Circuit Court for Baltimore City
Case No. 24-C-18-006986

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2491

September Term, 2019

TODD MARROW

v.

BANK OF AMERICA, N.A.

Leahy,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Leahy, J.

Filed: June 25, 2021

Todd Marrow, appellant, appeals from an order of the Circuit Court for Baltimore City granting summary judgment in favor of Bank of America, N.A. ("Bank of America"), appellee. On December 27, 2018, Mr. Marrow filed a complaint against Bank of America, Wendell Alston, and Deanna M. Harrod-Contee concerning allegedly unauthorized or fraudulent transactions drawn on his accounts at Bank of America between 2012 and 2016 while he was incarcerated. The complaint included one count of breach of contract and one count of defamation against Bank of America; two counts of wrongful taking and one count of theft against Mr. Alston; and one count of constructive fraud and one count of theft against Ms. Harrod-Contee. Bank of America filed an answer and cross-claims against Mr. Alston and Ms. Harrod-Contee.[1] On December 2, 2019, Bank of America filed a motion for summary judgment as to all claims against it and asserted that Mr. Marrow's claims against the bank were "barred by the governing contract of deposit and by the applicable statutes as a matter of law."

A hearing on the motion for summary judgment was held on January 22, 2020. In a written order filed on the same day, the court granted summary judgment in favor of Bank of America on all claims against it. On February 6, 2020, Mr. Marrow filed a notice of appeal from that order, while Mr. Marrow's claims against Ms. Harrod-Contee and Mr. Alston and Bank of America's cross-claims remained unresolved.

[1] Bank of America asserted cross-claims against Ms. Harrod-Contee and Mr. Alston for conversion, "money had and received," unjust enrichment, fraud, breach of warranty, contribution, and indemnification, all of which were predicated on a finding of liability on the part of the bank with respect to the claims set forth in Mr. Marrow's complaint.

After a bench trial on February 19, 2020, the court ruled in favor of the remaining defendants. On February 27, 2020, the court entered an order that provided, in relevant part:

> Upon consideration of the evidence presented during the trial on February 19, 2020 and the arguments of the parties, it is this 19th day of February 2020, by the Circuit Court for Baltimore City, hereby
>
> FOUND that the Plaintiff is unable to establish that Defendant Deanna Harrod-Contee made unauthorized withdrawals from his Bank of America bank account, and it is further
>
> FOUND that the Plaintiff is unable to establish that Defendant Wendall Alston made unauthorized withdrawals from his Bank of America bank account, and it is further
>
> ORDERED that judgment be entered in favor of the Defendants and against the Plaintiff[.]

ISSUES PRESENTED

Mr. Marrow presents the following issues for our review:

> "1. Whether the [c]ourt was correct to grant the Motion for Summary Judgment?
>
> 2. Whether the [C]ourt erred by failing to consider the Anti-Preemption provision of the statute [Electronic Fund Transaction Act, 15 U.S.C. § 1693(q)] in granting the Motion for Summary Judgment based on preemption?"

Before addressing these issues, we must first consider whether there was a final judgment from which Mr. Marrow was entitled to appeal.

APPEALABILITY AND FINAL JUDGMENT

"Generally, parties may appeal only upon the entry of a final judgment." *McLaughlin v. Ward*, 240 Md. App. 76, 82 (2019); *see also* Maryland Code (1974, 2020 Repl. Vol.), Courts and Judicial Proceedings Article ("CJ"), § 12-301. "One of the necessary elements of a final judgment is that the order must adjudicate or complete the

adjudication of all claims against all parties." *Id.* (collecting cases). In *Estep v. Georgetown Leather Design*, the Court of Appeals held that if the court has not adjudicated a defendant's cross-claims or third-party claims, the judgment is not final, and is not appealable, even if those claims have become "groundless" because of the entry of judgment against the plaintiff. 320 Md. 277, 286 (1990). Because the absence of a final judgment may deprive a court of appellate jurisdiction, we can raise the issue of finality sua sponte. *Waterkeeper All., Inc. v. Md. Dep't of Agric.*, 439 Md. 262, 276 n.11 (2014) (citing *Stachowski v. State*, 416 Md. 276, 285 (2010)).

The requirement that a final judgment must dispose of all claims against all parties is included in Maryland Rule 2-602(a), which provides:

> (a) **Generally**. Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
> (1) is not a final judgment;
> (2) does not terminate the action as to any of the claims or any of the parties; and
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

There are narrow exceptions to the final judgment rule. Maryland Rule 2-602(b) permits a court, in cases involving multiple parties, to enter a final judgment as to only one party. Under that Rule, "[i]f the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment . . . as to one or more but fewer than all of the claims or parties." Md. Rule 2-602(b). On appeal, we may enter a final judgment on our own initiative if we determine that "the order from

which the appeal is taken was not a final judgment when the notice of appeal was filed but that the lower court had discretion to direct the entry of a final judgment pursuant to Rule 2-602(b)[.]" Md. Rule 8-602(g)(1).

