

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

PRESENT: BERNARD J. FRIED PART 60

Justice

HON. BERNARD J. FRIED

-----X  
Bayerische Hypo-Und Vereinsbank AG,

Index No. #602761/2009

Plaintiff,

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

-against-

MOTION SEQ. NO. #001

HSBC BANK USA, N.A., DEUTSCHE BANK AG and

MASHREQBANK PSC

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

Defendants.  
-----X

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

This motion is decided in accordance  
with the attached memorandum decision.

Dated: 12/19/2011

Bernard J. Fried

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST [ ] REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER/JUDG.

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

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 60

-----X  
BAYERISCHE HYPO-UND VEREINSBANK AG,

Plaintiff,

Index No.: 602761/09

-against-

HSBC BANK USA, N.A., DEUTSCHE BANK AG  
and MASHREQBANK PSC,

Defendants.  
-----X

FOR PLAINTIFF:

Quinn Emanuel Urquhart  
Oliver & Hedges, LLP  
51 Madison Avenue, 22<sup>nd</sup> Fl.  
New York, New York 10010  
(Jake M. Shields)

FOR DEFENDANT HSBC:

Locke Lord Bissell &  
Liddell, LLP  
Three World Financial Center  
New York, New York 10281  
(Gregory T. Casamento)

FOR DEFENDANT DEUTSCHE BANK

Bingham McCutchen, LLP  
399 Park Avenue  
New York, New York 10022-4689  
(Joshua Dorchak)

FOR INTERVENOR

Holland 7 Knight, LLP  
31 West 52<sup>nd</sup> Street  
New York, New York 10019  
(H. Barry Vasios)

**FRIED, J.:**

Defendant HSBC Bank USA, N.A. (HSBC) moves, pursuant to CPLR 3211 (a) (7),  
to dismiss the complaint asserted as against it.

The International Banking Corporation, BSC (TIBC)<sup>1</sup> held bank accounts at both plaintiff Bayerische Hypo-Und Vereinsbank AG (HVB) in London and defendant HSBC in New York and, during the relevant period, owed money to both entities. On or about May 13, 2009, HVB sent a letter to TIBC informing TIBC that it owed HVB an outstanding obligation of approximately \$8,961,000.00 and other obligations that would soon become due. This letter further informed TIBC that if the debt were not satisfied by May 18, 2009, HVB would exercise its contractual right to satisfy the debt with funds from TIBC's accounts at the bank, and that HVB would be suspending TIBC's accounts at the bank because of the unpaid debts. According to the agreement between HBC and TIBC, TIBC had granted HVB a lien on its accounts.

On or about May 18, 2009, HVB enforced its lien on TIBC's accounts, and on May 19, 2009, to recover the funds owed to it by TIBC, sold Euros from TIBC's HVB account to itself and, in exchange, sold US dollars held by HVB to TIBC. The dollars sold by HVB to TIBC were placed by HVB in TIBC's HVB account.

According to a standing order, TIBC was required to have all dollars deposited into its HVB account wire transferred to TIBC's HSBC account. As a result, on May 20, 2009, a total of \$8,970,707.75 was electronically transferred from TIBC's HVB account to TIBC's HSBC account instead of to HVB's account. At the time of this transfer, TIBC's HSBC account was overdrawn by \$6.6 million. HSBC offset the \$6.6 million that TIBC owed it, leaving a net balance of approximately \$2.3 million.

---

1

The bankruptcy court administrator for TIBC has been permitted to intervene in this action

The day after the wire transfer, May 21, 2009, HSBC received a SWIFT message from JP Morgan Chase (JP Morgan), the intermediary bank, which stated:

“Attention investigations regarding our chips.  
SSN 0251949 for \$8,961,000.00/USD dated 5/20/2009.  
Our transaction reference number 3021100141FS.  
Please urgently refund as remittur requests return  
of funds. Cancellation of the subject payment order  
and .. return of amount thereof is sought at the  
request of our customer and is sought without  
any indemnification or other liability on the ..  
part of JP Morgan Chase NA. Please consider this  
our initial request for unjust enrichment. Please  
take care to avoid duplication. ...”

