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| <b>Brian E. Weiss D.D.S., P.C. v Chase Manhattan Bank</b>  |
| 2006 NY Slip Op 30009(U)   |
| December 13, 2006  |
| Supreme Court, New York County   |
| Docket Number: 0603195/2002  |
| Judge: Jane S. Solomon   |
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SCANNED ON 12/18/2006  
SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: **JANE S. SOLOMON**

PART 55

Index Number : 603195/2002

WEISS, BRIAN E., D.D.S., P.C.

vs

CHASE MANHATTAN BANK

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 8/17/06

MOTION SEQ. NO. \_\_\_\_\_

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

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

PAPERS NUMBERED

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

1-3

Answering Affidavits -- Exhibits \_\_\_\_\_

4-6

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided together with the motion under sequence #006 in accordance with the annexed memorandum decision and order.*

*N.B. Schedule at end of decision*

**FILED**

DEC 18 2006

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/13/06

*J.S.*  
**JANE S. SOLOMON**

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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 55

-----X  
BRIAN E. WEISS D.D.S., P.C.

Plaintiff,

INDEX NO. 603195/02

-against-

DECISION and ORDER

CHASE MANHATTAN BANK, HAROLD ZOREF  
CPA, P.C., ALTERNATIVE MGMT.  
SERVICES, LESLIE LISNITZER, LUZ M.  
"LUCY" PAULINO, "JOHN DOE",  
"JANE DOE" AND "XYZ" CORP.

Defendant.

-----X  
JANE S. SOLOMON, J.

**FILED**

DEC 18 2006

NEW YORK  
COUNTY OF NEW YORK

In this action to recover damages based on an employee's alleged embezzlement of funds, and the alleged failure of plaintiff's bank, accountant and bookkeepers to discover the employee's alleged wrongdoing, defendants have moved for summary judgment, and for the imposition of discovery sanctions against plaintiff.

Motion sequences #006 and #007 are consolidated for disposition.

In motion sequence #006, defendant JPMorgan Chase, s/h/a Chase Manhattan Bank (Chase), moves to dismiss and sever the complaint against it, claiming that plaintiff's complaint is untimely. In motion sequence #007, defendant Harold Zoref LLP (Zoref), incorrectly named as Harold Zoref, CPA, P.C., moves to

dismiss the complaint as against it based on a novation in that the thief has agreed to pay the money back in trade for continued employment as plaintiff's office manager. Chase cross-moved on the same grounds, and on the additional ground of the one-year statute of limitations contained in the Uniform Commercial Code (UCC 4-406[4]).

Plaintiff opposes defendants' motions, and has cross-moved in motion sequence #007 to strike Zoref's answer based on its alleged failure to appear at a deposition.

Plaintiff Brian Weiss, D.D.S., P.C. (Plaintiff) is a professional corporation used by a dentist, Brian Weiss, D.D.S. (Dr. Weiss) in connection with his dental practice. Plaintiff maintained a commercial bank account at Chase, for which the only signatory was Dr. Weiss. Plaintiff claims it engaged Zoref to perform accounting and bookkeeping services; and that during the period in issue, Zoref was responsible for reconciling plaintiff's bank statements on an ongoing basis. Zoref contends that his engagement was limited to tax preparation and that other defendants were responsible for bookkeeping (the complaint alleges that defendants Leslie Lisnitzer, Alternative Management Services, Inc. and Legend Management Services were engaged to do bookkeeping and to reconcile plaintiff's bank statements), but it

concedes the claim that it performed bookkeeping services for the purposes of its motion.

Plaintiff employed defendant Luz M. Paulino (Paulino) as its office manager beginning in 1995, and plaintiff still employs her in that capacity. Between 1998 and March 2001, Paulino forged hundreds of checks against plaintiff's Chase account and then presented the forged checks for payment at a branch of Chase. She made all of the forged checks payable to herself, and no one else received any of the money. The last forged check was honored by Chase on March 1, 2001, and the final relevant bank statement, which included the final forged check, was mailed by Chase on April 9, 2001.

