

Andre Romanelli, Inc. v Citibank, N.A.

2008 NY Slip Op 31105(U)

April 8, 2008

Supreme Court, New York County

Docket Number: 0109293/2005

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Romanelli, Inc

INDEX NO. 109293/05

- v -

MOTION DATE 12/12/07

Citibank, N.A.

MOTION SEQ. NO. 003

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED

APR 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/8/08

HON. RICHARD B. LOWE, III

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 56

-----X

ANDRE ROMANELLI, INC., VAN GILS
INTERNATIONAL, INC., and ANDRE ROMANELLI
INTERNATIONAL, INC.,

Plaintiffs,

Index No. 109293/05

-against-

CITIBANK, N.A. f/k/a EUROPEAN AMERICAN
BANK, NORTH FORK BANK, HSBC BANK USA,
N.A., BORIS SCHOR d/b/a BORIS SCHOR CPA,
SUSAN GOODMAN and STEPHEN SCHOR,

Defendants.

FILED
APR 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
RICHARD B. LOWE, III, J.:

Motion sequence numbers 003, 004 and 005 are consolidated for disposition.

In motion sequence number 003, defendant Susan Goodman (Goodman) moves, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint as against her, or, in the alternative, granting summary judgment on her counterclaim.

In motion sequence number 004, defendants Citibank N.A. f/k/a European American Bank (Citibank/EAB), North Fork Bank (North Fork) and HSBC Bank USA, N.A. (HSBC) (collectively, the Drawee Banks) move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint.

In motion sequence number 005, defendant JPMorgan Chase Bank, N.A. (Chase) moves, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint or, in the alternative, granting summary judgment on its counterclaims against plaintiffs.

Background

Plaintiffs Andre Romanelli, Inc. (Romanelli), Van Gils International, Inc. (Van Gils) and Andre Romanelli International, Inc. (International) are three corporations whose principal place of business is located at 159 W. 53rd Street, New York, New York. Irwin Peters (Peters) is the sole shareholder and president of Romanelli and Van Gils. Peters and Peter Lohman (Lohman) are each 50% shareholders of International. In or about 1996 or 1997, plaintiffs retained the firm of defendant Boris Schor CPA as their accountant. Virtually all of the work for the companies was performed by Boris's son, defendant Stephen Schor (Schor). Lohman had known Schor both professionally and as a close personal friend since about 1990, and recommended him to Peters.

Schor performed accounting and financial services for the three companies. Peters acknowledged that in late 2002 or 2003, he heard that Schor had a substance abuse problem, and thought that he was using cocaine. Peters Dep., at 49-51. This did not alter the position that Schor maintained with plaintiff companies.

Schor handled many financial matters for the companies, including preparing financial statements in connection with obtaining loans. Some time in the year 2000, Schor spoke to Peters about opening an account at Chase, and said that they might be able to get good loan interest rates from Chase. Peters filled out account application documents. Peters contends that the document was "only a teaser because you can't open a corporate account without a corporate seal and without personal ID." *Id.* at 73. However, Peters acknowledged that he signed the application and the signature card for Romanelli, that he did not draw a line through the lines for authorized signatures that were not filled in, and that he left the rest of the document blank. He also acknowledged signing a corporate resolution authorizing opening a business account at

Chase. *Id.* at 76-81. Schor later informed Peters that they could not obtain a better interest rate, so Peters told Schor not to open any accounts at Chase.

During this time, International and Romanelli both had a lending relationship with HSBC. Their combined borrowing from HSBC was approximately between \$3.5 and \$4.5 million. Schor informed Peters that the companies were out of formula for the amount of credit that they were receiving, meaning that their assets and inventory were insufficient to support the amount of the credit line. He suggested that the companies write checks payable to themselves, which he would use to pay tax liabilities. This would make it appear that the companies had more collateral for the loans. Schor would periodically send Peters a list of checks to make out, and Peters had the checks made out on the companies' HSBC account, or their accounts at Citibank/EAB or North Fork, and signed them (HSBC Scheme checks). Peters acknowledged that, when he signed the checks that were made out to Romanelli and International, he intended the checks to go to the taxing authorities, and not to the companies. *Id.* at 106-112. Peters did not endorse the back of the checks, and acknowledged that it would be necessary for them to be endorsed at some point, and that Schor was going to take care of seeing to it that the money was used to pay the company's taxes. *Id.* at 119-121.

