

Franklin Credit Mgt. Corp. v Providian Fin. Corp.

2004 NY Slip Op 30339(U)

February 4, 2004

Supreme Court, New York County

Docket Number: 601297-03

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

0601297/2003

FRANKLIN CREDIT MANAGEMENT

vs
PROVIDIAN FINANCIAL CORP

INDEX NO. 601297-03

MOTION DATE _____

MOTION SEQ NO 001

MOTION CAL NO _____

SEQ 1

DISMISS ACTION

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

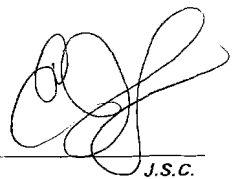
Cross-Motion: Yes No

and cross motion

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached decision*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 2/4/04



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 17

-----X
 FRANKLIN CREDIT MANAGEMENT CORPORATION,

Plaintiff,

against

Index No.: 601297/2003

PROVIDIAN FINANCIAL CORPORATION and
 RICARDO BROWN,

Defendants.

-----X
 EMILY GOODMAN, J.S.C.:¹

In this action, a financial services corporation seeks to recover from its former employee and the employee's credit card company the amount of \$31,312.51, for checks that the employee had allegedly fraudulently endorsed to pay off his credit card debt. Pursuant to CPLR 3211, defendant Providian Financial Corporation moves for dismissal from this action on the grounds of statute of limitations and failure to state a cause of action. Defendant Ricardo Brown cross-moves to dismiss the action as against him on the same grounds. This decision addresses both motions

BACKGROUND

Defendant Ricardo Brown, a former employee of plaintiff Franklin Credit Management Corporation (Franklin), allegedly indorsed six checks made payable to Franklin to himself from August 1998 through March 1999. Brown presented those checks to defendant Providian Financial Corporation (Providian) to pay off his credit card debt with Providian

¹The court would like to thank court attorney Richard Tsai for his invaluable contribution in the preparation of this decision.

On April 24, 2003, Franklin commenced this action, alleging that Providian was grossly negligent in accepting those checks, that it had acted in bad faith, that it violated its duties under Article 3 of the Uniform Commercial Code, and that it was unjustly enriched. Franklin also alleged causes of action against Brown for conversion and unjust enrichment, seeking a judgment in the amount of the indorsed checks, along with punitive damages.

While a decision on the motion and cross motion to dismiss was pending, Franklin amended the complaint, dropping the first cause of action against Providian, based on allegations of gross negligence, and the fourth cause of action against Brown, for conversion. Instead, the amended complaint asserts a new cause of action against Brown for breach of fiduciary duty. As a procedural matter, the court will treat defendants' motion and cross motion to dismiss as directed to the amended complaint, as the defendants have shown such an intention by submitting a reply following Franklin's amended complaint (see Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35, 38 [1st Dept 1998]).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001]).

Providian's Motion to Dismiss

Providian cites Getty Petroleum Corp. v American Express Travel Related Servs. Co. (90 NY2d 322 [1997]) as authority for dismissing Franklin's causes of action alleging commercial

bad faith and violations of UCC Article 3. In Gettv Petroleum Corn., an employee of Getty Petroleum forged indorsements of checks payable to Getty's deaclrs and submitted them to American Express in payment of the employee's own credit card debt. The Court held that American Express, as transferee of the checks, could invoke UCC 3-405 (1) (b), the fictitious payee rule, as a defense to liability on the checks.

Ordinarily, the maker or drawer of a check is not liable on a forged instrument (Gettv Petroleum Corn., 90 NY2d at 325). An exception to this principle is the ficlitious payee rule which provides that “[a]n indorsement by any person in the name of a named payee is effective if * * * a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument” (UCC 3-405 [1] [b]). Under the fictitious payee rule, “[t]he forged indorsement * * * is treated as if it were the actual indorsement of the stated payee, and payment by a transferee in the transactional chain is proper” (Gettv Petroleum Corn., 90 NY2d at 327). The rule shifts the risk of loss to the drawer of the forged instrument, because the drawer is normally in a better position either to prevent such forgeries or to cover the loss (Guardian Life Ins. Co. of Am. v Chemical Bank, 94 NY2d 418, 421-422 [2000]). However, “there is a ‘commercial bad faith’ exception to [the fictitious payee rule], applicable when the transferee ‘acts dishonestly--where it has actual knowledge of facts and circumstances that amount to bad faith, thus itself becoming a participant in a fraudulent scheme’” (Gettv Petroleum Corp., 90 NY2d at 331 [citation omitted]). Here, Providian maintains that Franklin does not allege, and cannot prove, that Providian had actual knowledge of Brown's alleged fraud.