We are cognizant that the power to enter a final judgment on our own initiative must be exercised sparingly. *Waterkeeper*, 439 Md. at 287-88. "Courts that exercise discretion to certify a non-final judgment for appeal 'should balance the exigencies of the case before them with the policy against piecemeal appeals and then only allow a separate appeal in the very infrequent harsh case.'" *Id.* (quoting *Diener Enters. v. Miller*, 266 Md. 551, 556 (1972)).

In the instant case, although the circuit court granted summary judgment in favor of Bank of America, and subsequently entered judgment in favor of Ms. Harrod-Contee and Mr. Alston, the record does not disclose that the court ruled on the cross-claims filed by Bank of America against Ms. Harrod-Contee and Mr. Alston. As a result, there is not yet a final, appealable judgment in this case. Had any of the parties requested the entry of judgment under Rule 2-602(b), the circuit court could reasonably have concluded that it had no just reason to delay the entry of a final judgment as to the claim against Bank of America alone.

We addressed this precise issue in *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 171-72, *cert. denied*, 444 Md. 641 (2015). In that case, two of the defendants, Penn Parking and Colossal Contractors, filed cross-claims against various other defendants. *Id.* at 166. Thereafter, the court entered summary judgment in favor of the defendants thereby eliminating any grounds for the cross-claims that had been asserted. *Id.* at 171. The trial

court did not, however, "enter an appealable final judgment, because it never formally adjudicated the cross-claims[.]" *Id.* at 173. We concluded that "had any of the parties requested the entry of judgment under Rule 2-602(b), the circuit court could reasonably have concluded that it had no just reason to delay the entry of a final judgment as to the [plaintiffs] alone – *i.e.*, that it had no just reason to delay the entry of final judgment 'as to one or more but fewer than all of the . . . parties.' Md. Rule 2-602(b)(1)." *Id.*

In reaching that conclusion, we recognized that it would have been difficult for the parties who had filed the cross-claims to resolve those claims without prejudicing their rights. We explained that if the cross-plaintiffs attempted to resolve the cross-claims by dismissing them with prejudice, "they risked losing the ability to reassert the cross-claims against one another" if the grant of summary judgment was reversed on appeal. *Id.* We also noted:

> [I]f Penn Parking and Colossal Contractors had attempted to resolve the cross-claims by dismissing them *without prejudice*, with the express or implicit understanding that they could reassert the cross-claims if an appellate court reversed the entry of summary judgment against the Zilichikhises, they might leave themselves open to an argument that the appeal should be dismissed because they had improperly circumvented the final judgment rule. *See Miller & Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 252-53, 987 A.2d 1 (2010). Furthermore, if the cross-claims included contractual claims for indemnification of defense costs as well as damages, it might be impossible to liquidate the claims and to quantify the full extent of a party's liability until the appeal had been concluded. Indeed, if the appellate court had reversed the entry of summary judgment, it might be impossible to liquidate those cross-claims until after further proceedings had occurred on remand and on a subsequent appeal.

Id. at 173-74. We further recognized that "[i]n analogous circumstances, where the circuit court entered summary judgment against the plaintiff, but did not dispose of a third-party

claim against a third-party defendant, the Court of Appeals exercised its discretion under Rule 8-602(e)(1)(C) to entertain the appeal." *Id.* at 174 (citations omitted). Consistent with Rule 8-602(e)(1)(C) and those "analogous circumstances," we entered "a final judgment as to the Zilichikhises, but not as to the unadjudicated cross-claims asserted by Colossal Contractors and Penn Parking." *Id.*

In the case at hand, the circuit court could have exercised its discretion under Maryland Rule 2-602(b) to enter a final judgment as to the grant of summary judgment in favor of Bank of America. Consistent with *Zilichikhis*, we exercise our discretion to enter final judgment only as to the grant of summary judgment in favor of Bank of America. Having resolved that the appeal is properly before us, we turn to consider the issues for our review.

BACKGROUND

In January 2010, Mr. Marrow opened both a checking and savings account at Bank of America. In connection with the opening of those accounts, Marrow signed two signature cards, both of which contained the following provision:

> By signing below, I/we acknowledge and agree that this account is and shall be governed by the terms and conditions set forth in the following documents, as amended from time to time: (1) if this account is a deposit account, the Deposit Agreement and Disclosures, the Personal Schedule of Fees . . . . Furthermore, I/we acknowledge the receipt of these documents.

From February 19, 2012 through August 2, 2017, Mr. Marrow was incarcerated at the Maryland Division of Corrections. According to Mr. Marrow, during his period of

incarceration, Mr. Alston[2] and Ms. Harrod-Contee, who is the mother of his son, began making "various unauthorized withdrawals and transactions" from his Bank of America accounts. Mr. Marrow alleged that, in about March 2012, Ms. Harrod-Contee had her name listed on his accounts using "a fraudulent power of attorney" that was not properly verified by Bank of America. Between April 2014 and July 2016, Ms. Harrod-Contee allegedly "stole, converted and/or misappropriated a total of $10,875" using teller transactions.