In August 2004, plaintiffs discovered that Schor had opened accounts at Chase without telling them, and that he had been depositing the checks written on the HSBC, Citibank/EAB, and North Fork accounts into the Chase account, and then stealing the money by dissipating the funds from the Chase account. Plaintiffs seek to recover the money from the various banks that were involved, contending that the Chase accounts were opened improperly, and that the banks honored forged endorsements.

Defendant Susan Goodman was employed by Chase and was the officer who opened the Romanelli account in 2000, and the Van Gils account in May 2001. Peters acknowledged that he has no knowledge that Goodman knew that Schor was using the Chase accounts to steal from the companies. Peters also acknowledged that he knew that Schor "always" bought presents for people in the office. He admitted that he had Schor prepare a personal income tax return for him that inflated his income so that he could cosign a lease for someone in or about 2003. *Id.* at 424-427.

Peter Lohman (Lohman) testified at his deposition that he first observed behavior by Schor indicating that he had emotional or mental problems in the mid-1990's. Lohman Dep., at 259. Among the things that Lohman had heard was that Schor gave very generous gifts to people, including his employees. *Id.* at 260-264. When Lohman and Peters discovered that Schor had stolen the money, Schor told Lohman that he conned the bank "out of their lives." *Id.* at 327. Lohman acknowledged that he did not have any information that Goodman helped Schor to steal, knowing that he was stealing. *Id.* at 335. He knew that Goodman received gifts from Schor, but he acknowledged that Schor gave many extravagant gifts to many people. *Id.* at 336.

Debra Sgro, a bookkeeper for Schor, testified at her deposition that Schor gave lavish gifts to many people, including people that he barely knew, or did not know. She cited one example in which he gave money to a friend of hers who needed it, and never sought to be paid back. He gave Sgro money for a down payment on a home, and would accept repayment of only \$5,000 of the \$43,000 that he gave her. Sgro Dep., at 19-21.

Goodman testified at her deposition that around the third year that Schor was a client of hers, he gave her a \$1,000 airline voucher so that she could visit her daughter, for a Christmas

present. She did not report the gift to Chase. Schor also lent her a cell phone for a few months when hers was stolen, because he wanted her to be available to her customers. He declined to accept any payment for it, because he said that it was part of the office phone. Schor loaned Goodman money to pay back people to whom she owed money from when she was ill. When she was sick, he also paid some credit card bills for her, and refused to accept repayment. Goodman stated that Schor was her accountant from approximately 2001 to 2004, and that he was adamant that her bills be paid on time, and he paid those that she could not. She considered those payments to be a loan, and intended to pay them back.

Goodman testified that, before 9/11, when opening a new account at Chase, there was a policy that when customers were referred by a good customer, Goodman had the authority to waive ID for the new customer. Goodman Dep., at 167-68. Goodman denied knowing anything about Schor stealing money, or treating him differently from any other customer. She further denied participating with him, or even, as of the date of the deposition, knowing what he actually did. *Id.* at 355-56.

In addition to depositing checks that the companies made out to themselves into, and then diverting money from, the Chase accounts, Schor also deposited tax refund checks into the Chase accounts. He later diverted that money to his own use. Peters and Lohman acknowledged receiving notices - at least 17 between 2002 and February 2004 - from various taxing authorities stating that the companies had failed to file returns or to pay taxes, but claim that they believed Schor when he told them that it had been worked out. They claim not to have known about the Chase accounts until a check written on one of them bounced, and Peters received it back from the IRS.

