IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MENTOR INVESTMENTS, INC. d/b/a MENTOR MOTORS,	§	
Plaintiff,	§	
vs.	§	Case No. 4:06 CV 108 RAS
	§	Judge Schell
WASHINGTON MUTUAL BANK, FA, E-LOAN, and GWENDOLYN PETERSON,	§	
Defendants.	§	

WASHINGTON MUTUAL'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

COMES NOW Washington Mutual Bank, f/k/a Washington Mutual Bank, FA, and files this its motion to dismiss pursuant to Rule 12(b)(6), stating as follows:

Allegations in Complaint

The law in this circuit regarding motions under Rule 12(b)(6), as most recently articulated, is that

> [t]hey should be granted only if it is evident the plaintiff cannot prove any set of facts entitling them to relief. *E.g., Blackburn v. City of Marshall,* 42 F.3d 925, 931 (5th Cir. 1995). Along this line, all well-pleaded facts must be viewed in the light most favorable to the plaintiff. *E.g., Spivey v. Robertson,* 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied,* 530 U.S. 1229 (2000). On the other hand, as noted, the plaintiff must plead specific facts, *not conclusory allegations,* to avoid dismissal. *E.g., Guidry v. Bank of LaPlace,* 954 F.2d 278, 281 (5th Cir. 1992).

Financial Acquisition Partners, L.P., v. Blackwell, Cause No. 04-1130, Opinion of February 14, 2006 (5th Cir.)(emphasis in original).

In this particular case, the few well-pleaded facts do not establish any cause of action against Washington Mutual Bank. The vast majority of allegations are simply conclusory. The facts of the case, as set out in the Declaration of Karen Gill, Appendix 2-3, establish that any cause of action is barred. Indeed, it is so blatantly apparent that this lawsuit is nothing more than judicial blackmail, that Washington Mutual believes that the court, sua sponte, as provided in Rule 11(c)(1)(B), may award Washington Mutual its fees and expenses in defending against this frivolous suit.

The substantive allegations against Washington Mutual are as follows:

> 10. On May 23, 2005, the Power Check was deposited into Plaintiff's account with Defendant, WASHINGTON MUTUAL BANK, FA.
>
> 11. On June 2, 2005, Defendant, WASHINGTON MUTUAL BANK, FA RETURNED THE Power Check to Plaintiff.
>
> * * * * *
>
> 16. Defendant, WASHINGTON MUTUAL BANK, FA did not comply with Title XIX Section 229.330 by delaying in returning the E-Loan check #1111219 to Plaintiff, thereby keeping Plaintiff from being able to locate Defendant, GWENDOLYN PETERSON. . . .

The remainder of the allegations against Washington Mutual are simply conclusory allegations against all "Defendants." Those allegations are insufficient to rescue this complaint from dismissal.

The Failure to State a Cause of Action

The reasons why this complaint fails to state a cause of action are many. Let us deal with them one at a time:

Not Plaintiff's Account

The complaint alleges that the check was deposited into Plaintiff's account with Washington Mutual. In point of fact, the account into which the check was deposited was not the account of the Plaintiff, Mentor Investments, Inc., but was the account of Mentor Properties, Ltd.. Hence Plaintiff

has no standing to bring this suit.

No Allegation of Wrongdoing

The only apparent allegation of wrongdoing is that Washington Mutual "did not comply with Title XIX Section 229.330 by delaying in returning the E-Loan check." The first mystery is what is meant by Title XIX Section 229.330, a citation which neither the undersigned counsel nor his readily accessible databases could identify. A telephone call to Plaintiff's counsel, however, confirmed that this was a misdesignation for 12 CFR §229.33, which deals with the timeliness of notice regarding returned checks.

The second mystery is what the Plaintiff is alleging. While she alleges when the check was returned – June 2, 2005 – she does not say when Washington Mutual received the return check or notice of dishonor. Without this fact alleged, one cannot know how long Plaintiff alleges it took Washington Mutual to send back the dishonored check; in other words, there are no "well-pleaded facts" on which her complaint relies.

No Violation of Federal Banking Regulations

Were Plaintiff to have done some investigation prior to filing her suit, she would have found that there has been no violation of 12 CFR §229.33. In assessing Washington Mutual's compliance, it is important to know that in this transaction Washington Mutual was the "depositary bank." That term is defined in Section 4.105(2) of the Texas UCC, found in the Texas Business and Commerce Code, as follows:

> "Depositary Bank" means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter.

Washington Mutual was not the collecting bank, defined by Section 4.105(5) of the Texas UCC as

"a bank handling an item for collection except for a payor bank." It is obvious from the face of the check that Washington Mutual was not the payor bank, which term is defined by Section 4.105(3) as the "bank that is the drawee of a draft." The face of the check further reveals that it is "Payable Through US Bank." Under the UCC, this language "designates the bank as a collecting bank." Texas UCC § 4.106(a)(1), Texas Business and Commerce Code. The Gill Declaration, Appendix 2, sets out Washington Mutual's practice in such a case:

> When a collecting bank is designated on a check, Washington Mutual does not attempt to collect on the check, but forwards it through the channels established by banking custom and federal banking regulations to the collecting bank.

