AY Bank Limited v JPMorgan Chase & Co.
2006 NY Slip Op 30012(U)
November 29, 2006
Supreme Court, New York County
Docket Number: 0604190/2004
Judge: Herman Cahn
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SCANNED ON 12/7/2006

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

PRESENT: HERMAN CAHN, Justice

PART 49

Ay Bank

Plaintiff

- v -

JP Morgan Chase

Defendant.

INDEX NO. 604190/04

MOTION DATE 6/27/06

MOTION SEQ. NO. 002

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

FILED
DEC 07 2006
NEW YORK COUNTY CLERK'S OFFICE

November 21, 2006

J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

AY BANK LIMITED (in Liquidation), Plaintiff,	:	
- against -	:	Index No. 604190/2004
JPMORGAN CHASE & CO. and JPMORGAN CHASE BANK, N.A., Defendants.	:	

HERMAN CAHN, J.:

Defendants move (1) to dismiss the complaint in its entirety as against defendant JPMorgan Chase & Co. (JPMC Co.), for failure to state a claim; and (2) to dismiss the complaint's first through seventh causes of action for failure to state a claim, and on the ground that certain of those claims are barred, at least in part, by the applicable statutes of limitations, CPLR 3211.

BACKGROUND

Plaintiff, an English bank, was founded in 1980, for the purpose of encouraging exports from, and investment in, Yugoslavia and the former Yugoslav republics.

The complaint alleges that JPMC Co. is a Delaware corporation, headquartered in New York, and the parent of defendant JPMorgan Chase Bank, N.A. (JPMC Bank), a recently chartered national bank which also has its corporate headquarters in New York. Defendants are alleged to be the successors by merger and/or acquisition, of Manufacturers Hanover Trust Company (MHT), Chemical Bank (Chemical), and The Chase Manhattan Bank.

Beginning on May 30, 1992 and continuing through the 1990s, Presidents Bush and Clinton issued a series of executive orders which prohibited certain trade, and blocked certain assets, having connection with the governments of Serbia, Montenegro, Yugoslavia, Bosnia, and Herzegovina. The Office of Foreign Assets Control of the United States Department of the Treasury, implemented the executive orders in regulations which are codified at 31 CFR parts 585 and 586 (collectively, the Regulations).

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On June 25, 1999, AY Bank filed for administration in the United Kingdom. This is similar to the filing in the United States of a petition under Chapter 11 of the Bankruptcy Code.

On September 26, 2003, AY Bank was placed into liquidation under British law. This is apparently similar to Chapter 7 under the United States Bankruptcy Code.

AY Bank allegedly maintained accounts and deposits in both New York and London (collectively, the Accounts), originally with defendants' predecessor MHT, which became subject to the Regulations. Pursuant to those regulations, the funds in, or transmitted to, the Accounts were blocked or frozen. The Regulations prevented the completion of four pending transactions between AY Bank and the London branch of defendants' predecessor Chemical: a $5,000,000 loan (the Loan), which was due to be repaid by AY Bank to Chemical in June 1992; and three foreign exchange contracts (the Forex Contracts), with settlement dates between June and December 1992, which involved AY Bank's purchase of French francs and British pounds sterling from, and sale of United States dollars and Swiss francs to, Chemical. The Regulations prevented Chemical from applying funds in the Accounts to repay the Loan on its due date, so that the Loan continued to be outstanding during the pendency of the Regulations. They also prevented the Forex Contracts from being settled on their respective settlement dates.

On June 20, 2002, defendants allegedly provided AY Bank with a spreadsheet (the Spreadsheet), which indicated that the Accounts contained a total of more than $37,200,000, of which -- if the Regulations had not been in effect, and if the funds in the Accounts had been used to repay AY Bank's obligations when the obligations became due -- a net amount of approximately $11,100,000 would have been due to AY Bank as of that date.

The Accounts were unblocked by Executive Order and, after May 28, 2003, the Regulations no longer applied to them. By letter dated June 16, 2003, defendants notified AY Bank that they were removing approximately $16,800.000 from the Accounts, as a set-off (the Set-Off) for amounts due under the Loan and Forex Contracts. Of the total amount removed, more than $9,000,000 was charged against Accounts held in London, and more than $7,000,000 was charged against an Account held in New York.

