

Lema v Bank of New York

2008 NY Slip Op 30170(U)

January 15, 2008

Supreme Court, New York County

Docket Number: 0104980/2004

Judge: Judith J. Gische

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

DECEMENT. **JUDITH J. GISCHE, J.S.C.**

PART 10

Index Number : 104980/2004

LEMA, NKIAMBI JEAN

vs

INDEX NO. _____

BANK OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

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

FILED
JAN 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 1/15/08


JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
NKIAMBI JEAN LEMA,

Plaintiff,

-against-

THE BANK OF NEW YORK and CASSA DI
RISPARMIO DI PADOVA E ROVIGO,

Defendants.
-----X

Decision/Order

Index No.: 104980/04

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def BNY n/m [sj] w/ GT affid, exhs, memo	1
Pltf opp, exhs	2
Def BNY reply w/GT affid, exhs, memo	3
Pltf further opp, exhs	4
Def BNY further supp. w/ GT affid, exhs, memo	5

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff seeking to recover \$60,000 and related costs and expenses arising from defendant Bank of America's February 16, 2000 debit to the account of N.J. Lema Co. ("N.J. Lema"), a sole proprietorship which plaintiff operates. Defendant Bank of New York now moves for summary judgment in its favor dismissing plaintiff's claims against it. CPLR § 3212. Defendant Cassa di Risparmio di Padova E Rovigo ("Cassa") has not appeared in this action.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212. Brill v. City of New York, 2 N.Y.3d

648 (2004).

Relevant Undisputed Facts

Many of the relevant facts are undisputed or have been determined by other courts in similar actions.¹ On November 24, 1999, Willy Amuli ("Amuli"), a former accounting client and friend of plaintiff, deposited a check in the amount of \$63,000 issued to the order of "N.J. Lema Co." and drawn by Cassa upon its account with Bank of New York (the "Check") into plaintiff's N.J. Lema Co. Bank of America account. From December 1999 through February 2000, a series of transactions were made in which the proceeds from the Check were withdrawn from the account, allegedly for the purpose of providing the funds to Amuli.

On January 12, 2000, Bank of New York sent Bank of America a "Notice of Forgery Claim" advising Bank of America that the amount of the Check had been altered from \$3,000 to \$63,000. On February 22, 2000, Bank of America informed plaintiff that the amount of the check had been altered and that on February 16, 2000, Bank of America debited \$57,888.60.

The Maryland Court of Appeals held in the First Maryland Action that the deposit agreement between Bank of America and plaintiff entitled bank to debit plaintiff's account. Lema, *supra* at 647-48.

On October 29, 2003, plaintiff filed a second action in the United States District Court for the District of Maryland against Bank of New York and Cassa seeking

¹ See e.g. Nkiamabi Jean Lema v. Bank of Am., N.A., 375 Md. 625 (Md. 2003) (the "First Maryland Action"). (Action brought by plaintiff seeking the release of funds that Bank of America had debited from plaintiff's business account. Plaintiff did not name Bank of New York as a defendant in that action.)

damages arising from the alleged fraudulent transfer (the "Second Maryland Action"). On December 18, 2003, Judge Nickerson dismissed the Second Maryland Action on the basis of lack of subject matter jurisdiction because plaintiff had failed to meet the requisite amount in controversy under 28 U.S.C. § 1332.

Plaintiff then filed a third complaint arising from the essentially the same facts in this court, on March 31, 2004, against Bank of New York and Cassa. Specifically, plaintiff has alleged that, on or before February 22, 2000, Bank of New York caused and/or contributed to his loss arising from the Check when it paid the Check without verifying whether the Check was properly indorsed and failed to return the Check in a timely manner. Plaintiff has asserted several causes of action against Bank of New York, to wit: [1] that the Bank of New York was negligent in paying the Check; [2] negligence under Regulation CC (codified at 12 C.F.R. § 229); [3] violation of Title 3 and 4 of the Maryland Code, Commercial Law; [4] fraud and conspiracy; [5] indemnification; and [6] contribution.

