

Hetcher v Citibank (New York State)

2006 NY Slip Op 30367(U)

January 12, 2006

Supreme Court, New York County

Docket Number:

Judge: Emily Jane Goodman

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

PRESENT: Hon. **EMILY JANE GOODMAN**

PART 17

Justice

Hetcher, Virginia
- v -
CITIBANK

INDEX NO. 601620/05
MOTION DATE _____
MOTION SEQ. NO. 001
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

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

FILED

JAN 24 2006

NEW YORK COUNTY CLERK'S OFFICE

Court declares having checking account and mortgage with Citibank.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C. DATED: _____

Dated: 1/12/06

[Signature]
EMILY JANE GOODMAN J.S.C.
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

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

-----X
VIRGINIA HETCHER, individually and on behalf of
all others similarly situated,

Plaintiff,

-against-

Index No. 601620/2005

CITIBANK (NEW YORK STATE),

Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

In this putative class action, plaintiff Virginia Hetcher alleges that, without her permission, defendant Citibank (New York State) exercised a right of set-off on a bank account which held her social security income, in violation of New York State banking laws. Hetcher also claims that defendant misled her to believe that it could take those funds without her permission, in violation of General Business Law § 349. Pursuant to CPLR 3211, defendant now moves to dismiss the complaint.

BACKGROUND

In 1992, plaintiff opened a checking account with defendant's bank in Rochester, New York.¹ Her monthly Social Security checks are deposited directly from the Social Security Administration into the checking account. Plaintiff also holds a Citibank Equity Source Account (essentially a second mortgage), which is secured by a single-family dwelling owned and occupied by plaintiff and her husband.

¹Defendant contends that it ceased to exist on August 30, 2003, when it merged with Citibank N.A., a national bank. The court discloses that it has bank accounts with Citibank, N.A.

At least 18 times in the past, defendant allegedly withdrew funds from plaintiff's checking account for monthly payments on the second mortgage, purportedly as a right of set-off. However, plaintiff claims that neither the terms of the second mortgage, the note, nor the documents to her checking account permit any right of set off. Plaintiff also alleges that defendant no longer owns the underlying second mortgage. As a result of the set-offs, plaintiff incurred various charges and fees for late payments and overdraft charges.

On May 5, 2005, plaintiff commenced this action, alleging violations of Banking Law § 9-g (1) (first cause of action), violations of General Business Law § 349 (second cause of action), breach of contract (fourth cause of action),² and unjust enrichment (fifth cause of action).

DISCUSSION

“When determining a motion to dismiss, the court must ‘accept facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory’” (*Goldman v Metropolitan Life Ins. Co.*, ___ NY3d ___, 2005 NY Slip Op 08846, *7 [Nov 21, 2005][citation omitted]). “In order to prevail on a CPLR 3211(a) (1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff's . . . allegations. . . .” (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, ___ NY3d ___, 2005 NY Slip Op 08763, *7 [Nov 17, 2005]).

Violation of New York Banking Law § 9-g (1)

Plaintiff alleges that defendant violated section 9-g (1) of the Banking Law, which states:

“No banking institution shall assert, claim or exercise any right of set off against

²The complaint incorrectly lists the third cause of action as the fourth cause of action.

any deposit account into which social security or supplemental security income payments are deposited pursuant to an agreement with such banking institution which provides that such payments be deposited directly into such deposit account without presentation to the depositor at the time of deposit.”

Plaintiff claims that she requested direct deposit of her social security monies at defendant’s branch (Complaint, ¶ 20). At that time, a teller allegedly agreed to “adjust the account to allow for such direct deposit” (*ibid.*). Thus, plaintiff contends that Banking Law § 9-g (1) prohibited defendant from exercising a right of set-off against her account without her authorization. Defendant argues that the statute applies only if plaintiff had a written agreement with defendant, and the allegations of an adjustment to plaintiff’s account are not sufficient.³

As a threshold matter, plaintiff argues that defendant is collaterally estopped from arguing the legal sufficiency of this cause of action. Plaintiff states that she had originally brought this action in federal court, where defendant had also challenged the legal sufficiency of the complaint. However, plaintiff has not met her burden of establishing collateral estoppel. The federal court’s decision granted defendant’s motion to dismiss in part on a decision on the record, but plaintiff did not submit the transcript (*see* Opp. Mem., at Ex A). Meanwhile, defendant has shown that the federal court action was dismissed for lack of subject matter jurisdiction. Thus, plaintiff has not shown that the legal sufficiency of this cause of action was necessarily decided and material in the federal action (*Pinnacle Consultants, Ltd. v Leucadia Natl. Corp.*, 94 NY2d 426, 432 [2000]).