In addition, from approximately April 2014 through July 2016, Mr. Alston had possession of the automated teller machine/debit card (hereinafter referred to as the "ATM card") associated with Mr. Marrow's bank accounts. According to Mr. Marrow, without his permission, Mr. Alston used that ATM card to steal, convert and/or misappropriate $43,127.49. Mr. Alston also "began to intercept the [bank] statement intended for Mr. Marrow in order to cover the theft from being discovered."

In or about February 2016, after he discovered numerous allegedly unauthorized transactions, Mr. Marrow contacted Bank of America. On or about March 3, 2016, Mr. Marrow challenged 37 ATM card withdrawals that occurred between November 2, 2015 and February 3, 2016 in the total amount of $4,671.15. On March 4, 2016, Marrow submitted a Fraud Statement in support of his claim. In addition, on or about March 4, 2016, Mr. Marrow submitted a second claim to Bank of America challenging the same 37 ATM card withdrawals.

[2] The record does not reveal Mr. Alston's relationship, if any, to Mr. Marrow.

On March 23, 2016, Marrow sent a letter to the fraud claims department of Bank of America. The letter provided, in part, as follows:

> At this time I have not yet receive[d] any mail, papers, or forms to fill out in reference to my claim as well as the copies of all transactions that have been posted against my accounts dating back to January 2014, to March 2016. I would like to review the two years off [sic] all activity. I've been in this prison for the last two years. I just did a change of address, and my new card arrived, but the copies I requested or any other documents pertaining to my claim has not been received at this time.
>
> * * *
>
> If you're unable to send me these documents here please reply to me here and let me know. I would also like to change the address to where my mail from the bank goes as well as suspend any and all check writing and on line check buying perigees [sic] on my checking and savings account. I want ATM withdraw[a]ls only on my account until further notice.
>
> Thank you very much, and kindly reply to this correspondence so I know where this claim stands.

After reviewing Mr. Marrow's claim, Bank of America determined that the transactions at issue were authorized and correctly posted to his account. On March 29, 2016, Bank of America sent two letters to Marrow. The first informed him that the bank had determined that the transactions were authorized and properly posted to his account. The second letter informed Marrow that his March 3rd claim involved the same transactions and was a duplicate of his first claim and that the second claim was denied on that ground. Bank of America sent Marrow two additional letters, one dated June 14, 2016 and the other dated September 8, 2017, each of which stated, "[w]e've completed an additional review of your case and concluded that our original decision was correct."

In his complaint, Mr. Marrow asserted that notwithstanding notice of his "incarceration status and the fraudulent activity on the [a]ccount[s]," Bank of America continued to permit Mr. Alston to access the accounts and continued to charge Mr. Marrow "overdraft charges in the amount of $2,625.00." Bank of America acknowledged that Mr. Marrow had made claims with respect to the 37 ATM card withdrawals that occurred between November 2, 2015 and February 3, 2016 in the total amount of $4,671.15, but denied receiving notice of any other claim by Mr. Marrow prior to the filing of his complaint on December 27, 2018.

Mr. Marrow's checking account was closed on August 31, 2016 with a negative balance. The bank charged off $447.77 and, on September 2, 2016, reported the negative balance to ChexSystems, Inc., a consumer credit reporting agency. Mr. Marrow's savings account was closed on January 25, 2017.

Mr. Marrow's complaint set forth seven counts. In count one, Mr. Marrow alleged breach of contract by Bank of America for failing to "properly handle the various fraud complaints" he made and for failing "to prevent further fraudulent activity" on his accounts after being made aware of the situation. In count two, Mr. Marrow alleged defamation by Bank of America for reporting the negative balance of his accounts to a credit reporting agency notwithstanding its knowledge that the overdrafts were the result of theft. Counts three and four asserted claims against Mr. Alston for trover, conversion, and wrongful taking. Both counts were based on Mr. Alston's alleged use of Mr. Marrow's bank card to withdraw $43,127.49. Similarly, in count five, Mr. Marrow alleged that Mr. Alston committed theft by removing $43,127.49 from his accounts. As to Ms. Harrod-Contee,

Mr. Marrow alleged in count six that she committed constructive fraud when she "exceeded [her] authority and put herself on [his] bank account in order to remove funds from the account," and, thereafter, withdrew funds in the total amount of $10,875.00. In count seven, Mr. Marrow asserted that Ms. Harrod-Contee committed theft when, "without permission or authorization," she removed funds from his bank account in the amount of $10,875.00.

