

**B.B.C.F.D., S.A. v Bank Julius Baer & Co.**

2007 NY Slip Op 30986(U)

April 24, 2007

Supreme Court, New York County

Docket Number: 0604084/2003

Judge: Helen E. Freedman

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

PRESENT: HELEN E. FREEDMAN  
*Justice*

PART 39

B.B.C.F.D., S.A., et al.

Plaintiff,

- v -

Bank Julius Baer & Co., et al.

INDEX NO. 604084/03

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 017

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

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

Upon the foregoing papers, it is ordered that motion sequences 017, 018 and 019 are consolidated for joint disposition and decided in accordance with accompanying memorandum decision.

**FILED**

APR 27 2007

NEW YORK COUNTY CLERK'S OFFICE  
*Helen E. Freedman*

Helen E. Freedman, J.S.C.

Dated: April 24, 2007

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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*MIAJ*

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

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B.B.C.F.D., S.A. (A Panamanian corporation),  
BIJAN NASSI as President of B.B.C.F.D., S.A.  
AND BIJAN NASSI, individually,  
Plaintiffs,

-against-

Index No. 604084/03

BANK JULIUS BAER & CO., LTD., JULIUS BAER  
SECURITIES, INC., JULIUS BAER HOLDING  
LIMITED, JULIUS BAER INVESTMENT  
MANAGEMENT, INC., MINA PERSYKO, BALZ  
EGGIMAN, URS SCHWYTTTER, BERNARD SPILKO,  
DAVID BONNER, WHEELER GEMMER, IDANIA  
VASQUEZ-LEONE, "JOHN DOES 1-31," DALIA  
SHIV, as Administratrix of the Estate of YEHUDA SHIV,  
deceased, SAGIV SHIV, MENACHEM IVCHER,  
BARUCH IVCHER, and WAXFIELD LIMITED,

Defendants.

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**FILED**  
APR 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**HELEN E. FREEDMAN, J:**

Motion sequences 017, 018, and 019 are consolidated for joint disposition.

Plaintiffs commenced this action after their investment manager, Yehuda Shiv, used the powers of attorney that plaintiffs had given him to misappropriate large sums from their accounts deposited with defendant Bank Julius Baer, Ltd. (the "Bank"). Plaintiffs sue Shiv's estate, the Bank, individual bank employees, and other defendants who allegedly aided and abetted or were complicit with Shiv in his fraudulent actions.

In three motions, the Bank and certain Bank affiliates, officers and directors, and employees<sup>1</sup> seek an order granting them partial summary judgment on the ground that plaintiffs

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<sup>1</sup>The moving defendants include (1) the Bank, Julius Baer Holding Ltd., Julius Baer Securities Inc., Julius Baer Investment Management LLC, Bernard Spilko, Wheeler Gemmer, Idania Vazquez-Leone (in motion # 017), (2) Urs Schwytter and Balz Eggimann (in motion # 018), and Mina Persyko (in motion # 019). Henceforth the moving defendants will be referred to as the "Bank Defendants."

failed to object to Shiv's withdrawals from their accounts within the time required under the statute of repose for fund transfers, N.Y. U.C.C. § 4-A-505 (the "Statute of Repose").

Defendant Sagiv Shiv, Yehuda Shiv's son, cross-moves for partial summary judgment on the same basis.

*Facts and allegations*

Various prior decisions in this case detail the history of this action,<sup>2</sup> and relevant facts are set forth in summary fashion here. Plaintiff Bijan Nassi is a principal of plaintiff B.B.C.F.D., S.A. ("BBCFD"), a Panamanian corporation. In June 1985, BBCFD granted a power of attorney to Yehuda Shiv which authorized him, among other things, to withdraw funds from plaintiffs' accounts at the Bank (the "Accounts") to invest them on BBCFD's behalf. In addition, BBCFD directed the Bank to send its monthly statements for the Accounts directly to Shiv, as BBCFD's designated agent.

In September 2001, the United States Securities and Exchange Commission (the "SEC") sued Shiv and investment companies he controlled (the "Sagam Companies"), alleging that Shiv and the Sagam Companies had defrauded a number of investment clients who held accounts at the Bank. In 2002 Shiv was criminally prosecuted and pled guilty to securities fraud in 2003. [U.S. v. Shiv, 02 Cr. 135 (SDNY)]. He died in 2004 while serving his prison sentence. Plaintiffs commenced this action in December 2003. Among other things, plaintiffs seek recovery for 165 withdrawals which Shiv made from their accounts from 1994 through 2001. These include 139 withdrawals, totaling more than \$ 20 million, that Shiv effected by instructing the Bank to wire money from BBCFD's account to the accounts of others at the Bank or

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<sup>2</sup>In particular, see Dec. & Ord. dated Feb. 22, 2005.

elsewhere, without a check or other negotiable instrument. It is undisputed that those transfers constitute “fund transfers” under Article 4-A of the New York Uniform Commercial Code, and henceforth, they will be referred to as the “Fund Transfers.”