By letter dated August 6, 2003 (the Demand), AY Bank objected to the Set-Off, and demanded that defendants return the balance of the funds remaining in the Accounts. Thus far, defendants have not returned any of the funds to AY Bank.

The Complaint

The complaint asserts eight causes of action, each of them against both defendants. The first four allege claims for breach of contract, by reason of: (1) defendants' refusal to return the funds remaining in the Accounts to AY Bank upon its demand, which allegedly resulted in damages of at least $11.1 million, i.e., the amount which the Spreadsheet had allegedly shown to be due to AY Bank as of June 20, 2002; (2) defendants' effecting of the Set-Off, which was allegedly improper and in violation of English common law and the English Insolvency Acts of 1986 and 2000; (3) defendants' alleged failure to pay a commercially reasonable rate of interest on the funds deposited in the Accounts; and (4) defendants' refusal to return the funds contained in the Accounts to AY Bank upon its Demand, without any set-off, which allegedly resulted in damages of at least $34 million.

The fifth cause of action alleges that defendants breached a duty imposed on them by the Regulations, by failing to pay a commercially reasonable rate of interest on the funds held on deposit in the Accounts.

The sixth cause of action is a claim for unjust enrichment, on the ground that defendants continue to retain, and are unjustly enriched by, the funds contained in the Accounts.

The seventh cause of action is a claim for breach of a duty of good faith and fair dealing which was allegedly implied in the parties' contract.

The eighth cause of action seeks a judgment declaring: that defendants have no right to retain possession of the funds on deposit in the Accounts; that defendants had no right to effect the Set-Off; that the Set-Off is invalid and void ab initio; and that defendants' continuing refusal to return to AY Bank all of the funds contained in the Accounts, including those which were

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deducted in the Set-Off, is without justification.

DISCUSSION

JPMC Co.

Defendants seek to have the claims against JPMC Co dismissed in their entirety. Plaintiff alleges that JPMC Co. is liable on the basis of an "alter ego" or "piercing of the corporate veil" theory, but fails to allege sufficient facts to support such a theory.

Plaintiff alleges that: JPMC Bank is an alter ego of JPMC Co.; certain of JPMC Co.'s public disclosures and business descriptions represent that banking operations under the "Chase" name are a mere "'brand' and department" of JPMC Co., and are not separately operated and independently managed subsidiaries; JPMC Bank is financially dependent upon JPMC Co.; defendants have "interlocking management, personnel, principal business locations, assets and/or general services operations"; JPMC Bank exists exclusively to serve JPMC Co.; defendants' interests are "so aligned and intertwined . . . that all of the results of operations for those companies are reported together on a consolidated basis"; and defendants are "so closely aligned for purposes of this action that they are united in interest." Am Compl ¶¶ 12-18. "By reason of the foregoing," "JPMC Co. "is liable for the acts and omissions" of JPMC Bank, according to the plaintiff. *Id.* ¶ 19. Plaintiff then assigns the same defined term in the complaint to include both JPMC Co. and JPMC Bank, and alleges its material allegations against both defendants collectively, without differentiating between them.

The Applicable Law:

As a preliminary matter, the parties disagree whether New York or Delaware law governs the issue of whether JPMC Bank's corporate form should be disregarded, or its "veil" pierced. Defendants assert that Delaware law should be applied, because JPMC Co. is a Delaware corporation, and because, under New York choice of law rules, issues of alter ego liability and corporate veil piercing are generally governed by the law of the state of incorporation. AY Bank asserts that New York law should be applied, apparently on the grounds that JPMC Co. has allegedly filed an application for a certificate of authority to do business in New York State and/or that JPMC Co. is headquartered in New York.

Defendants argue that even under New York law, plaintiff has failed to state a claim against JPMC Co. Reply Br at 3. Defendants contend that New York law requires a two-prong analysis for when the veil may be pierced and requires that: (i) the parent exercised completed dominion of the corporation with respect to the transaction attacked; and (ii) such dominion was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. Defendants assert that this is the standard under New York law regardless of whether the allegation is framed as a piercing of the corporate veil or an "alter ego" theory, citing *Morris v NY State Dep't of Taxation & Fin.*, 82 NY2d 135,141 (1993); *TNS Holdings, Inc v MKI Sec Corp.*, 92 NY2d 335, 339 (1998). They argue that plaintiff's claims fail both prongs of this analysis.