Contrary to defendant’s interpretation, Banking Law § 9-g (1) does not apply only to

³In a passing footnote in reply, defendant asserts, without support, that Banking Law § 9-g (1) does not apply to Citibank, N.A., the entity that defendant allegedly merged with on August 3, 2003 (Reply Mem. at 1, n1). Because plaintiff appears only to assert a claim against defendant, Citibank (New York State), the court does not address this contention.

written agreements between the depositor and banking institution. By its terms, the statute refers only to an agreement, which therefore can be either oral or written. Defendant offers no compelling reason for its reading of the statute. Here, at the pleading stage, the existence of an oral agreement can reasonably be inferred from the allegations that plaintiff visited defendant's branch in Rochester and spoke with a teller to make an arrangements for direct deposit (Complaint, ¶ 13).

Defendant's remaining arguments are equally unpersuasive. Defendant cites *Lopez v Washington Mut. Bank, FA* (302 F3d 900 [9th Cir 2002]) for the proposition that direct deposit can be created without a bank being a party to such an agreement. However, the fact that another bank had a different practice in a singular instance does not establish, as a matter of law, that defendant could not have entered into another oral agreement with plaintiff. Defendant makes much of the fact that the complaint itself does not allege that the arrangements with the teller constituted an agreement, but this is not fatal. "[A]ny deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (*AG Capital Funding Partners, L.P.*, 2005 NY Slip 08763, *7).

Defendant also points out that allegations that an agreement arose "by operation of law under 31 USC 3322, 31 CFR parts 240, 209, and 210" create confusion, especially since the provisions of federal law that plaintiff cites do not appear to create any agreement between plaintiff and any financial institution receiving direct deposits (*see* Complaint, ¶ 22).⁴ The court

⁴It appears that plaintiff cited these provisions because they were listed on a direct deposit sign-up form issued by the US Treasury Department, last revised in June 1987 (*see* Opp. Mem., Ex D). Defendant points out that 31 CFR part 209 presently contains no regulations (*see* 61 Fed Reg 68155-01 [1996]).

* 6]

interprets the complaint to allege, albeit inartfully, that federal law requires plaintiff to establish direct deposit of her social security payments with her bank (*see* 31 CFR 208.3, 31 CFR 208.6-208.8). To be clear, the obligation to establish direct deposit does not, in itself, create the agreement between plaintiff and defendant contemplated under Banking Law § 9-g (1).

Therefore, defendant's motion is denied as to this cause of action.

Violation of General Business Law § 349

Plaintiff alleges that defendant made materially false statements to its customers that it had a right of a set-off against accounts which received Social Security payments by direct deposit, and that it would only exercise its right of set-off to debts owed to defendant (Complaint, ¶ 3). Plaintiff submits a copy of a memorandum from the State Banking Department, which states that a bank must specifically disclose the actual language of Banking Law § 9-g (1) to a customer (Opp. Mem., Ex D). Plaintiff contends that these statements constitute deceptive acts and practices that are prohibited under General Business Law § 349. Defendant argues that this cause of action should be dismissed because plaintiff has not alleged any causal link between its alleged conduct and her injuries.

A plaintiff alleging a violation of General Business Law § 349 "must show that the defendant's 'material deceptive act' caused the injury" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). In *Gale v Intl. Bus. Mach. Corp.* (9 AD3d 446, 447 [2d Dept 2004]), the Court held that causation is lacking where a plaintiff did not see any allegedly false statements that he claimed were deceptive acts.⁵ Here, the complaint is unclear as to whether defendant had made

⁵Although plaintiff criticizes *Gale* as inconsistent with precedent in this judicial department, the cases that plaintiff cites are not to the contrary.

false statements to plaintiff, because the complaint states that defendant made such statements to its customers generally.