Bank of America filed a motion for summary judgment as to all of the claims asserted against it. It argued that the claims were barred by the terms of the deposit agreement with Mr. Marrow, the one-year statute of limitations set forth in the federal "Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 [] *et seq.* and the implementing regulations 12 C.F.R. 205 *et seq.* commonly known as Regulation E," and Maryland's three-year statute of limitations for breach of contract actions. Bank of America also asserted that it had immunity from liability for claims related to its reporting of information to consumer credit reporting agencies, that federal law preempted state law for Mr. Marrow's claim of defamation, that Mr. Marrow failed to file a dispute with the credit reporting agency, and that any state law claim for defamation was barred by a one-year statute of limitations.

Mr. Marrow opposed the motion for summary judgment. At the hearing on the motion, he explained to the trial court that, after he learned of Ms. Harrod-Contee and Mr. Alston's transactions in January 2016, he called and wrote letters to Bank of America and faxed "papers" to them. He claimed to have "been in constant contact with Bank of America," that he spoke with the collections department, and filed claims. Specifically,

Mr. Marrow pointed to the March 23, 2016 letter he sent a letter to Bank of America setting forth the challenged transactions on his account and advising that no one except him was authorized to make transactions on his accounts.

Mr. Marrow asserted that Ms. Harrod-Contee used a fraudulent power of attorney and that Bank of America failed to produce a copy of it in discovery, a fact the bank conceded because it could not locate a copy of the power of attorney used when she was added to Mr. Marrow's accounts. Mr. Marrow also pointed out that only his signature appeared on the signature card for his accounts. Mr. Marrow explained that during his incarceration, he had only a limited amount of time to use the telephone and that each time he called Bank of America, its employees "would start back from the original date, instead of continuing on with the date." After his release from incarceration in August 2017, Mr. Marrow did not retain an attorney, even though he admitted that the Bank of America customer service representative suggested that he should get one.

At the conclusion of the hearing on the motion for summary judgment, the trial judge announced his ruling, explaining in detail, why Mr. Marrow's claims against Bank of America were barred by provisions of the parties' contractual agreement and/or applicable statutes of limitation. The Judge stated, in relevant part:

> . . . [T]he [c]ourt finds that the $43,127.49 in ATM transactions is time-barred by a one-year statute of limitations contained in the Electronic Funds Transfer Act, which is, for the record, [15 U.S.C. § 1693m.]. There is no genuine dispute between the parties as to that very material fact as to whether the complaint was timely filed. The [c]ourt finds that it was not.
>
> With regard to Mr. Marrow's claim against Bank of America for defamation, again, that is a claim which has a one-year statute of limitations. Mr. Marrow knew or should have known with regard to the claim of

defamation perhaps inuring to his benefit or one in his shoes would have been aware of it, at the latest, in September of 2017.[3] And I say that because there are no facts in dispute to suggest anything other than the account of Mr. Marrow was force closed in August 2017, and then notice was given by the bank with regard to the force closure to a reporting agency the following month in September of 2017. With a one-year statute of limitations, that means suit would have had to have been filed on or before September 2nd, 2018, with regard to the defamation claim. And unfortunately, from Mr. Marrow's perspective, and I mean that, most unfortunately, as to his claim against Bank of America for defamation, that claim was not timely filed because, again, that claim, that count is a part of the December 27, 2018, filing of the complaint.

. . . The [c]ourt further concludes that there's no genuine dispute as a material fact with regard to the overdraft fees which were imposed upon Mr. Marrow, the bank customer, due to ATM and/or debit transactions being one year. And the one year long past, by which time Mr. Marrow should have filed suit but did not. None of this is to say that the [c]ourt does not understand Mr. Marrow's reasons for why he didn't file his action - - his case, at least as to Bank of America as being one of the Defendants in this case, sooner. Mr. Marrow was operating under a couple of, I think, misperceptions, and in good faith, doing so.

* * *

And it wasn't until he was released in 2017 that he realized that, you know, that faith had been placed in [his sister] to be able to undertake [to manage his accounts], while well-intentioned, was just misplaced, and that his financial circumstances with regard to his account had fallen through the cracks of his sister's observations and management. And then he took it upon himself to try and correct what he saw had happened to his account. Those are both, I believe to be, very persuasive explanations. But at the end of the day, those explanations don't excuse as a matter of law missing the statute of limitations. And because of that, because the statute of limitations simply was not complied with here with regard to the claims I just referenced, the

[3] As we explain in the discussion section, the circuit court incorrectly stated at the summary judgment hearing that Mr. Marrow's account "was force closed" in August 2017, and that notice was given to the reporting agency "the following month in September of 2017." However, the court correctly stated in other parts of the hearing that Mr. Marrow's account was force closed in August of 2016. The parties did not dispute that, on August 31, 2016, Bank of America closed Mr. Marrow's checking account due to a negative balance and, in September 2016, reported that information to ChexSystems, Inc.

> motion for summary judgment of Bank of America as to the counts against it is granted because there exists no genuine dispute as to a material fact regarding limitations were satisfied[.] They weren't.

We provide additional facts and discuss in more detail the circuit court's reasoning in our discussion of the issues presented.