Providian's reliance on the fictitious payee rule and the accompanying case law is misplaced. Though, as in Gctty, the signature of the payee was forged, UCC-3-405 (1) (b) very

clearly provides that the person who forged the signature must be an agent or employee of the maker or drawer of the instrument. As Franklin points out, Brown was neither an agent nor employee of the maker or drawer (i.e., Franklin's customers) of the instruments that were fraudulently endorsed. Rather, Brown is the employee of the payee (Franklin). Thus, Getty Petroleum Corp. is inapposite. Although Providian makes an appealing argument that Franklin is similarly in a better position to prevent this forgery, it is essentially asking the court to apply the broader rules of Section 3-405 of the 1990 amendments to Article 3 of the UCC, which New York has still not adopted (see McKinney's Cons Laws of NY, Book 62½, UCC Art 1 to Art 2, pt 4, 2004 Pocket Part, at 2-3 [table of jurisdictions adopting UCC]; see e.g. Lawyers' Fund for Client Protection of State of N.Y. v Bank Leumi Trust Co. of N.Y., 94 NY2d 398,406 [2000][New York has not adopted revised UCC 3-420]).²

Therefore, at this time, Providian has not raised legal arguments that would warrant dismissal of Franklin's causes of action for commercial bad faith and violations of UCC Article 3.

However, Franklin fails to state a cause of action against Providian for unjust enrichment. A cause of action for unjust enrichment is grounded in quasi contract, based on equitable principles that a person shall not be allowed to enrich himself or herself unjustly at the expense of another (Waldman v Englishtown Sportswear, Ltd., 92 AD2d 833, 836 [1st Dept 1983]). Here, Franklin does not have any relationship with Providian that could give rise to a quasi-contractual duty to return funds. Because the complaint alleges that Brown had endorsed the six checks and

²Section 3-405 of the 1990 amendments to Article 3 of the UCC is entitled "Employer's Responsibility for Fraudulent Indorsement by Employee"

used them “for his own benefit” (Amended Complaint ¶ 41), Providian was not enriched by Brown’s allegedly fraudulent acts (see Baratta v Kozlowski, 94 AD2d 454, 465 [2d Dept 1983]). Also, there is no unjust enrichment when Providian, as a creditor of Brown, has a right to retain money from Brown (900 Unlimited, Inc. v MCI Telecoimunications Corn., 215 AD2d 227, 227 [1st Dept 1995]).

Therefore, the third cause of action of the amended complaint is dismissed.

Brown’s Cross Motion

In large part, Providian’s amended complaint renders academic Brown’s original arguments in favor of dismissal. Providian has dropped the cause of action for conversion, which Brown claims was time-barred. Franklin no longer pleads its claim for punitive damages as a separate cause of action. Brown’s remaining arguments are that the causes of action for breach of fiduciary duty and unjust enrichment are time-barred, fail to state a cause of action and are duplicative.

“Generally, the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought” (Kaufman v Cohen, 307 AD2d 113, 118 [1st Dept 2003]). Where the relief sought for the breach of fiduciary duty is equitable, the six year statute of limitations of CPLR 213 (1) controls (ibid.). Where the relief sought for the breach of fiduciary duty is for money damages only, the three year statute of limitations of CPLR 214 (4) controls because courts have viewed such actions as alleging injury to property (ibid.). Notwithstanding the above, where a breach of fiduciary duty claim is based on allegations of fraud, the claim is subject to a six year statute of limitations (ibid.).