Plaintiffs commenced this action seeking to recover the monies stolen by Schor from the banks, Goodman, and Schor. They maintain that Chase should not have permitted the accounts to be opened, should not have accepted the checks for deposit, and that the drawee banks should not have paid out on checks that presented forged or unauthorized indorsements. The amount that was converted amounts to in excess of \$4 million.

Plaintiffs set forth 30 causes of action in the amended complaint: (1) violation of UCC 4-401 against Citibank/EAB, North Fork and HSBC, by Romanelli; (2) violation of UCC 4-401 against Citibank/EAB and North Fork, by Van Gils; (3) violation of UCC 4-401 against Citibank/EAB, North Fork and HSBC, by International; (4) Commercial bad faith against Chase and Goodman, by Romanelli; (5) Commercial bad faith against Chase and Goodman, by Van Gils; (6) Commercial bad faith against Chase and Goodman, by International; (7) Money had and received against Boris Schor CPA, Schor, Goodman and Chase, by Romanelli; (8) Money had and received against Boris Schor CPA, Schor, Goodman and Chase, by Van Gils; (9) Money had and received against Boris Schor CPA, Schor, Goodman and Chase, by International; (10) Conversion of Romanelli's assets under common law and UCC 3-419 against Boris Schor CPA, Schor, Chase and Goodman; (11) Conversion of Van Gil's assets under common law and UCC 3-419 against Boris Schor CPA, Schor, Chase and Goodman; (12) Conversion of International's assets under common law and UCC 3-419 against Boris Schor CPA, Schor, Chase and Goodman; (13) Fraud on Romanelli against Boris Schor CPA, Schor, Goodman and Chase; (14) Fraud on Van Gils against Boris Schor CPA, Schor, Goodman and Chase; (15) Fraud on International against Boris Schor CPA, Schor, Goodman and Chase; (16) Negligence causing injury to Romanelli against Boris Schor CPA, Schor, Goodman and Chase; (17) Negligence

causing injury to Van Gils against Boris Schor CPA, Schor, Goodman and Chase; (18) Negligence causing injury to International against Boris Schor CPA, Schor, Goodman and Chase; (19) Breach of fiduciary duty owed to Romanelli against Boris Schor CPA, Schor, Goodman and Chase; (20) Breach of fiduciary duty owed to Van Gils against Boris Schor CPA, Schor, Goodman and Chase; (21) Breach of fiduciary duty owed to International against Boris Schor CPA, Schor, Goodman and Chase; (22) Unjust enrichment at the expense of Romanelli against Boris Schor CPA, Schor, Goodman and Chase; (23) Unjust enrichment at the expense of Van Gils against Boris Schor CPA, Schor, Goodman and Chase; (24) Unjust enrichment at the expense of International against Boris Schor CPA, Schor, Goodman and Chase; (25) Breach of contract against Boris Schor CPA and Schor, on behalf of Romanelli; (26) Breach of contract against Boris Schor CPA and Schor, on behalf of Van Gils; (27) Breach of contract against Boris Schor CPA and Schor, on behalf of International; (28) Accounting malpractice against Boris Schor CPA and Schor, on behalf of Romanelli; (29) Accounting malpractice against Boris Schor CPA and Schor, on behalf of Van Gils; (30) Accounting malpractice against Boris Schor CPA and Schor, on behalf of International.

Schor has since been indicted on criminal charges in connection with these events.

DISCUSSION

Chase and Goodman join and adopts each others' arguments in addition to submitting their own memoranda of law.