Bank of New York contends that after filing the complaint, plaintiff has done nothing to prosecute this action, thereby allowing this action to lie dormant. Bank of New York filed a Request for Judicial Intervention on January 31, 2007. Bank of New York now moves for summary judgment on the grounds that this action is barred by the statute of limitation, and in the alternative, seeks judgment on the basis of its other affirmative defenses.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to

judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

At the outset, the court notes that plaintiff's arguments in opposition to this motion largely rely on issues of no consequence. For example, plaintiff states that: [1] Bank of New York has failed to comply with discovery orders; [2] that the "only issue before the court whether there was an alteration to the Check;" and [3] that [Bank of New York] does not have any admission from plaintiff to support the entry of summary judgment.

Defendant argues that: [1] a three-year statute of limitation bars plaintiff's negligence claim; [2] a one-year statute of limitation bars plaintiff's Regulation CC Claim; [3] Maryland's three-year statute of limitations bars plaintiff's UCC claims; and [4] that Maryland's three-year statute of limitations bars plaintiff's fraud claims.

Plaintiff contends that as to its claims against Bank of New York, the statute of limitation accrued by virtue of a letter plaintiff sent to Bank of New York on October 10, 2002 (the "demand letter.") In the demand letter, plaintiff requested that Bank of New York send him "the monies that Bank of America send you as I have become liable to Bank of America" because "[Bank of New York's] actions are prohibited by title 3 and title 4 of the Uniform Commercial Code." Plaintiff also argues that "a cause of action for breach of warranty under [the Maryland Commercial Code] accrues when the claimant has reason to know the breach." Many of plaintiff's arguments are inarticulate and inartfully plead. To the extent that the court can discern plaintiff's arguments, the court has done so. Modern pleading rules are "designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one." Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976). Regardless of any *pro se* status, however, plaintiff is still only allowed to prevail on legally cognizable claims and arguments.

Plaintiff's general claim that the statute of limitations tolls from the date of the demand letter has no basis in law and is, therefore, rejected by the court. The statute of limitations applicable to each of plaintiff's claims will be discussed herein.

CPLR § 214(4) provides that "an action to recover damages for an injury to property" must be commenced within three years. "This period of limitation, in a

negligence action without fraud, ordinarily runs from the time of the commission of the wrong or injury.” Icelandic Airlines, Inc. v. Canada Air, Ltd. 104 Misc. 2d 239, 243-44 (1st Dept. 1980).

As a matter of law, plaintiff’s negligence claim against the Bank of New York accrued, at the latest, on February 22, 2000, when plaintiff admits he learned that Bank of America had debited his business account on February 16, 2000, because Bank of New York demanded a refund. Thus, his failure to file an action against Bank of New York on or before February 22, 2003 bars his negligence claims.

The court rejects plaintiff’s contention that the statute of limitations on his negligence claim should not begin to run until August 9, 2002, when the Maryland Court of Special Appeals directed that judgment be entered against him in the First Maryland Action. The statute of limitations accrues “from the time of the commission of the wrong or injury.” The “wrong or injury” that plaintiff has alleged arises from Bank of New York’s refund demand, not the Maryland Court’s entry of judgment.

Plaintiff’s complaint appears to allege a claim under the federal regulations contained in Part 229 - Availability of Funds and Collection of Checks (“Regulation CC”).² 12 CFR § 229.30 *et seq.* sets forth a paying bank’s responsibility for the return of checks. Pursuant to 12 C.F.R. 229.38(g), any action under subpart C of Regulation CC must be brought “within one year after the date of the occurrence of the violation involved.” See First Union Nat. Bank v. Bank One, N.A., 2002 WL 501145 (E.D.Pa.

² Plaintiff has plead that Bank of New York was “negligent in paying the [Check]” because Bank of New York allegedly “took 17 days (11 days more than allowed by Federal Reserve Regulation CC, two day/four day test for return of check) before releasing funds.”

2002). Plaintiff's Regulation CC claim arises from Bank of New York's alleged late return of the Check, which took place on February 16, 2000. Therefore, plaintiff's cause of action under Regulation CC fails.