In determining the appropriate statute of limitations to be applied here, Kaufman provides

some guidance. In that case, the Court decided whether a three-year or a six-year statute of limitations applied to a claim by two partners against a third partner for breach of fiduciary duty arising from the misappropriation of a partnership interest (ibid. at 115). Around the time that a commercial property owned by the partnership was in foreclosure, one partner, Irwin Cohen, informed the other two partners that the property was not worth salvaging and that the partnership should allow the interest to lapse (ibid.). However, at that time, Cohen was allegedly secretly agreeing with new partners to re-acquire the property out of foreclosure, at a discount (id. at 115-116). The partnership allowed the foreclosure to proceed and Cohen re-acquired the property (id. at 116). In determining the applicable statute of limitations, the Court noted that the complaint demanded both legal and equitable relief and therefore, it was not clear whether a three-year or six-year statute of limitations should apply (id. at 118). However, given that the plaintiff alleged all the elements necessary to support a fraud claim (i.e., a representation of material fact, the falsity thereof, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and injury) and, the allegations of fraud were not merely incidental to the breach of fiduciary claim, the Court applied a six year statute of limitations (id. at 119-120).

Applying the principles of Kaufman here, the Court determines that the application of a three year statute of limitations is appropriate. Franklin does not allege a fraud claim against Brown which would support the application of a six year statute of limitations in connection with its breach of fiduciary claim. In fact, Franklin could not sustain a fraud claim because it could not show that it relied on any misrepresentation made by Brown to it when the checks were fraudulently endorsed to Providian, without Franklin's knowledge. Moreover, Franklin seeks

money damages, not equitable relief, which dictates the application of a three year statute of limitations. Accordingly, Plaintiff's fourth cause of action of the amended complaint For breach of fiduciary duty against Brown is dismissed as Lime-barred.

Plaintiff's unjust enrichment claim, however, which is governed by a six year statute of limitations, is not time-barred (Natimir Rest. Supply v London 62 Co., 140 AD2d 261 [1st Dept 1988]; Lawyers' Fund for Client Protection of State of N.Y. v Gateway State Bank, 239 AD2d 826 [3d Dept 1997]). Although Franklin originally asserted claims for both conversion and unjust enrichment, arising out of the same facts, the amended complaint reflects a permissible choice to waive the conversion claim and proceed on a theory which has a longer limitations period (Gold Sun Shipping v Ionian Transp., 245 AD2d 420, 421 [2d Dept 1997]).

Further, contrary to Brown's arguments, Franklin states a valid claim against Brown for unjust enrichment. As the complaint alleges, Brown fraudulently indorsed to himself **six** checks payable to his employer, and used them to pay his own credit card debt. Under the alleged circumstances, Brown was unjustly enriched by virtue of the check forgery, and as between him and Franklin, an innocent party, Brown would be liable for the loss (see A.J. Woody Ltd. v Commercial Bank of New York, 301 AD2d 476,477 [1st Dept 2003]). The issue of whether the breach of fiduciary duty claim is duplicative of the unjust enrichment claim is moot given that the Court has dismissed the breach of fiduciary duty claim as time-barred.

Lastly, Franklin has not alleged any basis for entitlement to attorney's fees under these causes of action against Brown, and therefore, that part of the complaint is dismissed (Hooper Assoc. Ltd v AGS Computers, 74 NY2d 487,491 [1989][prevailing party not entitled attorneys' fees unless authorized by agreement or statute]).

Accordingly, it is

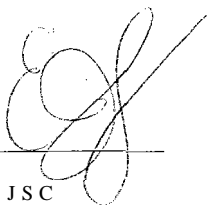
ORDERED that the motion to dismiss by defendant Providian Financial Corp. is granted only to the extent that plaintiff's third cause of action of the amended complaint for unjust enrichment is dismissed as against Providian Financial Corp, and is otherwise denied; and it is further

ORDERED that the cross motion to dismiss by defendant Ricardo Brown is granted only to the extent that plaintiff's fourth cause of action of the amended complaint for breach of fiduciary duty is dismissed as against Brown and that part of plaintiff's prayer for relief seeking attorneys fees against Brown is stricken from the amended complaint, and the cross motion is otherwise denied; and it is further

ORDERED that defendants shall serve answers to the amended complaint within 10 days of service of a copy of this order with notice of entry

Dated: February 4, 2004

ENTER:

A handwritten signature in black ink, appearing to read 'EJG', is written over a horizontal line. The signature is stylized and somewhat cursive.

J S C

EMILY JANE GOODMAN