With regard to the first prong, defendants assert that the complaint contains no allegation that JPMC Co. completely dominated JPMC Bank with respect to the transactions at issue. However, it is clear that in reading the complaint in the light most favorable to the non-moving party, as required on a motion to dismiss, that plaintiff did allege that JPMC Co. exercised complete dominion over JPMC Bank. By logical extension, if this allegation were true, it would certainly include the transaction at issue. Among plaintiff's allegations that support its contention that JPMC Bank is an alter ego of JPMC Co., plaintiff claims, upon information and belief, that

• JPMC Co. itself represents to the public that its banking operations under the "Chase" name, including JPMC Bank;

• JPMC Co.'s branded banks are not separately operated and independently managed subsidiaries, but rather are a mere "brand" and department of the corporate parent;

• JPMC Bank is financially dependent on JPMC Co.;

• JPMC Bank exists exclusively to serve its parent JPMC Co.;

• JPMC Bank's and JPMC Co.'s results of operations are reported together on a consolidated basis; and

• JPMC Bank and JPMC Co. have interlocking management, personnel, principle business locations, assets and/or general services operations.

While any one of the allegations might not be sufficient to meet the first prong of the analysis, taken together, they are certainly sufficient.

With regard to the second prong, defendants argue that the complaint does not allege that JPMC Co. used JPMC Bank to commit a fraud or cause an inequity. Plaintiff does, however, address at great lengths, and allege facts in support of, the claim that JPMC Co. and JPMC Bank operated in concert and that plaintiff was allegedly harmed by the defendants' actions. This is sufficient for pleading purposes.

Even if the complaint did not contain allegations sufficient to satisfy both prongs of the test, that would not bar plaintiff's claims against JPMC Co. The cases that defendant itself relies upon attest to the two-prong test being an aid, rather than requirements. *Morris* begins its analysis of this issue with the "general rule that: [b]roadly speaking, the courts will disregard the corporate form, or, to use the accepted terminology, 'pierce the corporate veil' whenever necessary to prevent fraud or achieve equity." *Morris v NY State Dep't of Taxation & Fin.*, 82 NY2d at 140 (internal citations omitted). The Court of Appeals then continues, noting that since "a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases *may not be reduced to definitive rules* governing the varying circumstances when the power may be exercised." *Id.* at 141 (emphasis added). Rather, the "party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party such that a court in equity will intervene." *Id.* at 141.[1]

[1] Additionally, the Court notes that the facts in *Morris* were dramatically different than those at issue here. In *Morris*, the State Department of Taxation and Finance, attempted to reach petitioner

Indeed, in *TNS Holdings, Inc., et al. v MKI Securities Corp., et al.*, to which defendants frequently cite, the two-prong test is not even included in the decision. 92 NY2d 335 (1998).[2]

Fundamentally, the question of whether plaintiff can ultimately establish that there was a piercing of the corporate veil is not the standard on a motion to dismiss. Plaintiff is entitled to proceed to discovery.

> In *Peterson v Spartan Indus.* (33NY2d 463), it was stated that under CPLR 3211 (d), a plaintiff opposing a motion to dismiss need only show that facts unavailable to the plaintiff *may* exist which will justify denial of the motion, and need not demonstrate the actual existence of such facts. Here, discovery may reveal evidence supporting a conclusion

that one company was acting as the alter ego of the other. *Cerchia v V.A. Mesa, Inc., et al.*, 191 AD2d 377, 378 (1st Dep't 1993) (emphasis in the original). This is particularly true where, as here, the corporate relationships are complex and the relevant facts are exclusively within the control of the party seeking dismissal of the action. *Banham v Morgan Stanley & Co., Inc.*, 178 AD2d 236, 237 (1st Dep't 1991).

Additionally, the Court notes that there are certain facts alleged in the complaint that are significant to the motion to dismiss. The accounts that plaintiff set up were originally at Manufacturer's Hanover Bank, and plaintiff alleges that there were at least three mergers and/or acquisitions that moved those accounts to the JPMC Co. entities.[3] Plaintiff does not know

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by piercing the corporate veil despite the fact that the connecting corporation had already been determined to owe nothing. *Morris v NY State Dep't of Taxation & Fin.*, 82 NY2d at 144.

