

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN  
*Justice*

PART 39

RELATIVITY TRAVEL, LTD.

Plaintiff,

- v -

JP MORGAN CHASE BANK, a New York Corporation,  
Defendant.

INDEX NO. 601075/05

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying memorandum decision.

**FILED**  
FEB 16 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: February 14, 2006

Helen E. Freedman, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 39

-----x  
RELATIVITY TRAVEL, LTD., individually  
and on behalf of all others similarly  
situated,

Plaintiff,

Index No. 601075/05

-against-

JP MORGAN CHASE BANK, a New York  
Corporation,

Defendant.  
-----x

**FILED**  
FEB 16 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

**Helen Freedman, J.:**

Plaintiff Relativity Travel, LTD, ("Relativity"), brings a proposed class action against defendant JP Morgan Chase Bank (Chase), claiming deceptive business practices, unjust enrichment and negligent misrepresentation, in connection with the foreign currency conversion rate that Chase applied to withdrawals of foreign currency from automatic teller machines (ATM) outside the United States. Chase moves, pursuant to CPLR 3211(a)(7), for an order dismissing the Complaint for failure to state a cause of action. For the reasons stated below, the motion is granted in part and denied in part.

**1. Background**

Relativity alleges that on four separate occasions in 2004, it withdrew cash from an ATM in Brazil, using a card issued by Chase. Each time, it received the local Brazilian currency and a

receipt indicating that its account had been debited a corresponding U.S. dollar amount.<sup>1</sup>

Relativity alleges that on its next corresponding monthly Account Statement there was a 3.5% discrepancy between the dollar amount indicated on the ATM receipt and the actual dollar amount withdrawn from Relativity's account because Chase imposed a hidden surcharge. Specifically, Relativity alleges that Chase added a 1% fee to the exchange rate at the time of withdrawal and then added another fee of 2.5%. The total 3.5% surcharge appeared as an increased amount on the monthly statement but was not labeled or otherwise disclosed as a separate charge.

Relativity alleges that Chase imposes this surcharge even though it asserts in various documents that the fee for using an ATM to conduct a foreign transaction is \$3.00. The \$3.00 fee is set forth in Chase's "Fee Schedule", but the 3.5% surcharge is not listed in that schedule.

The Complaint further states that Chase's website has a section titled "Chase Banking Card Frequently Asked Questions". It contains a question asking, "Are there any transaction fees?" The answer provided is "A \$3.00 fee will be imposed for ATM withdrawals occurring outside the United States." Relativity

---

<sup>1</sup> The amounts withdrawn were: \$346.38; \$343.41; \$340.37; and \$327.33.

states that unlike the 3.5% surcharge the \$3.00 fee is listed separately on the monthly Account Statement.

The Complaint acknowledges that the 3.5% surcharge is set forth in a document titled "Deposit Account Agreements and Disclosures" (Deposit Account Agreement) which each customer receives when the account is initially opened. However, the Complaint describes this as an "extremely long, prolix and complex document containing over 25 pages of fine print".

Relativity commenced this action in March of 2005 on behalf of itself and other similarly situated customers of Chase. The Complaint sets forth causes of action for: 1) deceptive trade practices; 2) unjust enrichment; and 3) negligent misrepresentation.

Chase now moves to dismiss the Complaint for failure to state a cause of action. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the allegations in the Complaint as true and accord plaintiff the benefit of every favorable inference. Edmond v International Business Machines Corp, 91 NY2d 949, 951 [1998]; Leon v Martinez, 84 NY2d 83, 87-88 [1994].

## **2. Deceptive Trade Practices**

Section 349(a) of the General Business Law prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service..." Section

349 is part of New York's Consumer Protection Act which "was enacted to provide consumers with a means of redress for injuries caused by unlawfully deceptive acts and practices." Goshen v Mutual Life Ins Co of New York, 98 NY2d 314, 323 [2002], citations omitted.

To make out a *prima face* claim under General Business Law § 349(h), a plaintiff must show the challenged act was consumer-oriented; that it was deceptive or misleading in a material way; and that plaintiff has suffered injury. Stutman v. Chemical Bank, 95 NY2d 24 (2000) citing Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 [1995]. The test is whether "the allegedly deceptive acts, representations or omissions" would be "misleading to 'a reasonable consumer.'" Id., quoting Oswego, 85 NY2d at 26; citing, Karlin v IVF America, Inc., 93 NY2d 282 [1999]; Gaidon v Guardian Life Insurance Co of America, 94 NY2d 330 [1999]. "A deceptive practice, however, need not reach the level of common-law fraud to be actionable under section 349." Stutman v Chemical Bank, *supra*.

#### **A. Deceptive or Misleading Act or Practice**

Initially, Chase argues that the Complaint fails to state a cause of action because a Section 349(a) claim may not be based on fully disclosed facts. See, Sands v Ticketmaster-New York, Inc., 207 AD2d 687 [1st Dept. 1994]. Chase argues that it cannot be engaged in any deceptive or misleading practices because it is

undisputed that the 3.5% surcharge is specifically set forth in the Deposit Account Agreement which Relativity received upon opening the account.<sup>2</sup>

Relativity acknowledges that the surcharge is contained in the Deposit Account Agreement but argues that the Deposit Account Agreement is so long and complex that most consumers will not read it; those who do read it will not realize that the surcharge is set forth in the document. Relativity further argues that, in any event, Chase's other practices mislead consumers to believe that there is only a \$3 charge for foreign currency transactions using ATMs.

Specifically, Relativity points to Chase's website which states forth that a \$3.00 fee will be imposed for ATM withdrawals occurring outside the United States, but does not mention the 3.5% surcharge. Relativity notes that the \$3.00 fee is listed separately on the monthly Account Statement, but the 3.5% surcharge is not listed. Thus, consumers are allegedly led to believe only that a \$3.00 fee will be applied.