Paulino confessed to plaintiff in March 2001. Plaintiff intentionally did not report the theft to any law enforcement authority (and never has), but reached a repayment agreement with Paulino. Dr. Weiss testified at his deposition that as of the date of the March 31, 2005 deposition, Paulino had repaid approximately \$130,000, of the \$350,000 she stole.

Each month, Chase sent plaintiff a bank statement and enclosed the checks paid. When the bank statements arrived at plaintiff's office, Paulino would remove the forged checks before Dr. Weiss had a chance to see them. She then created a counterfeit check with the identical number to the check Paulino

had forged, payable to a third-party vendor whose name Dr. Weiss would recognize, and substituted the counterfeit check in the place of the forged check that had been returned with plaintiff's bank statement. Paulino then accessed a computer program plaintiff used for accounting purposes (she was authorized to access the program to record payroll checks into the register), and entered the counterfeit checks. The accounting program was accessible from several computers in plaintiff's office, and also was used to print out checks.

The complaint refers to both the forged checks, which were negotiated through the bank, and the counterfeit checks, which were not. The complaint alleges that the forged checks were conspicuously identifiable by their forged signatures and fictitious indorsements, and the counterfeit checks were identifiable by a washed-out color, poor paper quality, and photocopied signatures.<sup>1</sup> The complaint also alleges that plaintiff's accounting program conspicuously indicated that substantial amounts of money had been misspent, wasted, paid to improper parties and siphoned off to unintended payees.

After Paulino's confession in March 2001, Dr. Weiss visited a Chase branch to speak to an employee there, named

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<sup>1</sup> The facts of the theft are so uncontroversial that no party on these motions submits copies of the checks, so no inference can be drawn from their appearance.

Marjorie Bruchner, with whom he had a working relationship. Ms. Bruchner was not present, so he told another employee that there was a problem with his account. He asked that Chase stop Paulino's check-cashing privileges, and that her signature card be "pulled". Chase responded by freezing the account. This angered Dr. Weiss. He sent a letter to Ms. Bruchner on April 26, 2001, complaining that the account was frozen and that he incurred bank fees from Chase and other banks due to returned checks (Chase later refunded its fee). The letter states that he only requested that Paulino no longer be permitted to cash checks. The letter makes no mention of embezzlement or forgery, and does not specify any improperly honored check. Chase received no written notice of forgery or embezzlement associated with the account until plaintiff served the summons and complaint in this action on or about September 2, 2002.

The complaint alleges eighteen causes of action. The claims against Chase (the first through third causes of action) are based on negligence, violations of the UCC, and breach of contract. The claims against Zoref (the fourth through sixth causes of action) are based on breach of fiduciary duty, negligence and breach of contract. Additional claims are made against Paulino, who is in default, and other parties who do not appear on these motions.

## DISCUSSION

The Chase Motions

Chase argues that plaintiff failed to comply with the bank's rules and regulations regarding notice of improprieties, and with the statutory requirements for notice under the UCC.

The bank's rules and regulations required a depositor to use reasonable care and promptness in examining its bank statements, and to notify Chase in writing within 60 calendar days of mailing of the statement, of errors, discrepancies, or irregularities, including an unauthorized drawer's signature, or alteration. Legal proceedings must then be commenced within one year from the date the statement was mailed. Chase averred that the account statements reflecting the alleged forged transactions were mailed to plaintiff on a monthly basis, and included paid checks or copies of checks paid on the account.

Dr. Weiss testified at his deposition that Paulino had forged checks between February 1998 and March 2001, and that he had not examined the monthly bank statements, or discovered the forgeries until Paulino confessed in March 2001. Chase claims that plaintiff failed to comply with UCC 4-406 and the bank's rules and regulations since it had not given Chase written notice identifying any forged checks, citing *New Gold Equities Corp. v Chemical Bank* (251 AD2d 91 [1<sup>st</sup> Dept 1998]). The complaint was served on Chase on September 2, 2002, more than one year after

the last forged check was paid by Chase, on March 1, 2001, and more than one year after Paulino's confession and when the statement including that last forged check was mailed to plaintiff on April 9, 2001.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

