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

PRESENT: Hon. DORIS LING-COHAN, Justice PART 36

STUART FRIEDMAN,

Plaintiff,

- v -

JP MORGAN CHASE MANHATTAN BANK,

Defendant.

INDEX NO. 102788/08
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL.NO.

The following papers, numbered 1 to 3 were read on this motion to/for : dismiss complaint.

Papers	Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2
Answering Affidavits - Exhibits (Memo)[1]	3
Replying Affidavits (Reply Memo)	

Cross Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is granted, as set forth below.

Background

Plaintiff, Stuart Friedman (plaintiff or Mr. Friedman), who is currently serving a prison sentence as a result of his criminal conviction (*see People v Friedman*, 14 AD3d 713 [2d Dept 2005], *lv denied* 5 NY3d 788 [2005]), brings this civil action *pro se* against defendant JP Morgan Chase Bank, N.A. (Chase or defendant bank), incorrectly sued herein as "JP Morgan Chase Manhattan Bank". The allegations in plaintiff's verified complaint relate to an incident which

[1] In addition to the bound papers, entitled "Plaintiff's Opposition to the Defendant's Motion to Dismiss", which were purportedly served on defendant on April 10, 2008, the file contains a series of loose papers from plaintiff, including: (1) an affidavit by plaintiff, entitled "Affidavit in Support of Plaintiff's Opposition not to Dismiss this Case", sworn to April 11, 2008 (this could not have been served on defendant on April 10, 2008); (2) a document entitled, "Supplemental Facts"; and (3) and a letter to the Court purporting to contain marked-up excerpts of testimony from plaintiff's criminal trial. The above documents are not properly before this Court on the instant motion, as there is no indication if and when plaintiff served them on defendant. Even assuming, for the sake of argument, that this Court considers the above documents, they would not alter the result on this motion

allegedly occurred between December 3-7, 2001 at Chase branch number 0819, located on the corner of 103rd Street and 39th Avenue in Corona, Queens, New York (Affidavit of Sheila E. Carson, Esq. in Support of Motion to Dismiss, Ex. A [Complaint], at ¶¶ 3, 8, 9, 11). Plaintiff alleges that Chase allowed an individual who maintained an account at the above branch to cash a forged check made out to plaintiff, without requiring either an endorsement or identification (Complaint, at ¶¶ 9, 10, 12, 13). Plaintiff alleges that he never saw the check at issue, nor did he benefit from the proceeds of said check (Complaint, at ¶ 10).

Plaintiff further asserts that he did not become aware that Chase had cashed the check until his criminal trial, in or about November 2002, which took place in Supreme Court, Queens County (Complaint, at ¶ 11, 13). The complaint alleges that an employee of Chase, Ms. Juanita Collazo, testified at plaintiff's criminal trial, in or about November 2002[2], that plaintiff had cashed the check at issue (*id.*). The complaint further alleges that Ms. Collazo testified that Chase had cashed the check without requesting identification and a signature endorsement, allegedly in violation of the bank's practices and Federal and State banking statutes and regulations, including the Uniform Commercial Code (UCC) (Complaint, at ¶¶ 12, 13). Plaintiff alleges that, as a result of the testimony of Chase's employee, which he characterizes as false, speculative and slander, he was convicted of "some type of fraudulent crime with respect to forgery of an unindorsed (sic) check, with no signature indorsement or I..D. markings on the back of said check that was cashed by someone other than this Plaintiff herein" (Complaint, at ¶ 13 [parenthetical supplied]).

The complaint alleges that plaintiff wrote letters requesting an investigation of the above incident to Mr. Jamie Dimon, president of Chase, and to various government agencies, including the New York State Attorney General and the New York State Banking Department, which referred matter to the Comptroller of the Currency, Administrator of National Banks (Complaint, at ¶¶ 14-16). Plaintiff did not receive a reply to his letter from Chase and the various government

---

[2] Plaintiff has annexed to the complaint what appears to be marked-up excerpts from the transcript of Ms. Collazo's testimony at his criminal trial, although the transcripts are not properly identified.

agencies did not investigate his complaint (*id.*, and letters annexed to Complaint).

The complaint seeks $5,000,000.00 in damages from Chase (Complaint, at ¶ 16). The complaint asserts causes of action sounding in "negligence, fraud, defacement of character and conspiracy to frame" (Complaint, at 1). Additionally, the complaint alleges that Chase violated Federal, State and local banking regulations and statutes, including the UCC (Complaint. At ¶ 4, 7, 12).