When opposing these motions, while plaintiffs are quick to point out that they fully repaid their loans from HSBC, they overlook the fact that they were involved in a scheme to defraud their bank, by misrepresenting their collateral so that HSBC loaned them more money

than they were entitled to borrow. The fact that the bank was not ultimately monetarily damaged by their fraudulent scheme does not alter the fact that they were involved in misrepresentations that were contrary to their legal obligations. This scheme laid the groundwork for Schor to be able to steal the money from plaintiffs, because they were drafting checks to themselves, which they had no intention of placing in their own accounts. Thus, they wrote checks for significant amounts, and did not track what happened to those checks, or to what use the funds were put. Plaintiffs did not even follow up in any meaningful way on the IRS notices that they received regarding the failure to pay taxes, even though they knew that they had written checks that they expected to be used for paying taxes, but were not made out to the taxing authorities. They did not check where that money went, and did not check that Schor's assertions that he had "taken care" of the problem were accurate. Under these circumstances, plaintiffs have demonstrated that they were not only involved in an illegal scheme which set the stage for their losses, but also were negligent in monitoring Schor's activities and their own checks.

The court will now turn to the merits of the motions.

Violation of UCC 4-401

UCC 4-401 provides:

- (1) As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.
- (2) A bank which in good faith makes payment to a holder may charge the indicated account of its customer according to
 - (a) the original tenor of his altered item; or
 - (b) the tenor of his completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

Plaintiffs contend that defendants improperly honored the checks bearing unauthorized

indorsements in the name of Romanelli, Van Gils and International, indorsements in the name of one other than the named payee, no indorsement, and no signature by Romanelli, Van Gils and International as drawer. Plaintiffs' assertions are not compelling.

Peters gave checks to Schor expecting that Schor would indorse them in order to pay taxes. While Schor did not use them for the intended purpose, Peters did intend that Schor indorse them. Consequently, the indorsements were not unauthorized. *See* UCC 3-403; *Rohrbacher v BancOhio Natl. Bank*, 171 AD2d 533 (1st Dept 1991); *Guaranty Trust Co. of N.Y. v Manhattan Co.*, 183 App Div 586, 589 (1st Dept 1918). The fact that plaintiffs' agent proved to be unfaithful does not enable plaintiffs, as principals, to challenge the agent's acts. *Bunge Corp. v Manufacturers Hanover Trust Co.*, 31 NY2d 223, 228-30 (1972). Further, the bank was not obligated to ascertain the extent of Schor's authority with respect to the accounts. His name was included on the signature card, and, therefore, he had at least apparent authority to act for those accounts. Peters created that situation, and cannot now seek to shift the responsibility to Chase. The fact that Peters had intended that Schor only make inquiries regarding interest rates does not place the responsibility on Chase. Peters never conveyed that limitation to Chase, and never crossed out the unused signature lines so as to prevent an unauthorized signatory from having access to the accounts. Thus, the person most able to prevent the improper use of the accounts was Peters, not Chase.

Thus, the indorsements on the Scheme checks, as well as on the tax refund checks were appropriately honored by the banks, and plaintiffs' claims based upon any purported impropriety in accepting those checks are dismissed.

The court further notes that even if the checks had not been properly honored, plaintiffs

could not recover. The banks have customer agreements for their accounts which provide deadlines by which a customer is required to report any claim of unauthorized payment of checks. Such agreements are enforceable. *See Gluck v JPMorgan Chase Bank*, 12 AD3d 305 (1st Dept 2004). Plaintiffs did not comply with the notice requirements.

Plaintiffs contend that they cannot be held to Chase's contractual limitations, because Peters never agreed to those terms, and never read them. However, in signing the account opening documents, Peters signed a statement that he had received and agreed to be bound by those terms. He cannot now deny their existence after having signed the documents. They were relied upon by Chase when opening the accounts and he was bound by those terms.

Even without the contractual time limit, plaintiffs' claim would be barred pursuant to UCC 4-406 (2) (b). That section provides that when there is a repeat forger, the customer must report the item within 14 days after the first statement on which it is contained becomes available. If the customer fails to so report the item, the customer is precluded from asserting any claim against the bank. Thus, plaintiffs' claims against the drawee banks are time-barred.