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material fact" and "the party in whose favor judgment is entered is entitled to judgment as a matter of law." Maryland Rule 2-501(f). Accordingly, we review the trial court's legal determinations without deference. *Thomas v. Shear*, 247 Md. App. 430, 447 (2020) (citing *Andrews & Lawrence Prof.'s Servs., LLC v. Mills*, 467 Md. 126, 146 (2020)).

We "independently review the record to determine whether the parties properly generated a dispute of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law." *Kennedy Krieger Inst., Inc.* v. *Partlow*, 460 Md. 607, 632 (2018) (quoting *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 482 (2017)). In doing so, "[w]e review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Id.* at 632-33 (quoting *Chateau Foghorn LP*, 455 Md. at 482). "When analyzing the decision of the circuit court, we consider only the grounds for granting summary judgment relied upon by the court." *Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294, 313 (2019).

DISCUSSION

In his briefing, Mr. Marrow limits his argument to his contention that the EFTA does not preempt Maryland law and that the court failed to consider the discovery rule in

regard to his defamation claim. The circuit court's decision to grant summary judgment, however, was based on more grounds than preemption by the EFTA and reflects that the court did consider the discovery rule in regard to Mr. Marrow's defamation and other claims.[4]

I. Defamation Claim

At the conclusion of the hearing on Mr. Marrow's motion for summary judgment, the trial judge determined that the defamation claim against Bank of America was barred by a one-year statute of limitations. The court incorrectly stated that Mr. Marrow's account "was force closed" in August 2017, and that notice was given to the reporting agency "the following month in September of 2017." However, the parties did not dispute that, on August 31, 2016, Bank of America closed Mr. Marrow's checking account due to a negative balance and, in September 2016, reported that information to ChexSystems, Inc. The judge observed that "Mr. Marrow knew or should have known with regard to the claim of defamation perhaps enuring to his benefit or one in his shoes would have been aware of it, at the latest" when the bank sent notice of the closure of his account to the reporting

[4] The transcript reflects that the court interrupted counsel's argument several times to inquire about whether the discovery rule applied to Mr. Marrow's various claims, and when Mr. Marrow should have been expected to discover certain claims. For example, on one occasion, the court inquired more generally:

> But, you know, when did a Plaintiff discover or when should a Plaintiff [] have discovered rather, that he or she needed to consider filing a civil action. What I'm hearing from Mr. Marrow is that it may not have been really until his account was force closed and then he was reported in August/ September 2016, right?

agency. The judge concluded that it meant "suit would have had to have been filed on or before September 2, 2018" on the defamation claim.

Section 5-105 of Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), provides that "[a]n action for assault, libel, or slander shall be filed within one year from the date it accrues." The parties do not dispute that Bank of America reported Mr. Marrow's account status to ChexSystems, Inc. on September 2, 2016. Even using the September 2, 2017 date utilized by the circuit court, Mr. Marrow's defamation claim was not filed until December 27, 2018, well after the one-year statute of limitations had expired. Accordingly, the trial court did not err in granting summary judgment in favor of Bank of America with respect to the defamation claim.[5]

II. Breach of Contract Claim

Mr. Marrow alleged that Bank of America breached its contract with him by failing "to properly handle the various fraud complaints made" by him and failing "to prevent further fraudulent activity on the account once alerted by" him. The alleged fraud involved

[5] Although not addressed by the circuit court, Mr. Marrow's defamation claim is further preempted by the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s-2. The FCRA's statutory scheme permits imposition of liability on a furnisher of incorrect information to a credit reporting agency if the furnisher of information fails to carry out its duties of investigation and correction as outlined in the statute but only after the reporting agency has provided notice to the furnisher of the consumer's dispute. *See* 15 U.S.C. § 1681s-2.(b)(1). Thus, although 15 U.S.C. § 1681s-2(b) creates a private cause of action by a consumer against a furnisher of information, that private cause of action is not triggered until after the furnisher of information receives notice of the dispute from the reporting agency, not just the consumer. Here, there is no evidence that Mr. Marrow filed a dispute with ChexSystems, Inc., the reporting agency. As a result, Mr. Marrow did not trigger any duty on the part of Bank of America to correct the information reported to ChexSystems, Inc., and no private cause of action exists.

teller transactions made by Ms. Harrod-Contee and ATM withdrawals made by Mr. Alston. We begin by examining the claims involving the teller transactions.

A. Teller Transactions

All of the teller transactions that are the subject of this case were allegedly performed by Ms. Harrod-Contee. Mr. Marrow alleged that Ms. Harrod-Contee fraudulently obtained a power of attorney and, using it, had herself listed on his accounts. Between April 2014 and July 2016, Ms. Harrod-Contee withdrew a total of $10,875.00 from his accounts. In announcing its ruling from the bench, the circuit court determined that the "teller transactions under the timelines which the Court heard today are absolutely barred by the statute of limitations."