[2] Further, in *TNS Holdings*, plaintiffs' were seeking to compel a non-signatory to a contract with an arbitration clause to proceed to arbitration. Thus, the alter ego theory was addressed in the context of potentially requiring the waiver of the benefits and safeguards which a court of law may provide. *TNS Holdings, Inc., et al. v MKI Securities Corp.,* 92 NY2d at 339. That is very different from the case here.

[3] Plaintiff alleges, upon information and belief, that Manufactures Hanover Trust merged with or was acquired by Chemical Bank in 1991, that Chemical Bank then merged with or was acquired by Chase Manhattan Bank in 1996, and that Chase Manhattan Bank merged with or was acquired by JPMorgan in 2000, forming JPMC Co. Am Compl ¶ 24.

which JPMC entity held or continues to hold each account or deposit at issue. Whichever JPMC entity or entities held or continues to hold the accounts and deposits allegedly failed to provide plaintiff with regular account statements. Plaintiff was allegedly provided with at least one document, reflecting that deposits at issue were being held by JPMC Co.

These allegations raise issues regarding which JPMC entity has been involved in the decisions and handling of the accounts at issue. If the allegations are ultimately shown to be true, it would be hard to envision how many more details plaintiff could know, and include in pleadings, prior to discovery. Additionally, to the extent that the accounts were brought into the JPMC entities through mergers with or acquisitions of other large financial entities, it is reasonable to permit discovery on the parent entity's involvement and/or allocation of these accounts.

Thus, that branch of the motion seeking dismissal as against JPMC Co., is denied.

Private Right of Action

Defendants move to dismiss the third and fifth causes of action, arguing that there is no private right of action under the Regulations. Defendants argue that, as such, plaintiff cannot assert claims to recover approximately $6.6 million in damages for defendants' alleged failure credit their account with a commercially reasonable rate of interest and for defendants' breach of a duty imposed by the Regulations, that funds blocked by the Regulations be held in an "interest-bearing account," and that an interest rate shall be "commercially reasonable if it is the rate currently offered to other depositors on deposits or instruments of comparable size and maturity." (31 CFR 586.203 [a], [b] [2]).

Notably, the third cause of action, although labeled a breach of contract claim, alleges that the defendants were required to credit a commercially reasonable rate of interest to the Accounts "[p]ursuant to the Sanctions Regulations." Am Compl ¶ 105. Thus, it too is dependent on AY Bank having a private right of action.

The Regulations were promulgated pursuant to executive orders issued by Presidents of the United States, (Executive Orders Nos. 12808 [57 Fed Reg 23299 (June 2, 1992)], 12810 [57 Fed Reg 24347 (June 9, 1992)], 12934 [59 Fed Reg 54117 (Oct. 27, 1994)]) (collectively, the Executive Orders), which were issued primarily pursuant to the International Emergency Economic Powers Act, 50 USC § 1701 *et seq.* (the IEEPA). Neither the IEEPA, nor the Executive Orders, nor the Regulations expressly confer upon a person or entity whose funds are blocked thereunder, any private right of action. Indeed, each of the Executive Orders provides that "[n]othing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, ***or any other person.***" Executive Orders No. 12808 § 6; No. 12810 § 8; No. 12934 § 7 (emphasis added).

However, to read this language as limiting AY Bank's ability to bring a claim would expand the limitation beyond what the words provide. Although the phrase "or any other person" is certainly expansive language, its clear context limits it to those other persons in relation to the United States government. That is, not only are claims against the United States, its agencies and its employees barred, but so too would a claim against, for example, a consultant to the United States government. The language is clearly limited to the government, its employees, and those persons or entities which are related to the government regardless of title. That does not mean, however, that it precludes claims against people or corporations acting in their private capacities.

"The general rule is and has long been that 'when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute.'" *Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 324 (1983) (*citing Candee v Hayward*, 37 NY 653, 656 (1868)). There is no question that the common law provides a remedy for claims of breach of contract and breach of duty. It is precisely these claims that are asserted in the third and fifth causes of action. As common law remedies were not precluded by the statute, as against private persons or corporations, AY Bank presumptively has the right to assert these claims. Indeed, in the instant action, not only are common law remedies presumptively available for these claims, but the banking regulations also provide remedies that exist outside of the Regulations. As such, the Court will not narrow the rights and avenues of redress for alleged wrongs where they may be regarded as cumulative rather than limiting.

