserting the preclusion based on the extent to which the failure to exercise ordinary care contributed to the loss.

MISCELLANEOUS

PURCHASER OF A PICKUP TRUCK CANNOT SUE UNDER THE FEDERAL ODOMETER DISCLOSURE STATUTE FOR THE SELLER'S ALLEGED FAILURE TO REVEAL THE VEHICLE'S ACCIDENT HISTORY

Bodine v. Graco, Inc., 533 F.3d 1145 (9th Cir. 2008).

FACTS: Maybe Bodine purchased a used vehicle from Graco, Inc. Graco provided Bodine with an accurate odometer statement, but did not provide a copy of the vehicle's title. Graco assured Bodine that the vehicle was in good condition, but the title would have revealed the vehicle's titled was branded "Restored Salvage" in accordance with Arizona law. Bodine claimed Graco deliberately withheld the title in order to conceal the fact that the vehicle had been severely damaged in an earlier collision.

Bodine discovered the vehicle's branding after she received a copy of the vehicle's registration. Bodine claimed that she would not have bought the vehicle had she known the status of the vehicle's title. She also discovered the vehicle had mechanical problems rendering it dangerous to drive. She requested that Graco take the vehicle back, but Graco refused and denied any knowledge of its branded status, even though Graco in fact knew about the status when he sold the vehicle.

Bodine filed a complaint in district court, alleging violations of the Motor Vehicle Information and Cost Savings Act, commonly referred to as the Odometer Act ("Act"), a federal law prohibiting vehicle odometer tampering. The parties agreed to have a federal magistrate judge hear the case. Graco filed a motion to dismiss for lack of jurisdiction, and the magistrate judge granted the motion. Bodine appealed.

HOLDING: Affirmed.

REASONING: The court stated that although Graco incorrectly filed a motion to dismiss for lack of jurisdiction, Bodine's more general argument, regarding the Act's "with intent to defraud" provision was not necessarily flawed. The Act prohibits odometer tampering with intent to change the mileage registered by the odometer, and creates a private right of action. The court adopted a narrow reading of the Act as pertaining only to the tampering with the odometer itself, and excluding any private right of action for withholding title information from the consumer. Under the narrow construction, Graco did not tamper with the odometer, thus it did not violate the Act. Graco did not alter the vehicle's

mileage on the title. Graco only failed to reveal the status of the vehicle before the transaction was completed, which under the court's adopted reasoning, was not enough to trigger a violation of the Act. The court analyzed the legislative intent of the Act. The words "with intent to defraud" were interpreted to encompass fraud only in context under the Act, and not for fraud outside of tampering with a vehicle's odometer. The court stated that a broader reading of the phrase could lead to results inconsistent with the Act's purpose.

The legislative intent and the Act's plain language led the court to determine that the Act should be narrowly construed and pertain only to tampering with a vehicle's odometer. A private right of action should not extend to areas broader than that. Congress intentionally left out collision history fraud because it believed that state regulation and state-law remedies were adequate. Even though court did not condone the activities Bodine alleged, her claim fell outside the Act's protections and thus, could not survive.

ATTORNEY FEE AGREEMENT NOT SUBJECT TO ORAL MODIFICATION

David J. Sacks, P.C. v. Haden, ____ S.W.3d ____ (Tex. 2008).

FACTS: Haden & Co. hired David Sacks as their appellate counsel. Haden and Sacks executed an agreement that called for Sacks's services at an hourly rate, subject to a \$5,000 retainer (modified and approved in writing from the originally drafted \$10,000). After Haden paid the retainer Sacks drafted an appellate brief for the court and billed Haden \$35,304.71. This represented the amount due less the amount paid in retainer. Haden paid Sacks an additional \$5,000. Sacks then spent the next two years attempting to collect payment on the remaining balance. Haden argued that Sacks was contracted to review the appellate brief, not draft a new one. Haden further argued that Sacks had agreed to an oral modification of the contract that capped Haden's expenses at \$10,000. Sacks filed suit to recover the remaining balance due on his services.

The trial court granted summary judgment in Sacks's favor, awarding him the balance due plus interest. The court also awarded reimbursement for attorney's fee accrued in pursuing his contract claim. The court of appeals reversed and held that a fact question existed with respect to whether there was a meeting