Maryland's statute of limitations for breach of contract claims is set forth in CJP § 5-101, which provides "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Mr. Marrow's complaint was filed on December 27, 2018. Thus, based on CJP § 5-101, all claims that occurred prior to December 26, 2015 were statutorily time barred.

As for the claims arising from transactions that occurred between December 26, 2015 and July 2016, they are barred by the parties' contract. Neither Mr. Marrow nor Bank of America dispute that they entered into an agreement or that the agreement constituted a valid contract. Rather, Mr. Marrow alleged in his complaint that "[d]uring the period in question [he] and Bank of America were in a contractual relation whereby [Bank of America] was to provide banking services to [him] and investigate fraud and abusive

transactions involving the named accounts." When Mr. Marrow opened his accounts at Bank of America, he signed two signature cards by which he acknowledged that his accounts would be governed by the terms and conditions found in the "Deposit Agreement and Disclosures." During the time the accounts were open, various Deposit Agreement and Disclosures were applicable, including an amended version that was effective February 6, 2015. We refer to the agreement in effect at any given time as "the Deposit Agreement."

We discussed the nature of such agreements in *Kiley v. First National Bank of Maryland*, 102 Md. App. 317 (1994). There, after the Kileys married, they "executed new signature cards with the Bank." *Id.* at 327. We determined that the relationship between the bank and the Kileys was "contractual in nature" and that the signature card constituted a contract between the bank and the Kileys. *Id.* at 326-27. We explained:

> In this case, the signature cards specifically referred to the Bank's Rules and Regulations and, in executing the signature cards, appellants accepted those Rules and Regulations. *Dietrich v. Chem. Bank*, 115 Misc.2d 713, 454 N.Y.S.2d 490, 491 (Sup.Ct. 1981), *aff'd*, 92 A.D.2d 786, 459 N.Y.S.2d 1016 (1983)(plaintiff may not claim she did not receive Bank's rules and regulations because she signed signature card acknowledging receipt). Collectively, the signature cards and the Rules and Regulations constituted the contract between the Bank and the Kileys. *See* 5(a) *Michie on Banks & Banking*, Ch. 9, § 1, at 30 (1994 Repl. Vol.)("Michie")("A 'signature card' is a contract which creates a savings account or checking account . . . .").

Id. at 327.

The Deposit Agreement effective February 6, 2015, as well as the prior versions contained in the record, contained specific provisions pertaining to problems and unauthorized transactions including, but not limited to "suspected fraud," "unauthorized electronic transfers," "missing, stolen, or unauthorized checks or other withdrawal orders,"

and "checks or other withdrawal orders bearing an unauthorized signature." Specifically, the Deposit Agreement included the following provision:

> **Reviewing Your Account Statements**
> Your review of your statements, checks and other items is one of the best ways to help prevent the wrongful use of your account. You agree:
>
> • to review your statements, checks and other items and reconcile them as soon as they are made available to you;
>
> • that our statements provide sufficient information to determine the identification and authenticity of any transaction including without limit, whether any are forged, altered or unauthorized if the statement includes the item number, amount and the date the item posted to your account;
>
> • to report any problems or unauthorized transactions as soon as possible; and
>
> • that 60 days after we send a statement and any accompanying items (or otherwise make them available) is the maximum reasonable amount of time for you to review your statement or items and report any problem or unauthorized transaction related to a matter shown on the statement or items. There are exceptions to this 60-day period. For forged, unauthorized or missing endorsements, you must notify us with the period specified by the state law applicable to your account. For substitute checks, you must notify us with 40 days to qualify for an expedited recredit. See section titled *Substitute Checks and Your Rights*.

Failure to provide the bank with notice as required by the Deposit Agreement was addressed in a section entitled "We Are Not Liable If You Fail To Report Promptly," which provided:

> Except as otherwise expressly provided elsewhere in this agreement, if you fail to notify us in writing of suspected problems or unauthorized transactions within 60 days after we make your statement or items available to you, you agree that:
>
> > • you may not make a claim against us relating to the unreported problems or unauthorized transactions regardless of

> the care or lack of care we may have exercised in handling your account; and
>
> • you may not bring any legal proceeding or action against us to recover any amount alleged to have been improperly paid out of your account.
>
> Except as otherwise expressly provided elsewhere in this agreement, we are not liable to you for subsequent unauthorized transactions on your account by the same person if you fail to report an unauthorized transaction on your account within 30 days (or such lesser period as is specified in the state law applicable to your account) following the closing date of the statement containing information about the first unauthorized transaction.

Pursuant to the terms of the parties' Deposit Agreement, Mr. Marrow had a maximum of 60 days from the issuance of the account statement containing the first allegedly unauthorized teller transaction in 2014 to notify Bank of America of the problem. There was no evidence that Mr. Marrow provided such notice. In addition, Mr. Marrow had only 30 days to report subsequent unauthorized transactions performed by the same wrongdoer. There was no evidence that he provided such notice. There was no evidence to suggest that Bank of America had any notice concerning unauthorized teller transactions by Ms. Harrod-Contee prior to the filing of the complaint in the instant case. Because Mr. Marrow failed to provide notice within the time periods set forth in the Deposit Agreement, he failed to meet the condition precedent to filing suit and, as a result, the circuit court did not err in granting summary judgment in favor of Bank of America.