Motion, Ex. A.

HSBC responded to JP Morgan’s SWIFT message on the same day, writing:

“We have contacted the International Banking Corp.  
BSC 10/F Bahrain Commercial Complex Avenue for debit  
authority. Upon receipt of their reply, we shall  
revert. Please quote our field 20 reference in field  
21 on our subsequent correspondence. Kind regards,  
Ryesha Clayton MT Investigations HSBC ...”

Motion, Ex. B.

When HSBC did not receive a response from TIBC, it again contacted JP Morgan in a SWIFT message, stating:

“We have contacted the International Banking Corp. BSC  
for debit authority on several occasions. However, we  
have been unable to obtain debit authorization. We  
respectfully request that you contact the International  
Banking Corp. BSC ... directly.”

Motion, Ex. C.

On May 21, 2009, HVB sent a letter to HSBC stating:

“We refer to the above SWIFT reference and write to inform you that the Transfers were made in error. As you are aware all external transfers to and from TIBC accounts require that prior consultation be held with the Central Bank of Bahraian (‘CBB’). Such consultation did not take place prior to, and in respect of, the Transfers. Moreover TIBC did not request the Transfers.

Noting that the Transfers were made in error we instruct you to remit the entirety of the funds the subject of the Transfers to our account number 0011915089 with JP Morgan Chase New York with the earliest possible value date.

Given the level of sums involved in the erroneous Transfers, we request that you contact Brian Lawrence +44 20 7826 1751 at Bayerische Hypo-Und Vereinsbank, AG, London Branch without delay to confirm receipt of this letter and that the above remittance instruction has been actioned.”

Motion, Ex. G.

Prior to this transfer, on May 13, 2009, Deutsche Bank AG (Deutsche Bank) initiated an action against TIBC, seeking approximately \$74 million in damages, (#601471-2009), and Deutsche Bank obtained a temporary restraining order (TRO) on May 13, 2009 preventing the transfer of TIBC’s assets pending resolution of that case. That TRO restrained and enjoined HSBC from transferring or paying any assets of TIBC.

On May 28, 2009, HSBC and Deutsche Bank entered into a stipulation regarding the \$8,970,707.75 that had been credited to HSBC’s account a week earlier, allegedly without any notification to HVB. Pursuant to this stipulation, HSBC provisionally agreed that HSBC would offset the amount owed to it by HVB from this transfer, but the remainder of the transfer would remain subject to the TRO.

On July 6, 2009, TIBC sent a letter to HVB confirming that TIBC never instructed HVB to transfer the funds into its HSBC account. Complaint, ¶ 38. On July 21, 2009, HVB sent a demand letter to HSBC demanding the return of the transferred funds, but HSBC refused to remit the money.

The complaint asserts three causes of action against HSBC: (1) a declaratory judgment that the transfer to HSBC's account belongs to HVB; (2) unjust enrichment by offsetting the money HVB allegedly owes to HSBC; and (3) conversion of the funds so offset.

It is HSBC's contention that the "discharge for value" rule allows it to retain the funds that it has used to offset the amount owed to it by TIBC.

At the time of the transfer, TIBC owed money to HSBC and, prior to receiving any notice of error, HSBC used a portion of the funds to offset that debt. HSBC asserts that the SWIFT notices and letter to it from JP Morgan do not constitute notice that the transfer was made in error. Specifically, HSBC points out that the SWIFT message of May 21, 2009, only states that a remittur is requested, but does not say that the transfer was mistakenly made.

Based on the documentary evidence, HSBC contends that, pursuant to the discharge for value rule, it is entitled to retain the funds and the complaint should be dismissed as asserted against it. Further, HSBC maintains that a declaratory judgment is procedurally inappropriate because HVB has adequate alternative remedies. In addition, HSBC claims that HVB never owned the money claimed in this action, but only had a contractual right to offset amounts due to it from TIBC from a TIBC account held at HVB.