However, this pleading deficiency can be cured with a supplemental pleading, rather than dismissal of this cause of action (*AG Capital Funding Partners, L.P.*, 2005 NY Slip 08763, *7). Therefore, the court will give plaintiff time to supplement the complaint to cure this deficiency, or else this cause of action will be deemed dismissed with prejudice.

Breach of Contract

As an alternative cause of action, plaintiff alleges that, if defendant exercised a contractual right of set-off, then defendant violated that contract because it applied the set-off to the debt of a third party, not its own debt. According to plaintiff, defendant sold her mortgage to a different lender. Defendant argues that this cause of action should be dismissed because plaintiff has not alleged the terms of a contract. Plaintiff disputes this requirement, citing *Shilkoff, Inc. v 885 Third Ave. Corp.* (299 AD2d 253 [1st Dept 2002]).

To state a cause of action for breach of contract, plaintiff must allege the terms of the contract that defendant allegedly breached (*Gordon & Breach Science Publs. v New York Sys. Exch.*, 267 AD2d 52, 52 [1st Dept 1999]; *Bomser v Moyle*, 89 AD2d 202, 203 [1st Dept 1982]). Plaintiff merely speculates that the contractual right of set-off does not permit the bank from collecting debts on behalf of others.

Plaintiff has misconstrued *Shilkoff, Inc.* From the record on appeal, it is clear that the plaintiff in that case had alleged the provision of the contract that was breached. However, the defendant-respondent argued on appeal that plaintiff was required to allege the circumstances surrounding the breach. The Court rejected that argument, reasoning that such a requirement

would “hold plaintiff to particularity in a contract pleading that is not required” (*Shilkoff, Inc.*, 299 AD2d at 254).

Therefore, this cause of action is dismissed.

Unjust Enrichment

Defendant argues that this cause of action should be dismissed because it is inherently contradictory to plaintiff's cause of action for breach of contract, citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.* (70 NY2d 382 [1987]).

It is true that plaintiff cannot press a claim for unjust enrichment if the matter is controlled by contract (*Goldman*, 2005 NY Slip Op 08846, *9-10). However, defendant has not produced any documentary evidence of a written contract that covers the subject matter at issue. Meanwhile, plaintiff was only speculating as to the existence of such a contract.

The complaint's allegations support a cause of action in quasi-contract. A bank has a right to set-off the accounts of a depositor against the matured debts of the depositor owed to the bank (*see Marine Midland Bank-New York v Graybar Elec. Co.*, 41 NY2d 703, 708 [1977]; *Falkland v St. Nicholas Nat. Bank*, 84 NY 145, 149 [1881]). This right arises from a contract implied from the relationship of debtor and creditor between the bank and the depositor (*Straus v Tradesmen's Nat. Bank of N. Y.*, 122 NY 379, 382-383 [1890]). Thus, plaintiff's approval is not required. However, a bank may only exercise this right against matured debt owed to the bank, not to third parties (*Falkland*, 84 NY at 149; *Fenton v Ives*, 222 AD2d 776, 777 [3d Dept 1995]). Here, plaintiff apparently contends that no debt is owing to defendant because its mortgage was allegedly sold to a different lender. Thus, the allegations state a cause of action against defendant, i.e., the improper exercise of its quasi-contractual right of set-off.

Therefore, defendant is not entitled to dismissal of this cause of action at this stage.

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is granted to the extent that the fourth cause of action of the complaint, for breach of contract, is dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiff is granted leave to serve a supplemental complaint upon defendant, supplementing the second cause of action, within 20 days after service of a copy of Decision and Order, with notice of entry, and if no supplemental complaint is served within that time, the second cause of action is dismissed; and it is further

ORDERED that defendants shall answer the complaint within 20 days of service of a copy this Decision and Order, with notice of entry. If plaintiff serves a supplemental complaint, then defendants' time to answer is extended to 20 days after service of plaintiffs' supplemental complaint.

Dated: January 12, 2006

This Constitutes the Decision and Order of the Court.

ENTER:


ISC
EMILY JANE GOODMAN

FILED

JAN 24 2006

NEW YORK
COUNTY CLERK'S OFFICE