B. ATM Withdrawals

Mr. Marrow's breach of contract claim against Bank of America was also predicated on his allegation that, between March 2012 and June 2016, Mr. Alston was in possession of his ATM card and used it, without permission, to withdraw $43,127.49. In granting

summary judgment in favor of Bank of America on this claim, the circuit court determined that the claim for $43,127.49 in ATM transactions was time-barred by the one-year statute of limitations contained in the EFTA, 15 U.S.C. § 1693m.[6] Mr. Marrow's breach of contract claim also included a claim for overdraft fees charged to him by the bank as a result of the ATM withdrawals allegedly performed by Mr. Alston. The court determined that that claim was also barred by a one-year statute of limitations.

Mr. Marrow contends that the circuit court erred in granting summary judgment in favor of Bank of America on those grounds because, although the EFTA provides a one-year statute of limitations, states are not "barred from offering a greater statute of limitation in state court." In support of his argument, Mr. Marrow directs our attention to the following portion of 15 U.S.C. § 1693q.:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, dormancy fees, inactivity charges or fees, service fees, or expiration dates of gift certificates, store gift cards, or general-use prepaid cards, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

Mr. Marrow maintains that Maryland's general three-year statute of limitations should have been applied. He correctly points out that the circuit court did not specifically

[6] Section 1693m.(g) provides:

> (g) **Jurisdiction of courts; time for maintenance of action**
> Without regard to the amount in controversy, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

address 15 U.S.C. § 1693q. in either its oral ruling or its written order and did not provide "reasoning for granting preemption in this case." Nevertheless, for several reasons, the circuit court did not err in granting summary judgment in favor of Bank of America on these issues.

The Federal Code of Regulations, Title 12, Chapter X, Part 1005, which is known as Regulation E, contains provisions to carry out the purposes of the EFTA, "which establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer and remittance transfer services and of financial institutions or other persons that offer these services." 12 C.F.R. 1005.1(b). The phrase "electronic fund transfer" is defined in 12 C.F.R. 1005.3(b) as follows:

> (b) Electronic fund transfer –
> (1) Definition. The term "electronic fund transfer" means any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account. The term includes, but is not limited to:
> (i) Point-of-sale transfers;
> (ii) Automated teller machine transfers;
> (iii) Direct deposits or withdrawals of funds;
> (iv) Transfers initiated by telephone; and
> (v) Transfers resulting from debit card transactions, whether or not initiated through an electronic terminal.

12 C.F.R. 1005.3(b).

The clear language of § 1693q. indicates that Congress did not intend for the EFTA to provide the exclusive cause of action for claims relating to unauthorized electronic fund transfers but instead contemplated the application of state law that is not preempted by its provisions. The issue for us to resolve, therefore, is whether Maryland has enacted any

law pertaining to electronic fund transfers that is not preempted because it provides protection to consumers that is greater than that provided by EFTA.

We addressed that issue in *Margolis v. Sandy Spring Bank*, 221 Md. App. 703 (2015). There, the plaintiff, Daniel Margolis, a representative of a putative class, challenged a bank's practice of batch-processing certain transactions, including ATM transactions. *Margolis*, 221 Md. App. at 707-08. Batch-processing is a practice by which a bank organizes transactions "by dollar amount and then debits the largest transactions first and the smallest transactions last." *Id.* "By engaging in batch-processing, a bank increases the likelihood of overdrafts – and of overdraft fees." *Id.* at 708. Margolis claimed that through the use of batch-processing, his bank engaged in unfair and deceptive trade practices in violation of Maryland's Consumer Protection Act. *Id.* The bank filed a motion to dismiss, arguing, among other things, that § 4-303(b) of the Maryland Code (1975, 2013 Repl. Vol.), Commercial Law Article ("CL"), expressly permitted banks to reorder transactions. *Id.* at 712. The trial court agreed, stating in part, that "it appears to me that the Maryland legislature has, . . . said it's okay, when they specifically authorized the bank to go ahead and re-order [the transactions] in any fashion they want." *Id.* at 712-713.