The Complaint also asserts that Chase's customer service representatives are unaware of the existence of the surcharge, and are, thus "unable to explain to the customer how the

---

<sup>2</sup> Chase does not include a copy of the Deposit Account Agreement in support of its motion.

conversion rate reflected in the Account Statement is arrived at." (Complaint at ¶ 19).

"A 'deceptive act or practice' is a representation or omission 'likely to mislead a reasonable consumer acting reasonably under the circumstances' ". Zurakov v Register.Com, Inc, 304 AD2d 176 [1st Dept 2003], quoting Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25-26 [1995]. Here, assuming the truth of the allegations in the Complaint, Relativity has sufficiently alleged that consumers would be misled by Chase's practices with respect to the 3.5% surcharge.

Relativity has adequately alleged that the Deposit Account Agreement was deceptive despite the fact that the surcharge is described in that agreement. The issue is not simply whether the Deposit Account Agreement was deceptive, but whether Chase's overall business practices in connection with the charge were deceptive. See, Gaidon, 94 NY2d 330, 345 [1999]; Sims v First Consumers Nat Bank, 303 AD2d 288 [1st Dept 2003]. Viewing Chase's practices as a whole including the failure to list the surcharge on the Account Statement or on Chase's website and the failure to properly inform its representatives about the surcharge are sufficient, if proved, to establish a *prima facie* case.

## **B. Actual Injury**

Chase argues that the §349 claim must be dismissed because Relativity has failed to allege that it suffered an actual injury. In order to state a claim under GBL §349, a plaintiff must allege an "actual" injury to recover under the statute, although this does not necessarily require a demonstration of pecuniary harm. Stutman v Chemical Bank, 95 NY2d 24, 29 [2000], citations omitted; Smith v Chase Manhattan Bank, USA, NA, 293 AD2d 598 [2d Dept 2002].

In Stutman, 95 NY2d 24 (2000), the plaintiffs' allegation "that they were forced to pay a \$275 fee that they had been led to believe was not required" was sufficient to fulfill the requirement of pleading actual injury. Id.

Here, the Complaint alleges that Relativity was injured because it paid more for its foreign currency than what was required by the conversion rate applicable at the time of each transaction. Relativity's allegation that it was injured by having been charged an undisclosed additional amount on foreign currency transactions is sufficient to state a claim. See, Stutman v Chemical Bank, supra at 29; Bildstein v MasterCard International, Inc, 2005 WL 1324972 [SDNY 2005].

## **C. Materially Misleading**

Chase argues that the GBL §349 claim must be dismissed because the Complaint fails to allege that Chase's conduct was

"materially misleading". Specifically, Chase contends that the Complaint fails to set forth a "clear allegation" that if there had been better disclosure: 1) Relativity would have moved its business to a different bank; 2) a cheaper source of foreign currency was available to Relativity; or 3) that Relativity would have availed itself of such currency.

The Complaint alleges that the failure to adequately disclose the surcharge was material in several ways. First, the 3.5% surcharge directly affects the cost of each ATM foreign transaction. Second, customers are prevented from making informed decisions about making foreign currency exchanges or for "shopping" for more favorable terms. Chase's argument that the Complaint fails to make a showing that the deceptive practices were materially misleading is unpersuasive.

### **3. Unjust Enrichment**

Relativity's second cause of action alleges that Chase was unjustly enriched by collecting and retaining the Surcharge. Chase argues that this claim must be dismissed because the transaction at issue was governed by an express contract.

It is well-settled that a party cannot recover under a theory of unjust enrichment when the dispute between the parties is governed by a valid contract. See, Paragon Leasing, Inc v Mezei, 8 AD3d 54 [1st Dept 2004], citing Feigen v Advance Capital Mgt Corp, 150 AD2d 281, 283 [1st Dept 1989]; Neos v Lacey, 2 AD3d

812 [2d Dept 2003]. Inasmuch as the transaction at issue, i.e., the foreign currency surcharge, is governed by a contract, the Deposit Account Agreement, and Relativity has not opposed Chase's motion to dismiss this claim, the second cause of action is dismissed.

#### **4. Negligent Misrepresentation**

The third cause of action is for negligent misrepresentation. Relativity alleges that the documents and other information provided by Chase to its customers contained material misstatements and omissions in connection with the fees and surcharges related to use of a Chase ATM card to conduct a foreign transaction. It further alleges that it relied on these misstatements and omissions to its detriment.

"A claim for negligent misrepresentation can only stand in the presence of a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another." United Safety of America, Inc v Consolidated Edison Co of New York, Inc, 213 AD2d 283 [1st Dept 1995], citing Delcor Labs v Cosmair, Inc, 169 AD2d 639 [1st Dept 1991]. "A simple arm's length business relationship is not enough." Id, citing Andres v LeRoy Adventures, 201 AD2d 262 [1st Dept 1994]; see, Busino v Meachem, 270 AD2d 606 [3d Dept 2000].

Here, Relativity does not allege any facts to support the existence of a special relationship of trust or confidence with

Chase. At most, the Complaint sets forth facts demonstrating the existence of an arm's length business relationship between the parties. Therefore, this cause of action is dismissed.

Accordingly, it is

ORDERED that defendant's motion to dismiss the Complaint is granted to the extent that the causes of action for unjust enrichment and negligent misrepresentation are dismissed; and it is further

ORDERED that the motion is otherwise denied.

DATED: February 14, 2006

ENTER:



Helen E. Freedman, J.S.C.

**FILED**  
**FEB 16 2006**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**