Finally, in the absence of an expressly created private right of action, a four-part test may be applied to determine whether an implied right of action exists under a federal statute.

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v Ash, 422 US 66, 78 (1975) (internal citations omitted). *See also CPC Intl. Inc. v McKesson Corp.*, 70 NY2d 268, 280 (1987), *Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314 at 325.

The last three of these tests are clearly no hindrance to AY Bank's claims. The Court has already reviewed that there is no indication of an intent to deny this remedy. Certainly, to the extent that the Regulations provide AY Bank with rights, it is not inconsistent with the purpose of the Regulations to permit those rights to be enforced. Finally, the claims at issue are most assuredly ones traditionally in the purview of state and general common law. The first prong of this test, however, requires a closer examination.

The question of for whose benefit the Regulations were enacted is one that has more than one answer. Certainly they were not enacted in an effort to protect entities such as AY Bank. However, it is also abundantly apparent that such entities are **among** those protected by the Regulations. It is notable that AY Bank is not seeking compensation from the United States government for any damages from the imposition of the Regulations. Rather, AY Bank is seeking redress from private companies which, allegedly, failed to properly handle Accounts while the sanctions were pending, as the Regulations required. Inasmuch as the Regulations contained such requirements as mandating that commercially reasonable rates of interest be credited to blocked accounts, those portions of the Regulations are explicitly and solely for the benefit of those whose accounts have been blocked. AY Bank is a member of this class and, therefore, is among those protected by the Regulations.

As such, AY Bank does have a private right of action against private persons or corporations, insofar as such claims stem from those portions of the Regulations that provide protection for entities such as itself.

Entitlement to Any Remaining Funds

Defendants move to dismiss the first cause of action, arguing that plaintiff fails to allege any entitlement to the funds as a matter of law. The first cause of action alleges that defendants breached the parties' contract when they refused to pay to AY Bank, upon its Demand, the funds which were on deposit in the Accounts as of that date.

Defendants argue that the first cause of action is deficient, as a matter of law, because: (1) the complaint acknowledges that at least some of the funds which were contained in the Accounts at the time they were unblocked were the proceeds of wire transfers from third parties, which were received after the Regulations were imposed; (2) the complaint fails to allege the amount of funds in the Accounts which are attributable either to AY Bank's own deposits or to wire transfers from third parties; and (3) the cause of action fails to allege the facts that are necessary -- under Article 4-A of the Uniform Commercial Code, which is the exclusive means by which a party may establish its right to the proceeds of a wire transfer -- to establish AY Bank's entitlement to the proceeds of wire transfers remaining in the Accounts.

As defendants assert, the complaint does contain allegations from which it might be inferred that some of the funds contained in the Accounts, at the time when they were unblocked, were the proceeds of funds transfers. However, affording the complaint a liberal construction, and according to plaintiff the benefit of every possible favorable inference -- as the court is required to do in the context of a motion to dismiss, (*Goshen v Mutual Life Ins. Co. of New York,*

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98 NY2d 314, 326 (2002)), it may also be reasonably inferred that some of the funds on deposit in the Accounts are not the proceeds of wire transfers. The complaint contains numerous allegations which support an interpretation that the Accounts contain at least some funds attributable to AY Bank's own deposits. *See e.g.* Am Compl ¶¶ 1, 4, 38, 49, 53. The plaintiff alleges that the defendants prepared and issued the Spreadsheet to AY Bank, which purportedly indicated that approximately $11.1 million would have been payable to AY Bank as of June 20, 2002, if the Regulations had not been in effect and if the funds could have been used to repay AY Bank's obligations when they were due. *Id.* ¶¶ 50-52.[4] Additionally, the complaint contains allegations that "[t]here are no liens, third party claims, levies or other restraints on the Accounts, and under all law applicable thereto, AY Bank is entitled to immediate payment of the Undisputed Amount [i.e., approximately $11.1 million] upon demand." *Id.* ¶ 78.

In support of defendants' contention that AY Bank's claim to the funds in the Accounts must satisfy the requirements of Article 4-A, defendants cite the Official Comment to UCC 4-A-102. This states that the sections of Article 4-A "are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article." However, defendants have not conclusively established that the Accounts contain only the proceeds of wire transfers. As such, defendants' argument that AY Bank can state a claim to funds on deposit in the Accounts only by satisfying the requirements of Article 4-A, fails.