Between a bank and its customers, the UCC envisions "a series of shifting burdens of risk of loss with respect to forged checks." *Putnam Rolling Ladder Co. v Manufacturers Hanover Trust Company*, 74 NY2d 340, 345 (1989). Initially, the risk of loss from forgery is on the bank. However, the UCC "imposes certain reciprocal duties on the customer. Failure to comply with those duties shifts the burden of loss from the bank to customer." *Id.*

UCC 4-406 (1) states that a bank customer must exercise reasonable care and promptness in examining bank statements, to discover unauthorized signatures or any alterations, and must notify the bank promptly after the bank sends a statement of account to the customer, or otherwise makes the statement available to the customer. UCC 1-201 defines "sends" as "to deposit in the mail." A customer's failure to

examine bank statements and canceled checks results in preclusion of any claim against the bank for repeated forgeries by the same wrongdoer after the first such check and statements reflecting it are made available to the customer. *Putnam Rolling Ladder Co.*, 74 NY2d at 345.

UCC 4-406 (2) states that if the bank establishes that the customer failed to exercise reasonable care and promptness, or failed to promptly notify the bank after such discovery, the customer is precluded from asserting claims against the bank on that item, or on any other item altered by the same wrongdoer, where the bank statement was available to the customer and the bank did not receive notice from the customer.

Under UCC 4-406 (3), the loss of even multiple forgeries will be shifted back to the bank, where the customer is able to prove that the bank lacked ordinary care in paying the forged checks, and this is so even if the customer breached its own duty to inspect its canceled checks and statements. "Ordinary care," discussed in the Official Comments to UCC 4-103, has its normal tort meaning. *Putnam Rolling Ladder Company, supra.*

UCC 4-406 (4) sets out the statute of limitations: without regard to care or lack of care of either the customer or the bank, a customer has one year from the time the statement and the disputed items are made available to the customer to discover

and report an unauthorized signature or alteration; and the customer has three years from that time to discover and report an unauthorized indorsement.

Plaintiff's claims against Chase based on the UCC are, therefore, untimely. These claims concern checks Paulino signed without authorization. Under UCC 4-406 (4), plaintiff had one year from April 9, 2001, when Chase made the last relevant statement and check available to plaintiff.

Plaintiff has not come forward with any evidence concerning an unauthorized indorsement. In opposing Chase's motion, plaintiff's attorney simply states "Paulino's testimony indicates that she forged the signature and/or the indorsements on 301 of Plaintiff's checks. (Exhibits D and E)." Aff. In Opposition to Order to Show Cause and In Support of Cross-Motion, by Leslie Ben-Zvi, Esq., paragraphs 51 and 59. Exhibit D is an excerpt, several hundred pages long, of Paulino's deposition transcript. Plaintiff does not state what part, if any, of this testimony shows that checks with forged indorsements were presented to Chase. Indeed, she testified at length regarding checks she wrote to herself forging Dr. Weiss's signature, but for which she later created counterfeit checks with forged indorsements to hide her defalcation from plaintiff and its accountant.

Exhibit E is an unexplained print-out of check numbers, amounts and names that appear to reflect the records maintained by the accounting software. Paulino testified that she input false information into the accounting software to cover for checks she wrote to herself. Exhibit E, as presented, is not evidence in admissible form sufficient to defeat summary judgment. Even if it were in admissible form, its content is consistent with Paulino's testimony that she input false names after the forged checks were returned by Chase, not that she used false or improper indorsements. In fact, she testified that she only wrote checks to herself, so the indorsements in her own name were not unauthorized or forged. Plaintiff's Exhibit E, at 198. PS

Plaintiff claims that Chase's *Terms and Conditions for Business Accounts and Services (Terms and Conditions)* permitted it 18 months in which to commence a lawsuit against Chase, and that service and filing of the complaint in this action on September 2, 2002 was within 18 months after Weiss's April 26, 2001 letter, as well as the prior oral notification that allegedly had been given to Chase, and that the period of limitations was tolled until plaintiff's actual receipt of the statement.