In opposition, HVB contends that HSBC had notice that the transfer was made in

error, long before it could have detrimentally relied on the transfer, and, regardless, it did not owe any money to HSBC. In addition, HVB states that, pursuant to its SWIFT message, HSBC agreed to revert the funds, but has failed to do so. Further, HVB argues that the discharge for value doctrine is inapplicable to the case at bar because: (1) HVB made the transfer to TIBC's account held at HSBC, not to HSBC directly; (2) HVB does not owe any debt to HSBC; and (3) HSBC was immediately put on notice of the error. Moreover, HSBC disregarded the TRO which was in place at the time that it used the transferred funds as an alleged offset.

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

\* \* \*

(7) the pleading fails to state a cause of action; ...."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 (1<sup>st</sup> Dept 1999). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1977); *Salles v Chase Manhattan Bank*, 300 AD2d 226 (1<sup>st</sup> Dept 2002).

HSBC's motion to dismiss is denied, because questions of fact exist which preclude dismissing the action.

HSBC contends that the “discharge for value” rule applies to the instant matter and requires dismissal of HVB’s claims asserted as against it. The “discharge for value” rule is applicable to wire transfers of money, and states:

“[w]hen a beneficiary receives money to which it is entitled and has no knowledge that the money was erroneously wired, the beneficiary should not have to wonder whether it may retain the funds; rather, such a beneficiary should be able to consider the transfer of funds as a final and complete transaction, not subject to revocation.”

*Banque Worms v BankAmerica International*, 77 NY2d 362, 373 (1991).

However, the documents presented indicate that both TIBC and HVB received some notification that the transfer was made in error. On May 13, 2009, HVB wrote to TIBC that, if payment were not made, HVB would execute its contractual lien on TIBC’s funds on May 18, 2009, which HVB did. Therefore, TIBC received some written indication that funds would be withdrawn from its account, not deposited therein. Similarly, on May 21, 2009, the day after the transfer, HVB notified HSBC that the funds were not to be deposited, and HSBC wrote back to HVB that it would remit the funds when notified by TIBC. In addition, during this period, HSBC was restrained from transferring any moneys out of TIBC’s accounts. Therefore, a question of fact exists as to whether TIBC and HSBC received sufficient notification of mistake, precluding application of the “discharge for value” rule.

If the “discharge for value” rule is eventually found to be inapplicable, HSBC would have to return the funds pursuant to the mistake of fact doctrine.

“The mistake of fact doctrine provides that a party who pays money, under a mistake of fact, to one who is not entitled to it should, in equity and good conscience,

be permitted to recover it back, even if the mistake is due to the negligence of the payor.”

*A.I. Trade Finance, Inc. v Petra Bank*, 1997 WL 291841, \*3, 1997 US Dist LEXIS 7662, \*9 (SD NY 1997).

Unless the payee has detrimentally relied on the transfer, which has not been alleged in this motion, pursuant to the mistake of fact doctrine, the funds must be returned to HVB. *Collins v HSBC Bank USA*, 305 AD2d 361 (2d Dept 2003); *Bank of New York v Spiro*, 267 AD2d 339 (2d Dept 1999); *Manufacturers Hanover Trust Company v Chemical Bank*, 160 AD2d 113 (1<sup>st</sup> Dept 1990).

As a consequence of the foregoing, questions of fact exist regarding the effect of the notices sent to TIBC and HSBC which preclude dismissal of HVB’s cause of action for unjust enrichment prior to discovery taking place.

Moreover, at this point in the proceedings, HVB has sufficiently pled that it had a possessory interest in the funds and that HSBC has retained dominion over those funds so as to preclude dismissing HVB’s cause of action for conversion. *See generally Dobroski v Bank of America, N.A.*, 65 AD3d 882 (1<sup>st</sup> Dept 2009).

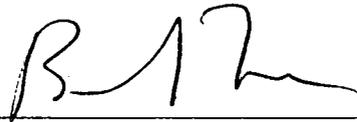
Lastly, in the exercise of my discretion, I decline to dismiss HVB’s cause of action for a declaratory judgment at this pre-discovery stage of the proceedings.

Based on the foregoing, it is hereby

ORDERED that defendant HSBC Bank USA, N.A.'s motion to dismiss the complaint asserted as against it is denied.

DATED: 12/19/2011

ENTER:



J.S.C.

**HON. BERNARD J. FRIED**