It is clear that "situations not covered [by particular provisions of Article 4-A] are not the exclusive province of the Article," and, "the only restraint on [a] plaintiff seeking . . . relief [on

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[4] Defendants' argument that they were entitled to effect the Set-Off is predicated, in part, upon the presumption that AY Bank's status, vis-à-vis JPMC Bank at the time of the Set-Off and regarding the funds deducted from the Accounts in the Set-Off, was essentially that of a depositor to a bank. *See* Def Br at 16, 18. As such, defendants apparently concede that the funds which they deducted from the Accounts in the Set-Off were AY Bank's own deposit. Reply Br at 12.

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bases other than the provisions of Article 4-A] is that 'resort to principles of law or equity outside of Article 4-A' must not be inconsistent with provisions within the Article." *Sheerbonnet, Ltd. v American Express Bank, Ltd.*, 951 F Supp 403, 407-08 (SDNY 1995) (quoting UCC 4-A-102, Official Comment). Defendants have failed to establish that plaintiff's first claim is precluded as necessarily inconsistent with the provisions of UCC Article 4-A.

Defendants' motion to dismiss the first cause of action is, therefore, denied.

Propriety of the Set-Off

Defendants move to dismiss the second cause of action, arguing that their own actions were proper as a matter of law. The second cause of action alleges that the defendants breached their contract with plaintiff when they applied an improper Set-Off. Plaintiff further alleges that the Set-Off was violation of English common law and the English Insolvency Acts of 1986 and 2000.

Plaintiff argues that the Set-Off was improper because defendants: (1) combined Accounts which should not have been combined, because the Accounts were of different natures (e.g., in that some of the Accounts were based upon AY Bank's debt obligations on the Loan and the Forex Contracts, whereas others were traditional bank accounts), and were maintained by AY Bank in different currencies, in different countries, and subject to different laws; and (2) combined Accounts in different currencies using currency exchange rates which were arbitrary and/or improperly favorable to defendants. Plaintiff claims that the defendants never provided it with "any statement of account" with regard to the Set-Off "which explained and justified what [defendants] had done and why." Am Compl ¶ 96.

Defendants assert that the Set-Off was not only permitted, but mandatory, under Rule 4.90 of the Insolvency Rules. That Rule provides, in pertinent part:

> 4.90 (1) This Rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.

> (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other.

Levi Affid., Ex H (UK Insolvency Rules of 1986, Rule 4.90). Defendants also argue that "leading English commentators have concluded that the doctrine of combination should apply to accounts in different currencies or in different countries, so long as [among other things] the exchange rates are transparent." Def Br at 17.

However, defendants have not established that the second cause of action fails to state a claim. For example, Defendants concede that the Set-Off was premature, at least under Rule 4.90, but argue that AY Bank has suffered no injury as a result of the timing of the Set-Off. Reply Br at 19. If, however, AY Bank is able to establish that defendants acted prematurely, it may ultimately be able to establish that it was damaged as a result of the timing of the Set-Off. Or, AY Bank may be able to establish that the Accounts which defendants combined were sufficiently different in character as to indicate an implied agreement among the parties not to combine those Accounts. Mitchell Affirm., Ex. G (citing Paget, Law of Banking §§ 29.20, 29.22, 29.24, at 606-609 [12th ed]). As such, dismissal of the second claim is premature at this time.

Pleading Breach of Contract Claims

Defendants move to dismiss the second, third, fourth and seventh causes of action, arguing that, although labeled as claims for breach of contract, they are inadequately pleaded. Plaintiff's second claim, as discussed above, alleges that the Set-Of was improper; the third claim, as discussed above, alleges a failure to pay commercially reasonable interest rates; the fourth claim, as discussed above, alleges a breach of banking regulations; and the seventh claim alleges breach of good faith and fair dealing.

Defendants contend that plaintiff's breach of contract claims: fail to adequately allege the terms of the parties' contract; fail to allege the specific contractual provisions purportedly breached; and largely arise under a statute rather than under a contract.