Chase's *Terms and Conditions* contains a two-tiered system for providing written notice to Chase of improperly paid items. A customer has 60 days from mailing, transmission, or the

date the statement is made available to the customer, to notify Chase, in writing, of

errors, discrepancies, or irregularities, including but not limited to unauthorized or missing drawer's signature or alteration, unauthorized transfers or withdrawals of funds by wire or otherwise, or of the non-receipt of an expected Statement, advice or credit.

Consistent with the extended statute of limitations under UCC 4-406 (3) where the customer's complaint arises from an unauthorized, improper or missing indorsement, the *Terms and Conditions* provide that a customer has six months from the mailing of the statement, or the time that it has been made available to the customer, to give notice regarding those claims. After notice is given, a customer has one year from the time that the statement was mailed or made available to commence an action for unauthorized or missing drawer's signature or alteration, or 18 months in the case of an unauthorized, improper or missing indorsement.

Where a bank's rules and regulations require notification of a forgery or alteration within 60 days of the mailing of the statement, that rule constitutes a condition precedent to a claim of forgery or alteration, and a failure to comply with the condition precedent bars a customer's claim against the bank. *Josephs v Bank of New York*, 302 AD2d 318 (1<sup>st</sup> Dept 2003).

Plaintiff offers no evidence that it did not receive Chase's bank statements in the normal course of mail delivery, i.e., within a few days of mailing. Chase sent the last relevant statement on April 9, 2001, and plaintiff was obligated to exercise reasonable care and promptly notify Chase of a problem after the statement was sent. See, UCC 4-406(1) and UCC 1-201. Plaintiff's attempt to raise a triable issue by arguing that Chase has failed to prove delivery is not based on any evidence in the record. Moreover, there is no factual issue regarding plaintiff's opportunity to learn of the embezzlement after March 2001, since that is when plaintiff admits that it learned of Paulino's forgery scheme.

Since there is no claim in the complaint that any of Paulino's indorsements on the backs of the forged checks were false, plaintiff's time to give Chase written notice, and its time to commence this lawsuit, are governed by the 60-day/one-year provisions in the *Terms and Conditions*, applicable to items with unauthorized drawer's signatures.

Even assuming that plaintiff's alleged oral notice to Chase in March 2001, which notice is not supported by the record, satisfied the 60-day rule for notice contained in Chase's *Terms and Conditions*, plaintiff failed to commence this suit within one year from when Chase mailed the bank statement containing the final forged check, and plaintiff failed to rebut the presumption

of regularity attached to Chase's statements regarding the date of mailing.

There is no independent claim for negligence that is not governed by the time limits set forth in either the *Terms and Conditions* or the UCC. Therefore, plaintiff's negligence claim against Chase is dismissed.

Finally, plaintiff has failed to establish an independent basis for its claim for breach of contract, beyond what has been alleged in its unsuccessful claim for negligence. See *Kestonbaum v Suroff*, 268 AD2d 560 (2<sup>nd</sup> Dept 2000).

Thus, the claims against Chase based on negligence, breach of contract, and violations of the UCC are all dismissed. Although the motion is not directed to the cross-claims by and against Chase, there is no basis for its liability to any other defendant, and its cross-claims are grounded in indemnity (including a claim for legal fees) and contribution. There is no contribution where Chase itself is not liable for negligence, and absent a specific agreement or statutory provision to the contrary, a successful party does not recover legal fees from its opponents in the American legal system.

#### The Zoref Motion

In motion sequence #007, defendant Zoref moves for summary judgment based on a novation that plaintiff allegedly

entered into with its employee, and also seeks to dismiss the complaint based on plaintiff's failure to comply with defendant's discovery demands.

A novation requires proof of a previously valid obligation, an agreement entered into by all parties to the old contract, extinguishment of the old contract, and a valid new contract. *Callanan Industries, Inc. v Micheli Contracting Corporation*, 124 AD2d 960 (3<sup>rd</sup> Dept 1986). Zoref's allegations that Paulino entered into a new employment contract with plaintiff at no salary, as a means of paying back her debt, fails to satisfy Zoref's claim of a novation since Zoref was not a party to this agreement. Therefore, Zoref has failed to establish a prima facie case of entitlement to summary judgment.