On appeal, Margolis argued that the trial court erred in relying on CL § 4-303(b) because that section does not apply to electronic funds transactions such as debit and ATM transactions. *Id.* at 714. Although we determined that "the court's reliance on the statute was ultimately immaterial," we agreed, stating:

> Whereas the language of section 4-303(b) seems to bestow discretion on the banks to use the posting order of their choice, the courts have interpreted Article 4 of the U.C.C. *not* to apply to ATM and debit

> transactions. *See In re Checking Account Overdraft Litg. (MDL)*, 694 F.Supp.2d 1302, 1315 n. 9 (S.D. Fla. 2010)("[t]he banks rely on [section] 4-303(b) of the UCC . . . . The UCC drafters however did not include transactions initiated by means of a credit card or debit cards in its endorsement of high-to-low posting"); *Hospicomm, Inc. v. Fleet Bank, N.A.*, 338 F.Supp.2d 578, 586 (E.D. Pa. 2004)(holding that "Article 4 does not contemplate electronic withdrawals").
>
> In reaching this conclusion, courts have reasoned that U.C.C. Article 4 applies only to an "item," *see, e.g. Hospicomm*, 338 F.Supp.2d at 586; *Sinclair Oil Corp. v. Sylvan State Bank*, 254 Kan. 836, 843, 869 P.2d 675 (1994), which means an "instrument or a promise or order to pay money handled by a bank for collection or payment." U.C.C. § 4-104(a)(9); *accord* CL § 4-104(a)(9). An "instrument," in turn, means "a negotiable instrument," *see* U.C.C. § 3-104(b); CL § 3-104(b); such as a check. By its terms, therefore, Article 4 does not apply to electronic-funds transactions, such as ATM withdrawals or debit-card or POS purchases. Instead, as other courts have recognized, electronic-funds transactions are governed by the federal Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.* *See e.g.*, *Hospicomm*, 338 F.Supp.2d at 586.

Margolis, 221 Md. App. at 714-15 (footnote omitted).

Our reasoning in *Margolis* remains applicable in the instant case. No provision of Article 4 of Maryland's Commercial Law Article applies to electronic funds transactions such as the ATM withdrawals that are at issue here. Because Maryland has not enacted any law pertaining to electronic fund transfers that provides protection to consumers greater than that provided by the EFTA, the one-year statute of limitations provided by 15 U.S.C. § 1693m. applies. Mr. Marrow filed his complaint on December 27, 2018, well after the one-year period had passed.

In addition, the circuit court's grant of summary judgment was also appropriate because Mr. Marrow failed to report the unauthorized ATM transactions within 60 days of the transmittal of the bank statement showing the alleged unauthorized activity. *See* 15

U.S.C. § 1693g.(a)[7] and 12 C.F.R. 205.6(b)(3).[8] Mr. Marrow had a duty to notify Bank of

[7] Section 1693g.(a) provides, in relevant part:

> In no event, however, shall a consumer's liability for an unauthorized transfer exceed the lesser of –
> (1) $50; or
> (2) the amount of money or value of property or services obtained in such unauthorized electronic fund transfer prior to the time the financial institution is notified of, or otherwise becomes aware of, circumstances which lead to the reasonable belief that an unauthorized electronic fund transfer involving the consumer's account has been or may be effected. Notice under this paragraph is sufficient when such steps have been taken as may be reasonably required in the ordinary course of business to provide the financial institution with the pertinent information, whether or not any particular officer, employee, or agent of the financial institution does in fact receive such information.
>
> Notwithstanding the foregoing, reimbursement need not be made to the consumer for losses the financial institution establishes would not have occurred but for the failure of the consumer to report within sixty days of transmittal of the statement (or in extenuating circumstances such as extended travel or hospitalization, within a reasonable time under the circumstances) any unauthorized electronic fund transfer or account error which appears on the periodic statement provided to the consumer under section 1693d of this title. In addition, reimbursement need not be made to the consumer for losses which the financial institution establishes would not have occurred but for the failure of the consumer to report any loss or theft of a card or other means of access within two business days after the consumer learns of the loss or theft (or in extenuating circumstances such as extended travel or hospitalization, within a longer period which is reasonable under the circumstances), but the consumer's liability under this subsection in any such case may not exceed a total of $500, or the amount of unauthorized electronic fund transfers which occur following the close of two business days (or such longer period) after the consumer learns of the loss or theft but prior to notice to the financial institution under this subsection, whichever is less.

[8] Regulation E, 12 C.F.R. 205.6(b)(3) provides:

(Continued)

America of the unauthorized electronic fund transactions that he alleged began in April 2014 within 60 days after receiving the monthly bank statement that included those transactions. Because he failed to provide such notice, his claim was barred.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

> (b) Limitations on amount of liability. A consumer's liability for an unauthorized electronic fund transfer or a series of related unauthorized transfers shall be determined as follows:
>
> * * *
>
> (3) Periodic statement; timely notice not given. A consumer must report an unauthorized electronic fund transfer that appears on a periodic statement within 60 days of the financial institution's transmittal of the statement to avoid liability for subsequent transfers. If the consumer fails to do so, the consumer's liability shall not exceed the amount of the unauthorized transfers that occur after the close of the 60 days and before notice to the institution, and that the institution establishes would not have occurred had the consumer notified the institution within the 60-day period. When an access device is involved in the unauthorized transfer, the consumer may be liable for other amounts set forth in paragraphs (b)(1) or (b)(2) of this section, as applicable.