As the depositary bank, Washington Mutual's only obligation under 12 CFR §229.33 is contained in subsection (d), which reads as follows:

> (d) *Notification to customer.* If the depositary bank receives a returned check or notice of nonpayment, it shall send or give notice to its customer of the facts by midnight of the banking day following the banking day on which it received the returned check or notice, or with a longer reasonable time.

Here Washington Mutual gave notice and returned the check the same day it learned of the dishonor.

Lawsuit as Shakedown

The court may recall – and therefore take judicial notice of – the words of Willie Sutton. Willie was an immaculately dressed and polite bank robber in the 30's (for which he was convicted) and perhaps in the 40s and 50s (which he denied) after his escape from prison. Nicknamed "the Actor," he was, for a time, on the FBI's Ten Most Wanted list. Because of his obvious intelligence and ability to comport himself with a semblance of decorum, Willie was asked by a puzzled journalist why he robbed banks. "Because," Willie dead-panned, "that's where the money is."

This lawsuit is as much a stick-up as anything that Willie Sutton ever conceived. It is

certainly not brought on the basis of any merit. Plaintiff sold a car to Gwendolyn Peterson, accepting the E-Loan check attached as an exhibit to its complaint in payment for the car. The face of that check alone should have given Plaintiff pause. Plaintiff was selling its car to Gwendolyn Peterson; the check was an E-Loan check from Sherrie L. King and signed by Sherrie L. King, identified as the borrower from E-Loan. One would think that Plaintiff, had it had its wits about it, would have paused before giving Ms. Peterson the car keys on the basis of a third party's check.

It gets worse. As one can find out from E-Loan's website, E-Loan provides funds with which a borrower can purchase a car. Like all automobile purchase lenders, E-Loan wants a lien against the purchased vehicle to collateralize its loan. It accomplishes that through the PowerCheck®. On the face of the check, above the signature of Sherrie L. King appears the language:

> I AGREE THAT MY SIGNATURE OF THIS CHECK ALSO CONSTITUTES MY SIGNATURE ON THE NOTE AND SECURITY AGREEMENT

The complaint and its Exhibit A indicate that the car was sold not to Sherrie L. King, but to Ms. Peterson. Would not a prudent seller have at least wondered how Ms. King's signature could have created the collateral lien that E-Loan sought?

It gets still worse. The copy of the E-Loan check attached to the Plaintiff's complaint only shows the front of the check. The copy attached to the Gill Declaration, a copy made immediately after the check's deposit with Washington Mutual, shows both sides. The back of the check sets out several requirements for anyone who accepts the check in payment for a motor vehicle. It states as conditions on the payment of the check that the seller is required to endorse a first lien in favor of E-Loan on the title documents and that it is make sure that the "identity of each borrower signing the check is true and correct." There is of course nothing in the complaint about the endorsement of the

required lien on the title documents, about its determination that Ms. King, the borrower, was borrowing to buy Ms. Peterson an auto, about its making sure that Ms. King agreed that the funds she was borrowing could be secured by Ms. Peterson's car, or about its ascertainment that Ms. King's signature was true and correct.

It get even worse. Attached as Exhibit C to the DuBose Declaration is a copy of the Instructions for the PowerCheck® which are referred to on the back of the check which were provided to the undersigned counsel by counsel for E-Loan. Appendix 28-32. Those instructions required that before depositing the PowerCheck®, the automobile dealer selling the car needed to execute certain documents and fax those documents to E-Loan. Counsel for E-Loan has informed the undersigned counsel that when it files its answer or motion, it will file sworn statements from E-Loan attesting that Plaintiff complied none of these conditions. Washington Mutual requests that when those documents are filed that they be considered to have been incorporated into this motion as if filed herewith.

Plaintiff now attests in its motion for substituted service that it cannot locate Ms. Peterson. Can anyone be surprised at that? Is it not a safe bet that before the sun had set on Ms. Peterson on the day she drove off in her new car, she had hightailed it, and the car was either intact in Mexico or in pieces at a chop shop? Now Plaintiff is trying to recover its loss from parties who can in no way be considered to have caused that loss. Washington Mutual thus suggests that the court might consider imposing its costs on Plaintiff and its counsel *sua sponte.* The DuBose Declaration states that Washington Mutual's reasonable and necessary fees and expenses to date are $7,265.94. Appendix 19.

Conclusion

This motion should be granted and Plaintiff's complaint be dismissed with prejudice.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT
WASHINGTON MUTUAL BANK

Certificate of Service

The undersigned hereby certifies that he served the attached document on opposing counsel this 17 day of March, 2006, by United States mail, first class postage prepaid.

Eugene Zemp DuBose