Zoref also claims that plaintiff's claim against it must be dismissed since plaintiff's agreement with Paulino for reimbursement constitutes a covenant not to enforce a judgment pursuant to General Obligations Law § 15-108 (GOL § 15-108).

GOL § 15-108 states, in relevant part:

a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, ... it does not discharge any of the other tortfeasors from liability for the injury ... unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any

amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

McKinney's General Obligations Law § 15-108.

According to Zoref, plaintiff's agreement with Paulino will "effectively end the dispute" between the parties, citing *Bank Brussels Lambert v Credit Lyonnais (Suisse) S.A.* (2001 WL 492356 [SD NY 2001]). Zoref contends that since Paulino will recompense plaintiff in full, there will be no further recoverable damages. Zoref states that plaintiff's claims against it for breach of contract and breach of fiduciary duty, and the damages sought therein, are duplicative of the damages sought under the negligence claim, and must be considered together under GOL § 15-108. Further, argues Zoref, GOL § 15-108 has been held to be applicable to actions for accountant malpractice, citing *LaSalle National Bank v Ernst & Young LLP* (285 AD2d 101 [1<sup>st</sup> Dept 2001]).

The claim against Zoref will not be dismissed now under GOL § 15-108, because the statute states that a release will not discharge other tortfeasors unless the release expressly so provides. See *Moller v North Shore University Hospital*, 12 F3d 13 (2<sup>nd</sup> Cir 1993). Since plaintiff's agreement with Paulino did not expressly contemplate a release of Zoref, Zoref's application

to be released on this ground as a matter of law is denied. However, damages sought at trial against Paulino's co-defendants must be adjusted to reflect plaintiff's recovery under the agreement with her.

With respect to Zoref's request for discovery sanctions, it concedes that plaintiff has identified the forged and counterfeit checks which make up its claim, after a series of court orders were required to obtain plaintiff's compliance. Zoref complains that his second, third and fourth discovery requests have not been complied with, that plaintiff has failed to provide an affidavit detailing the efforts made to locate responsive documents and information, and that plaintiff has failed to answer Zoref's interrogatories in the form required by CPLR 3133 (b).

Zoref did not submit on its motion a copy of either the interrogatories, or defendant's allegedly unsworn answers to same. Plaintiff claims that on February 28, 2006, it answered Zoref's discovery demands, and it has attached its responses to Zoref's second, third, fourth and fifth discovery demands to its opposition to the motion. Plaintiff has also attached, as an exhibit, an affidavit of having conducted a good faith search to provide responsive documents. Therefore, Zoref's motion for discovery sanctions against plaintiff is denied.

Plaintiff's cross motion for discovery sanctions against Zoref is granted conditionally. Zoref has no justifiable excuse for failing to appear for deposition. Accordingly, it is

ORDERED that the motion and cross-motion by defendant JP Morgan Chase Bank, s/h/a Chase Manhattan Bank, for summary judgment dismissing the complaint as against it is granted, and the complaint hereby is severed and dismissed as against it, and all cross-claims by and against Chase are dismissed; and it further is

ORDERED that the Clerk of the Court shall enter judgment accordingly, with costs and disbursements to Chase as taxed; and it further is

ORDERED that defendant Zoref's motion for summary judgment and for discovery sanctions against plaintiff is denied; and it further is

ORDERED that plaintiff's cross motion for discovery sanctions against defendant Zoref is granted conditionally, and Zoref is directed to produce a witness to appear for a deposition on or before January 31, 2007, and to remain until the conclusion of business that day, and to return day-to-day until plaintiff's deposition of Zoref has been completed, failing which the court shall strike Zoref's answer upon a motion made by order to show cause no later than February 9, 2007; and it further is

ORDERED that plaintiff's time to file and serve a note of issue is extended to February 16, 2007.

Dated: December 13, 2006

ENTER:

  
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J.S.C.  
**JANE S. SOLOMON**

**FILED**  
DEC 18 2006  
NEW YORK  
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