In addition, UCC 4-406 (4) bars any claim of unauthorized indorsement made more than three years after the statement containing the item was made available, and any claims relating to the customer's own allegedly unauthorized signature made after one year. This section, as well, precludes recovery on many items at issue.

Finally, pursuant to the fictitious payee rule, contained in UCC 3-405, plaintiffs are also precluded from recovering on the checks that they made out to themselves, and that Schor deposited into the Chase account. UCC 3-405 provides that an indorsement by any person in the name of a named payee is effective if the person signing on behalf of the maker or drawer intends

that the payee have no interest in the check, or where an agent or employee of the maker or drawer has supplied the maker or drawer with the name of the payee, intending that the payee have no interest in the instrument.

Here, not only did Peters not intend that the companies would not actually receive the proceeds of the checks, but Schor, plaintiffs' agent, supplied Peters with the name of the payee, and intended the payee not to have any interest in the check. Thus, under both subsections (b) and (c), the indorsement of those checks was effective, regardless of who endorsed them. See *Guardian Life Ins. Co. of Am. v Chemical Bank*, 94 NY2d 418 (2000).

Plaintiffs contend that the fictitious payee rule should not apply, because they intended to retain some interest in the checks, in that they expected the checks to be used to pay taxes. They rely on *Kersner v First Federal Savings and Loan Association of Rochester* (264 AD2d 711 [2d Dept 1999]) to support their position. However, the situation in *Kersner* was very different from that in this case. In *Kersner*, the plaintiff, Kersner, made a check payable to himself in order to pay off a line of credit, and open a new account with a lower rate of interest. He had written on the face of the check that it was to pay off the line of credit. The purported mortgage broker to whom he gave the check forged his signature to indorse the check. The bank that honored the forged signature had Kersner's signature on file, because he was the drawer as well as the payee. Thus, it was in a position to verify the signature. In rejecting the bank's attempt to avoid liability by raising the fictitious payee rule, the Court stated that

the vast majority of cases in which the fictitious payee rule has been held applicable involve faithless employees who devise forgery schemes to convert funds from their employers, and that in such instances, the employer is usually in the best position to prevent such losses through the exercise of reasonable care in the selection and supervision of employees.

Id. at 713. This sets forth the precise situation in the case before the court. Further, in *Kersner*, unlike the present case, the bank did not follow its own commercially reasonable standards in honoring the check. Thus, the *Kersner* Court specifically distinguished the case before it from a case such as this, where plaintiffs were in the best position to prevent their losses, not only through the selection and supervision of their employee, but also by exercising more care in signing documents that could be used improperly, and by being more diligent in overseeing where their money was going.

Plaintiffs also rely on *Underpinning & Foundation Constructors v Chase Manhattan Bank, N.A.* (46 NY2d 459 [1979]) for the proposition that Chase should be held liable because it did not follow its own policies and procedures. However, this too is not compelling. Plaintiffs specifically place much emphasis on Chase accepting a corporate resolution which did not have a legible corporate seal. However, there was a corporate seal on the corporate resolution, even if it was not entirely clear. Apparently, there were enough letters legible not to arouse suspicion. Even now, several years of wear and tear later, there is unrefuted evidence that “Andre” “LLI,” “I C”, “New York” and “1982” are visible.

With respect to Van Gils, there is a question as to whether the account was opened properly because Chase has been unable to locate any of the documents. There is evidence, however, that the documents for Van Gils were submitted to Chase, even though they are missing. When combined with Chase’s policy of a lower standard of ID required when a new customer is introduced by a highly valued customer, like Schor, it is uncertain whether the account was opened properly or not. Regardless, this issue still does not allow plaintiffs to recover, because the checks written on Van Gils’s account were still subject to the fictitious

payee rule. Whether the Chase account was properly opened, is not dispositive. Van Gils has no recourse to any of the banks once it has been demonstrated that it made out the checks with no intention of the payee having an interest in the funds, or once Van Gils's employee, Schor, instructed Van Gils to draft the checks while intending that the payee would have no interest in the funds. Since, at the time that Schor told Peters to make out the checks, Schor had no intention that Van Gils would have an interest in the proceeds, Van Gils cannot seek redress against any of the banks involved.