However, the underlying relationship between a bank and its depositor is a contractual one of debtor and creditor, "which includes an implicit understanding that the bank will pay out a customer's funds only in accordance with its instructions." *Shapiro v McNeill*, 92 NY2d 91, 98 (1998) (internal citation omitted). Simply put, a bank and its depositor stand in a debtor-creditor relationship that is contractual by its nature. When funds are deposited in a general bank account,

> the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand.

Peoples Westchester Sav. Bank v Federal Deposit Ins. Corp., 961 F2d 327, 330 (2d Cir 1992). *See also In re Masterwear Corp.*, 229 BR 301, 310 (Bankr SDNY 1999). Plaintiff may ultimately be able to establish that defendants' actions constituted a breach of contract, if defendants' actions were not explicitly permitted by statute or banking regulations. However, since every contract contains an implied duty of good faith, is not necessary to separately plead a breach of said implied duty, as a separate cause of action. The implied duty is part of the breach of contract causes of action. Therefore, the motion is granted to the extent of dismissing the seventh cause of action.

<u>Pleading a Quasi Contract Claim</u>

Defendants move to dismiss the sixth cause of action, arguing that plaintiff's claim in quasi contract is inconsistent with its arguments that a contractual relationship governed the parties. The sixth cause of action alleges that defendants were unjustly enriched at plaintiff's expense and that principles of equity and good conscience require restitution to AY Bank.

Defendants argue that the claim for unjust enrichment and restitution should be dismissed because it is a claim in quasi contract, and a plaintiff may not maintain a claim in quasi contract where the plaintiff alleges that an agreement governs the rights and duties of the parties.

It is true that the existence of a valid and enforceable contract governing a particular subject matter will ordinarily preclude recovery in quasi contract for events arising out of the same subject matter. *Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 (1st Dep't 1996). However, a party is permitted to plead alternative - - and inconsistent - - theories of recovery in a complaint. CPLR 3014; *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 177 (1st Dep't 1998). Thus, a claim for unjust enrichment may "stand alongside" a claim for breach of contract where, as here, an action is still "at the pleading stage." *Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253, 253 (1st Dep't 2002).

Defendants also argue that AY Bank's unjust enrichment claim should be dismissed because such a claim must allege that a defendant is retaining the property which is the subject of the claim and plaintiff does not allege that defendants have asserted ownership over the funds remaining in the Accounts. Reply Br. at 28. However, the court declines to consider this argument on this motion, because defendants raise it for the first time only in their reply papers. *Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dep't 1992).

Statute of Limitations

Defendants move to dismiss the third, fifth, sixth, and seventh causes of action arguing that they are barred by the statute of limitations. They argue that although plaintiff might not have been able to collect on any judgment prior to the lifting of the Regulations, plaintiff have brought claims for the adjudication of its rights. This argument is unpersuasive.

Defendants cite to a number of cases where claims were not prohibited despite the fact that the plaintiffs could not yet collect upon any monetary judgment stemming from those claims. *See, i.e. LBS Bank-New York v Metallia S.R.L., et al.*, 280 AD2d 304, 305 (1st Dep't 2001). However, such cases are not dispositive to whether plaintiff was required to bring its claims while the Regulations were still in effect.

Moreover, in affording the complaint every favorable inference, as is required in a motion to dismiss, each claim may be inextricably linked to defendants refusal to meet plaintiff's August 6, 2003 Demand for the return of funds and objecting to the Set-Off. Defendants allege that the applicable statute of limitations for each claim is six years. Inasmuch as the amended complaint was filed in March, 2005, the statute would not have run from the date of the Demand until the date of the complaint.

For example, with regard to the third cause of action, defendants argue that under plaintiff's argument that commercially reasonable interest was required to be paid periodically, the statute of limitations would have begun to run when each payment became due. Defendants argue, therefore, that plaintiff is barred for seeking any interest payments that were due, if the statute of limitations ran out for that particular payment. However, plaintiff's claim can easily be read to stem from defendants' failure to meet plaintiff's Demand, including defendants' failure to pay that portion of the funds that includes interest that would have accrued.

In short, defendants' have not established that plaintiff's claims stem solely from each individual action, rather than from defendants' refusal to meet plaintiff's Demand. Since the statute of limitations has not run for any of these claims, from the date of the Demand, no portion of plaintiff's claims is dismissed based on the statute of limitations.

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied, except for the seventh cause of action, which is dismissed; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: November 28, 2006

FILED
DEC 07 2006
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.