

CASE TRANSLATION: GREECE

CASE CITATION:

**Court Decision No. 9460/1999
(9460/1999 ΕΦΑΘ)**

NAME AND LEVEL OF COURT:

Court of Appeals of Athens

INSTRUCTING JUSTICE FOR THE APPEALS

COURT: Kyriakos Georgiou

Banking; sending a card and electronic signature (Personal Identification Number (PIN)) through the national post; loss of items; liability for subsequent unauthorised withdrawals

Summary: Banks. The bank sends a credit card and the Personal Identification Number (PIN) through the national post (Hellenic Post). These items are not delivered to the address, and money is withdrawn from the account by an unauthorised third person. There is no bank liability, contractual or non-contractual, in accordance with articles 914, 919, 288 and 334 of the Civil Code. It is self-evident that there is a tortious liability by the Hellenic Post because it is not an agent of the bank, because the officially assigned postman acted with negligence, since he delivered the registered letters to a person that was not authorized to receive the post.

(Abstract.....)

During the proceedings the attorneys of the parties developed their allegations and asked for the acceptance of everything that is mentioned in their minutes and claims.

After considering the pleadings

Based on the law

From the depositions of the witnesses who were examined during the oral procedure in the court and from the legal documents that are invoked, the court concludes, reliant on the above mentioned evidence, the following facts:

The claimants, with the claim in question states that, on

the 10.7.1995 they entered into a deposit contract with the bank and opened a savings (deposit) joint account,¹ with an account number 101-2101-600073. That on the same date, after filling in the relevant application forms, so to enable the (same) bank to approve the issuance of 2 different (carrying the name of each of them) credit cards that have the name “CASHCARD-DEBIT” (a banking and debit card) for the purpose of automatic transactions with the defendant bank through their ATM machines. That on the same date, the qualified bank’s employee notified them that both the credit cards as well as the PIN numbers would be dispatched to them by mail to their postal address recorded with the bank, and specifically the credit cards would be dispatched in a registered letter and the PINs to be sent by simple mail.

It is well known² that all banks follow the same practice in dispatching the credit cards and the PIN numbers to their clients. Indeed, it was proved by a relevant Hellenic Post document that the registered letters containing the claimants’ credit cards were delivered to the post office on 11.8.1996 to be sent to the claimants, and were registered under the numbers 1154 and 1155.

Those (registered) letters were supposed to be delivered either to the recipients themselves or to a person that is specially authorized to receive the documents, who should show the specific power of attorney to the postman (who is then obliged³ to write down under the signature of the receiver/delegate the phrase ‘*proxy according to document*’). Where neither the person to whom the post is addressed nor the person that is empowered to received the documents are available to received the registered letter when the postman arrives, the postman is then obliged⁴ to issue a notification addressed to the recipient of the letter, to enable the recipient to go to the relevant Post

¹ As predicted in act 5638/1932.

² Article 336 §1 Greek Civil Procedure Code.

³ According to article 2 of the Official Instructions of the Hellenic Post.

⁴ According to both moral conventions as well as the official instructions of the Hellenic Post.

Office to retrieve the mail. Nevertheless, the officially assigned Hellenic Post postman did not deliver the above-mentioned registered (under the numbers 1154 and 1155) letters to the defendants nor to a delegated person, but the postman delivered them to a person that was not authorized to receive the post, who then put them in the safe of the travel agent “PETER TOURS” where he was working. The result was the loss of the registered letter, as all employees of this travel agent had access to the safe into which the mail was put. (Only the letter that was addressed to the one claimant was to be found).

The Hellenic Post detected its employee’s mistake, and he was disciplined and punished with a fine. Meanwhile, the bank dispatched the letters containing the PIN numbers by simple mail and never received them back as ‘undelivered’. This fact leads the court to the conclusion that these letters have also been received by the same (non-authorized) person and were put in the same safe where the lost registered letter had also been put, because a third party, unknown, has illegally removed them from the safe and gained access to the claimants’ deposits in the defendant bank through the ATM machines and withdrew the amount of 3.680.000 GRD (equivalent of 10.799 euros) from the above-mentioned joint account.

After the above data, the following conclusions can be made:

A) Liability of the bank

No liability, contractual or non-contractual [liability in tort, according to articles 914 and 919 of the Greek Civil Code], of the defendant bank is proven.

In particular, its contractual liability for compensation is dismissed, because the bank has fully complied with the agreement with the claimants for the sending of the credit cards and the PIN numbers. There is also no liability of the bank that could be based on the principles of good faith and moral conventions, for the exact reason that the bank has executed its obligation to protect the interests of its clients-claimants. There was no other contractual obligation for the bank, as the aforementioned method of dispatch is common between all banks in Greece and the fulfillment of this

obligation complies with the principle of good faith and moral conventions.⁵

Furthermore, there is no contractual liability of the bank that could be based upon either a breach of the Banking Code of Conduct or a breach of article 8a act 2251/1994 [that predicts liability for the provision of services], because as stated above, the bank bears no liability for the damage incurred, not even by application of article 334 of the Greek Civil Code⁶ (because the letters were sent by post), because the Hellenic Post cannot be – by definition – a delegate of the bank, as the principal should exercise supervision to the delegate for the substantiation of the legal term ‘delegate’ according to article 334 of the Greek Civil Code.

Moreover, the bank’s tort liability is also dismissed. Because the bank acted by complying both with the contractual agreement as well as with the common bank practice and the moral conventions, and so there is no liability based upon either article 919 or article 914 of the Greek Civil Code that can be verified. The bank’s tort liability based upon article 914 of the Greek Civil Code is also dismissed on the ground that the bank’s actions did not attack the claimant’s interests or any protective law and, therefore, no unlawful action nor an illegal action (tort) took place.

Hence, the Court of First Instance correctly dismissed the case as far as the defendant bank is concerned and, therefore, the ruling appeal, where the opposite facts are claimed, must be set aside and dismissed as unsubstantiated on merits. Both parties’ legal costs for the present appeal should be recouped because of the reasonable doubt of the claimants’ case at issue.⁷

B) On the contrary, the non-contractual liability of the defendant Hellenic Post is proven; its liability is self-evident and not as delegate of the bank. This is based on the ground that the Hellenic Post’s employee, the officially assigned postman who is a civil servant and is under the inspection and supervision of his employer, acted with negligence, because he failed to follow the ordinary diligence in transactions, since he delivered the registered letters (that included the credit cards inside) to a non-authorized person with the above-mentioned outcome.

⁵ Article 288 of the Greek Civil Code.

⁶ Article 334 of the Greek Civil Code; liability from a delegate’s mistake.

⁷ Articles 183, 179 of the Greek Code of Civil Procedure.

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His negligent behaviour, which took place during the execution of his duties that were officially assigned to him by his employer – the Hellenic Post-, was the only active cause [:causa adaequata] that leads to the consequential property damage. This (negligent) behaviour is clearly opposed to the moral conventions and the proper delivery of the mail, for the distributed items to be delivered to the right recipient or a properly authorised third person.

For these reasons

The liability in tort of the officially assigned postman is legally substantiated, based upon art 919 of the Greek Civil Code, as a delegate. Consequently, there is also tort liability for the Hellenic Post, as a delegated body.⁸

Therefore, the action should be admitted for the Hellenic post as legally and well founded on merits.

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Michael G. Rachavelias is a member of the editorial board

⁸ Article 922 of the Greek Civil Code.