Plaintiff has also alleged that Bank of America violated its obligations under Maryland Code, Commercial Law. The New York Borrowing Statute applies to an action brought by an out of state resident whose claim arose outside the State of New York. CPLR § 202. CPLR § 202 requires New York Courts to "borrow" the Statute of Limitations of a foreign jurisdiction "where a nonresident's cause of action accrued, if that limitations period is shorter than New York's [statute of limitations.]" Global Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 526 (1999). In cases in which the alleged injury is purely economic, courts have recognized that the place of injury is usually where the plaintiff resides and sustains the economic impact of the loss. Global Fin., *supra*.

Plaintiff is a Maryland resident, his business account against which Bank of America charged back the Check's proceeds was located in Maryland and the judgment that Bank of America obtained against him in the First Maryland Action was entered in Maryland. Therefore, his alleged injury arose in Maryland and his causes of action have accrued in Maryland.

Under Maryland law, plaintiff's claims under UCC Articles 3 and 4 are governed by a three-year statute of limitation. Section 3-118(g) of the Maryland Code, Commercial Law, provides that "an action (i) for conversion of an instrument, for money had and recieved, or like action based on conversion, (ii) for breach of warrant, or (iii) to enforce an obligation, duty or right arising under this article and not governed by this section must be commence within 3 years after the cause of action accrues.'

Section 4-111 of the Maryland Code, Commercial Law, provides that “[a]n action to enforce an obligation, duty, or right arising under this title must be commenced within 3 years after the cause of action accrues.”

Therefore, plaintiff had three years from the date on which his cause of action accrued, to wit, February 22, 2003, at the latest. Therefore his UCC claims are also barred by the statute of limitations.

Also, under Maryland law, “[t]he statutory period of limitations applicable to actions in law for fraud or deceit or for money received [in Maryland] is three years.” Villarreal v. Glacken, 63 Md. App. 114, 127 (1985).

A three-year statute of limitations applied to plaintiff’s fraud claims against Bank of New York. Since plaintiff failed to file his fraud claim timely, it is barred by the statute of limitations. Moreover, even if plaintiff’s fraud claim was brought timely, he has not set forth any facts which would otherwise substantiate a claim for fraud and satisfy his burden in opposition to the instant motion.

As for plaintiff’s conspiracy claim, under New York Law, “conspiracy to commit a tort such as fraud is not an independent cause of action... but, rather, allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort.” Snyder v. Puente De Brooklyn Realty Corp., 297 A.D.2d 432 (3d Dept. 2002) *app. den.* 99 N.Y.2d 506 (2003) (internal quotations omitted). Thus plaintiff’s conspiracy to commit fraud claim is, as a matter of law, only relevant so as to substantiate the otherwise untimely fraud claim. Since the fraud action is not sustainable, neither is the separately plead conspiracy claim.

Plaintiff’s third and fourth causes of action are for indemnification and

contribution. These claims are legally untenable where they seek damages for economic loss resulting from an alleged breach of contract, and present no issue of tort liability. CPLR § 1401; Land, Air, Water Environmental Services, Inc. v. Britelite Elec., 252 A.D.2d 573 (2d Dept. 1998). Moreover, plaintiff's indemnification claim against Bank of New York arises from his own liability for breach of contract where he participated in the underlying transaction. Plaintiff's liability to Bank of America is not purely vicarious to any fault attributable to Bank of New York. Therefore, common law indemnification against Bank of New York does not lie. Politte v. Sherman, 168 A.D.2d 761 (1st Dept 1985). Similarly, contribution is not available when the underlying liability is grounded in breach of contract. See Rockefeller Univ. v. Tishman Const. Corp., 232 A.D.2d 155 (1st Dept. 1996).

Accordingly, defendant Bank of New York's motion is granted and the complaint is hereby severed and dismissed as to it.

With respect to defendant Cassa, there is no proof that this defendant was ever served, plaintiff has failed to bring a timely motion for entry of a default judgment and it appears that this action would otherwise be barred against Cassa for all the reasons set forth herein. Accordingly, in the interest of justice, the complaint is hereby dismissed in its entirety.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion by defendant Bank of New York is granted and the

complaint is hereby dismissed in its entirety.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
January 15, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
JAN 23 2008
NEW YORK
COUNTY CLERK'S OFFICE