Consequently, pursuant to the UCC, plaintiffs cannot obtain recovery for the checks that were misappropriated.

Commercial Bad Faith

Plaintiffs seek to recover against Chase and Goodman for commercial bad faith. They base their claims on assertions that Goodman improperly opened the Romanelli and Van Gils accounts without necessary documentation, accepted for deposit into those accounts checks with unauthorized indorsements, accepted for deposit into the Romanelli account checks payable to International, and that Goodman participated in the looting of the accounts.

Commercial bad faith is a common-law cause of action that can be asserted against a bank if the bank acted dishonestly. *Prudential-Bache Sec. v Citibank, N.A.*, 73 NY2d 263, 274-275 (1989). In order to recover, plaintiffs must demonstrate that Chase actually knew of Schor's wrongdoing, and thereby became a participant in the crime. *Id.* at 277; *Banco Di Roma v Merchants Bank of N.Y.*, 251 AD2d 139 (1st Dept 1998); *National Union Fire Ins. Co of Pittsburgh, Pa. v Glass Check Cashing Corp.*, 177 AD2d 419 (1st Dept 1991). Evidence of knowledge and participation by senior bank officers is required. *Prudential-Bache*, 73 NY2d at

277.

Goodman was a small business relationship manager, who initially reported to the branch manager, and later to a “team leader.” Thus, she did not hold a sufficiently high position in the bank to be deemed a “principal” of the bank. *Id.* Therefore, the claims of commercial bad faith must fail. In addition, plaintiffs have not produced any evidence that Goodman was aware of Schor’s scheme, or that she participated in it. In fact, most of the checks were deposited at the Chase Times Square branch, not the Montague Street branch where Goodman worked. Thus, plaintiffs’ contentions that Goodman improperly accepted checks for deposit are without basis.

To the extent that plaintiffs base their assertions on the alleged improper opening of the Romanelli account, their position is also unconvincing. Peters admitted that he signed the corporate resolution, signature card, and business account application. There is no question that there was a seal on the corporate resolution; the only question raised by plaintiffs is who placed the seal on the document, and whether it was in fact the correct corporate seal. Contrary to plaintiffs’ argument, Dominick Testa did not testify that the seal was inadequate; he said that he could not read the name on the seal. *Zuckerbrod Affid., ex. D, at 29-31.* He refused to say whether the documents presented would have sufficed to open an account. *Id.* Further, plaintiffs place much emphasis on the fact that the account was opened without Peters having appeared at the bank in person. However, Schor did have a copy of Peters’s driver’s license, and while ID is often required when opening a business account, Chase’s policy specifically includes a proviso that when a new customer is introduced by a “high value” customer, ID may be waived. *Plaintiffs’ Consolidated Memorandum of Law, Ex. B, at 8725.* According to Goodman’s unrefuted deposition testimony, Schor qualified as a high value customer; thus, there is nothing

suspect about his having been permitted to open the account. The court also notes that it was only because Peters filled out the documents, and left blanks, that Schor was able to open the account as a signatory on it. Had Peters crossed out the blank signature lines, as instructed, Schor could not have added his own name to it. Thus, in this matter, too, plaintiffs' negligence caused the damage that ensued.

With respect to the Van Gils account, there is some discrepancy. The bank could not locate any of the documentation from opening that account. Peters admitted in the interrogatory responses that he signed the documents for opening the account, and Goodman states that she gave the blank documents to Schor, and received them back completed. At his deposition, however, Peters denied signing those documents.

Regardless of the missing documents, in order to establish commercial bad faith, plaintiffs would have to demonstrate that Goodman, or Chase, knew that Schor was involved in stealing money from plaintiffs. There is no evidence to that effect. Accordingly, the causes of action for commercial bad faith must be dismissed.

