

DMDB Adults, Inc. v Bank of Am. Corp.

2010 NY Slip Op 32815(U)

October 7, 2010

Sup Ct, NY County

Docket Number: 103977/09

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK

PART 39

Justice

DMDB ADULTS

INDEX NO. 103977/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

BANK OF AMERICA

The following papers, numbered 1 to _____ were read on the motion to/for _____

FILED

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits _____

OCT. 12 2010

Answering Affidavits -- Exhibits _____

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Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with the accompanying memorandum decision.

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Dated: 10/7/10

[Signature]
BARBARA R. KAPNICK 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: IA PART 39

-----x
DMDB ADULTS, INC. and DMDB KIDS, INC.,

Plaintiffs,

-against-

BANK OF AMERICA CORP. d/b/a BANK OF
AMERICA,

Defendant.

-----x
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 103977/09
Motion Seq. No. 001

Plaintiffs DMDB Adults, Inc. ("DMDB Adults") and DMDB Kids, Inc. ("DMDB Kids") both maintained corporate checking accounts at defendant Bank of America Corp. d/b/a Bank of America (the "Bank") in Englewood, New Jersey. Plaintiffs' principals, Dean Hecker and William Hecker, were the only authorized signatures on the accounts.

Plaintiffs claim that their then bookkeeper, Debra Haber ("Haber"), without their knowledge and consent, wrongfully and illegally diverted and took possession of various checks which she made payable to "cash."

According to plaintiffs, the defendant Bank wrongfully paid Haber (a) the sum of \$780,226.33 on forged and fraudulent checks issued from the account of DMDB Adults during the period from January 9, 2005 through December 23, 2008, and (b) the sum of \$171,457.76 on forged and fraudulent checks issued from the account

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of DMDB Kids during the period September 7, 2005 through December 23, 2008, without making any inquiry.

Plaintiffs' Complaint seeks to recover compensatory and punitive damages against the Bank for: (i) breach of contract/fiduciary duty (first cause of action); (ii) breach of its duty to act with reasonable care in safeguarding the interest of its depositors (second cause of action); (iii) conversion (third cause of action); and (iv) fraudulent conduct and false representations (fourth cause of action).

Defendant now moves for an order pursuant to CPLR 3212(b) granting summary judgment dismissing plaintiffs' claims against it on the ground that defendant has established its defenses as a matter of law based, *inter alia*, on the applicable provisions of the UCC (specifically, UCC 4-406) and the contract between the parties, and based on plaintiffs' failure to state a cause of action against it.

Plaintiffs oppose the motion and cross-move for summary judgment, arguing that: (a) Bank of America's failure to exercise ordinary care in paying the forged checks prevent it from invoking

UCC 4-406; and (b) plaintiffs have a valid claim for conversion against the Bank.¹

Based on the papers submitted and the oral argument held on the record on July 14, 2010, defendant's motion is granted to the extent of dismissing plaintiffs' claims based on checks paid prior to December 2007 on the ground that plaintiffs are precluded from asserting said claims pursuant to NJ UCC 4-406(f).

Defendant further argues that the one-year rule set forth in Section 4-406(f) was varied by the terms of the relevant account agreements to the shorter period of 60 days, as permitted under UCC 4-103.

This Court finds that there are issues of fact as to whether or not DMDB Adults, which originally opened its account with a predecessor bank, received the Bank of America depository agreement with respect to that account. Therefore, that portion of defendant's motion seeking to dismiss additional claims brought by DMDB Adults on the ground that they are barred by the 60-day contractual period is denied as premature.

¹ Both sides cite to New Jersey law in support of their respective positions.

There is no dispute, however, that Dean Hecker and William Hecker both signed the signature card for the DMDB Kids account, by which they agreed to be bound by Bank of America's account agreement. Thus, the shorter 60-day period applies to that account, and DMDB Kids is precluded from asserting any claims against defendant for checks which were not reported to the Bank within 60 days, without regard to care or lack of care of either DMDB Kids or the Bank. See, UCC 4-406(f).

Plaintiffs' cross-motion for summary judgment and that portion of defendant's motion seeking to dismiss the remaining claims as time barred based on checks not barred by the one-year rule (or with respect to DMDB kids, the 60-day rule) are denied as this Court finds that there are issues of fact as to whether or not defendant exercised ordinary care in paying those items. See NJ UCC 4-406(e); *Travelers Indem. Co. v Good*, 325 NJ Super 16 (1999).²

That portion of defendant's motion seeking to dismiss plaintiffs' third cause of action for conversion for failure to state a cause of action is denied, since a depository bank may be

² In *New Jersey Steel Corp. v Warburton*, 139 NJ 536 (1995), a case cited by plaintiffs in support of their cross-motion, the New Jersey Supreme Court found that the defendant bank had a duty to physically examine the endorsement on individual checks, a practice which was allegedly not in place in the instant case. However, that case is not dispositive since it was based on an earlier version of the UCC. Moreover, that case was a different procedural posture since it involved a decision after a full trial.

held strictly liable under the UCC for conversion. See, *Leeds v Chase Manhattan Bank, N.A.*, 331 NJ Super 416 (App. Div. 2000).

That portion of defendant's motion seeking to dismiss plaintiffs' fourth cause of action sounding in fraud is granted, as this Court finds that the Complaint fails to allege the purported fraud with sufficient particularity.

A status conference shall be held in IA Part 39, 60 Centre Street, Room 208 on November 17, 2010 at 9:30 a.m. in order to coordinate all outstanding discovery, including the depositions of the parties.

This constitutes the decision and order of this Court.

Dated: October 7, 2010



BARBARA R. KAPNICK
J.S.C.

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