It is undisputed that neither plaintiffs nor anyone else objected to many of the Fund Transfers until they were identified in this complaint. On June 11, 2003, however, the receiver appointed for the Sagam entities sent the Bank a letter listing some of the allegedly fraudulent Fund Transfers for which BBCFD seeks recovery.

*Motion*

Seeking summary judgment, movants rely on the Statute of Repose, which requires an account holding customer to object to any Fund Transfer from the account within one year after the customer is notified of the debit. U.C.C. § 4-A-505 states:

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer.

The movants contend that the Statute of Repose bars plaintiffs' claims because (1) each of the Fund Transfers was disclosed on the Bank's monthly account statements (the “Bank Statements”); BBCFD was notified of the Fund Transfers when its designated agent, Shiv, received the Bank Statements; and (3) no one from BBCFD notified the Bank of any objection to

any Fund Transfer until, at the earliest, June 2003, or more than eighteen months after BBCFD was notified of the last Fund Transfer.<sup>3</sup>

In opposition, plaintiffs contend that they did not “receive notification” of the Fund Transfers within the meaning of the Statute of Repose. They submit the deposition testimony of Bijan Nassi, who states that after Shiv received the Bank Statements, he would forward them to Nassi, along with statements that Shiv had prepared that purportedly presented the information in the Bank Statements in a simplified form (the “Shiv Statements”). In fact, Nassi testifies, the Shiv Statements concealed the Fund Transfers by greatly overstating how much remained in the Bank accounts and by omitting and falsifying other information. Nassi further testifies that he had great difficulty understanding the complex Bank Statements, and that to ensure that the Shiv Statements accurately summarized the information in the Bank Statements, he had met with individual bank officers, including Bernard Spilko, Mina Persyko and Balz Eggiman who specifically confirmed the accuracy of the Shiv Statements and the accuracy of the account balances. Nassi attested to having had several meetings at which these bank officers assured him that the Shiv Statements were accurate. In fact, plaintiffs claim, the Bank Defendants knew that the Shiv Statements were inaccurate but deceived Nassi to further Shiv’s fraud. Accordingly, plaintiffs argue, defendants cannot claim that they notified plaintiffs of the Fund Transfers by

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<sup>3</sup>In their reply, the Bank Defendants raise additional grounds for partial summary judgment: they claim that, even if the Statute of Repose does not apply, (1) plaintiffs fail to make out claims for all but the first two causes of action (conspiring in and aiding and abetting fraud), and (2) Nassi admits that Shiv sent him certain Bank Statements listing some of the Fund Transfers. Those claims will not be considered because new legal theories may not be raised for the first time in reply papers.

sending the Bank Statements to Shiv, as BBCFD's designated agent, because the Bank Defendants knew that Shiv was misleading plaintiffs with the Shiv Statements.

*Discussion*

The common law principles of principal and agent supplement the UCC unless particular provisions displace them. *See* UCC § 1-103. Ordinarily "knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it." *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782 (1985); *Farr v. Newman*, 14 N.Y.2d 183. However, there is an "adverse interest" exception, where "an agent is engaged in a scheme to defraud his principal either for his own benefit or that of another person." *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782 (1985) (citing, *inter alia*, *Restatement of Agency 2d* § 282). The rule binding a principal to his or her agent's knowledge is designed to protect third parties who rely upon the agent in good faith. *See Rosalie Estates, Inc. v. Sports Motor Cycle Center*, 227 A.D.2d 335 (1<sup>st</sup> Dept. 1996).

Where an agent is engaged in fraud that was either known or should have been known or it is known that the agent would not advise his principal, the rule imputing knowledge does not apply. *Rosalie Estates, Inc. v. Sports Motor Cycle Center*, *supra*. Nassi's testimony that the Bank Defendants, after comparing Shiv Statements with the corresponding Bank Statements, assured him on a number of occasions that the Shiv Statements were accurate, raises genuine issues concerning the Bank's knowledge and possible furtherance of Shiv's duplicitous behavior.

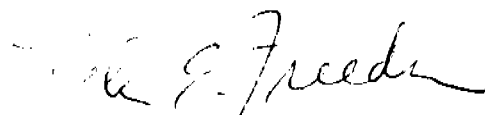
Assuming the truth of Nassi's testimony as one must on a motion for summary judgment, it could be reasonably inferred that the Bank Defendants deliberately misled Nassi, that they knew that Shiv was defrauding plaintiffs, and that they were furthering that fraud. In those circumstances, Shiv's receipt of the Bank Statements would not constitute notice to BBCFD. While, the Bank Defendants urge this Court to disregard Nassi's testimony as "plainly incredible," that characterization is extreme and credibility cannot be determined on this motion at this time.

The cross-motion for partial summary judgment by Sagiv Shiv, in which he joins in the Bank Defendants' arguments, is denied for the additional reason that he cannot avail himself of the Statute of Repose because he is unaffiliated with the Bank.

ORDERED that the motions and cross-motion for summary judgment are denied.

DATED: April 24, 2007

ENTER:



Helen E. Freedman, J.S.C.

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