Money had and received, Common-law conversion, Negligence, and Unjust Enrichment

Where the UCC bars recovery, a plaintiff cannot resort to common-law claims in order to, in effect, nullify the UCC provisions. *Prudential-Bache*, 73 NY2d at 272-273. Here, the UCC precludes recovery based upon the fictitious payee rule. Plaintiffs cannot circumvent the allocation of risk contained in UCC 3-405 by bringing common-law claims for money had and received, common-law conversion, negligence, or unjust enrichment. The question of whether the bank was negligent is irrelevant when UCC 3-405 comes into play. *Id.* at 273-274; *Merrill Lynch, Pierce, Fenner & Smith v Chemical Bank*, 57 NY2d 439, 447 (1982); *Sunset Park*

Redevelopment Comm., Inc. v Bowery Sav. Bank, 224 AD2d 608, 609 (2d Dept 1996).

Plaintiffs contend that the UCC is not a bar to these claims because plaintiffs have not alleged simple negligence, but have alleged that the depository bank acted dishonestly. However, as discussed above, plaintiffs' claims of dishonesty are without supporting evidence, and do not alter the general rule that these common-law claims are precluded.

Since, with respect to these claims, any claims against Goodman are in her capacity as an employee of the bank, the claims cannot stand as against her, either. Plaintiffs argue that Goodman benefitted personally from her actions in opening the account. However, they have presented no evidence that, at the time that the account was opened, Goodman received any benefit. The evidence demonstrates that Goodman did not receive any presents from Schor until more than two years after the Romanelli account was opened, and a year and a half after the Van Gils account was opened. There is also no evidence that she received a benefit from the accounts. There is no evidence regarding where the money for her presents originated, or that they were in any way connected with her opening of the accounts. Thus, there is no basis to proceed on these common-law claims as against her personally.

Even if these causes of action were not precluded, they would fail. The bank was not required to inquire into Schor's authority to open the accounts in order to protect his principal from his defalcations. *William Penn Life Ins. Co. of N.Y. v Irving Trust Co.*, 145 AD2d 174, 177 (1st Dept 1989). Further, Peters signed, and gave to Schor, the signature card, corporate resolution and account application, thus giving him apparent authority to open the account. Additionally, the opening of the accounts did not cause plaintiffs' loss. It was caused by Schor's diversion of the checks that he was authorized to indorse.

International contends that the bank was negligent in accepting for deposit to the Romanelli account checks that were payable to it. Initially, the court notes that Chase did not owe any duty of care to International, because International was not its customer. *Tzaras v Evergreen Intl. Spot Trading, Inc.*, 2003 WL 470611, *5, 2003 US Dist LEXIS 2707 (SD NY 2003). In any event, the checks were made payable to “Andre Romanelli International, Inc.” The account was in the name of “Andre Romanelli, Inc.” The two names are so similar that the bank “acted in accordance with reasonable commercial standards when it accepted” the check for deposit. *29th Street Corp. v New York Community Bank*, 2 AD3d 838, 839 (2d Dept 2003); *see also Penny Tech. v Citibank, N.A.*, 248 AD2d 217 (1st Dept 1998); UCC 3-401 (2). This is especially true since the check was endorsed with a restrictive endorsement directing deposit to the Romanelli account, and the bank followed that indorsement. *Federal Ins. Co. v Manufacturers Hanover Trust Co.*, 157 AD2d 460 (1st Dept 1990). With respect to any claims against Goodman, there is the additional fact that most of the checks were deposited at the Times Square Branch, not the Montague Branch. Therefore, Goodman did not personally accept those checks for deposit, and cannot be held responsible for their acceptance.

Breach of fiduciary duty

Plaintiffs contend that Goodman and Chase are liable for breach of fiduciary duty to them. They do not assert that Chase or Goodman owed them a fiduciary duty, but that Goodman and Chase participated in Schor’s breach of his fiduciary duty to plaintiffs.

To prove aiding and abetting a breach of fiduciary duty, a plaintiff must demonstrate a breach by a fiduciary of obligations to another, that the defendant knowingly induced or participated in the breach, and that the plaintiff suffered damage as a result of the breach.

Kaufman v Cohen, 307 AD2d 113, 125 (1st Dept 2003). The defendant must have actual knowledge of the breach of fiduciary duty by another; constructive knowledge does not suffice. *Id.* Further, the defendant must provide “‘substantial assistance’ to the primary violator”; mere inaction does not constitute substantial assistance. *Id.*

Plaintiffs have failed to provide any evidence that Goodman was aware of Schor’s breach of duty, or that she affirmatively assisted him in his acts. Consequently, plaintiffs have failed to raise a question of fact, and the causes of action for breach of fiduciary duty are dismissed as against Chase and Goodman.

Breach of Contract and Accounting Malpractice

Plaintiffs’ causes of action for breach of contract and accounting malpractice are brought only against Boris Schor CPA and Schor. Thus, they are not at issue in this motion.

Fraud

Plaintiffs seek to recover against Goodman and Chase for fraud.

The elements of fraud are a misrepresentation of a material fact, knowledge by the person making it that the representation was false or was recklessly made, that the representation was made to deceive and induce the other party to rely upon it, and the party to whom it was made relied upon it to its detriment. *Zaref v Berk & Michaels, P.C.*, 192 AD2d 346, 348 (1st Dept 1993). Plaintiffs have not asserted that Goodman or Chase made any false statements to them. Hence, no cause of action for fraud can be maintained.

Plaintiffs maintain that the causes of action are for aiding and abetting fraud. However, the elements of aiding and abetting fraud include the knowledge by the defendant of the fraud by the primary wrongdoer, and that the defendant substantially assisted in the fraud. *Gabriel*

Capital, L.P. v NatWest Fin., Inc., 94 F Supp 2d 491, 511 (SD NY 2000). As discussed above, plaintiffs have failed to set forth any evidence that Chase or Goodman knew of Schor's alleged fraud. With respect to the element of substantially assisting the fraud, there would have to be evidence that there was assistance relating to the preparation or dissemination of the false statements. *Morin v Trupin*, 711 F Supp 97, 113 (SD NY 1989). Here, there is no allegation, much less evidence, that Goodman or anyone from Chase assisted Schor in making false statements to plaintiffs. Further, plaintiffs' burden in this cause of action is to prove their claims by clear and convincing evidence (*Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 10 [1972]), and the evidence must make "the inference of fraud unequivocal." *Manchel v Kasdan*, 286 App Div 483, 484 (1st Dept 1955), *aff'd* 1 NY2d 734 (1956). Plaintiffs have not presented evidence to meet this burden. Consequently, the claims for fraud are dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant Susan Goodman (motion sequence number 003) for summary judgment is granted, and the amended complaint is dismissed as against her, with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

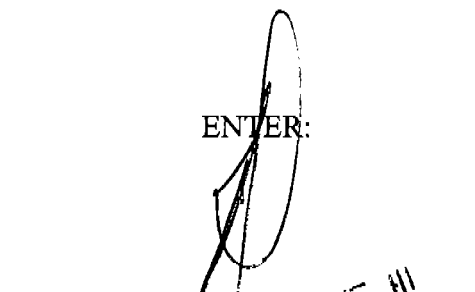
ORDERED that the motion of Citibank, N.A. f/k/a European American Bank, North Fork Bank, and HSBC Bank USA, N.A. (motion sequence number 004) for summary judgment is granted, and the amended complaint is dismissed against them with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of JPMorgan Chase Bank, N.A. (motion sequence number 005) for summary judgment is granted, and the amended complaint is dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 8, 2008

ENTER:


J.S.C.
HON. RICHARD B. LOVE, III

FILED
APR 16 2008
COUNTY CLERK'S OFFICE
NEW YORK