Plaintiff was convicted on or about December 3, 2002, upon a jury verdict after a criminal trial in Supreme Court, Queens County, of multiple counts of forgery in the second degree, criminal possession of a forged instrument in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree and petit larceny (*People v Friedman*, 14 AD3d 713). On appeal, the Appellate Division modified plaintiff's conviction by concluding that the evidence was insufficient to sustain his conviction on several counts based upon incidents not related to the check at issue in his civil complaint (*id.*). Plaintiff's conviction with respect to the other counts of the indictment was affirmed (*id.*).

Plaintiff commenced the instant action by filing the summons and complaint, on or about February 21, 2008. Chase moves for an order pursuant to CPLR 3211(a)(5) and (7), dismissing the complaint, as the claims asserted therein are barred by the applicable statutes of limitations and, in any event, fail to state legally cognizable causes of action. For the reasons set forth below, this Court grants Chase's motion to dismiss the complaint.

Discussion

1. Plaintiff's Claims are time-Barred by the Applicable Statutes of Limitations

On a motion to dismiss pursuant to CPLR 3211(a), the pleadings, in this case the complaint are liberally construed and all factual allegations asserted therein are accepted as true (*see Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1984]; *Gertler v Goodgold*, 107 AD2d 481, 485 [1st Dept 1985], *affd on op. below* 66 NY2d 946 [1985]). Accepting the factual allegations set forth in plaintiff's complaint as true and according them every

favorable inference, the claims asserted therein are time-barred by the applicable statutes of limitations and, hence, this Court grants Chase's motion to dismiss the complaint pursuant to CPLR 3211(a)(5).

a. Negligence

Plaintiff's cause of action for negligence is governed by the three-year statute of limitations in CPLR § 214(5), for actions to "recover damages for a personal injury". A cause of action for personal injuries sounding in negligence accrues at the time of injury (*see Barrell v Glen Oaks Vil. Owners, Inc.*, 29 AD3d 612, 613 [2d Dept 2006] [cause of action to recover damages for personal injuries allegedly caused by negligently installed hose supplying hot water to a washing machine accrued when hose ruptured, resulting in injuries to plaintiff, not when hose was installed]; see also *Ross v Louise Wise Servs., Inc.*, 28 AD3d 272, 281 [1st Dept 2006], *modified on other grounds* 8 NY3d 478 [2006] [limitations period for cause of action alleging that defendant agency negligently failed to disclose information concerning the medical and psychological history of adopted child's family accrued when adoption was finalized]).

Accordingly, plaintiff's cause of action for negligence accrued, at the latest, when he was convicted after his criminal trial, in December 2002, and, thus, this claim was time-barred by the applicable three-year statute of limitations in December 2005.

b. Statutory and Regulatory Violations, Including Violations of the UCC

Plaintiff's allegations that Chase violated various Federal and State banking regulations and statutes, including the UCC, are governed by the three-year statute of limitations in CPLR § 214(2), for an "action to recover upon a liability, penalty or forfeiture created or imposed by statute", except to the extent that the statutes involved merely codify an existing common law liability (*see Banca Commerciale Italiana, New York Branch v Northern Trust Intl. Banking Corp.*, 160 F3d 90, 94 [2d Cir 1998]). The three-year limitations period applicable to plaintiff's statutory claims began to run in December 2001, when Chase cashed the check at issue, or, at the latest, in December 2002, when plaintiff was convicted after his criminal trial. Accordingly, the statutory

claims were time-barred, at the latest, in December 2005.

c. Slander

An action to recover damages for certain intentional torts, including libel and slander, is subject to a one-year statute of limitations (CPLR § 215 [3]). The statute of limitations for a slander claim begins to run on the date that the allegedly slanderous statements are uttered (*see Gigante v Arbucci*, 34 AD3d 425, 426 [2d Dept 2006]; *Stafford v Bickford*, 159 AD2d 456, 457 [1st Dept 1990], *lv dismissed* 76 NY2d 825 [1990], *rearg denied* 76 NY2d 936 [1990]). Assuming, for the sake of argument, that plaintiff can maintain a cause of action for slander based upon statements that a Chase employee made during the course of her testimony as a witness at plaintiff's criminal trial, which is not the case for the reasons set forth in Section 2, *infra.*, plaintiff's slander cause of action accrued on the date when the witness made the allegedly slanderous statements, at the latest on or about November 30, 2002. Accordingly, plaintiff's slander cause of action was time-barred one year after the alleged statements, or on or about November 30, 2003.

d. Fraud

A cause of action sounding in fraud is subject to the limitations period prescribed by CPLR § 213 (8), providing, in pertinent part, that the time in which a fraud claim must be commenced "shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it" (*see Prichard v 164 Ludlow Corp.*, 49 AD3d 408 [1st Dept 2008] [six-year limitations period for fraud cause of action began to run when plaintiffs entered into the contract allegedly induced by the fraudulent statements; fraud cause of action time-barred by both the six-year limitations period and the two-year limitations period dating from the discovery of the alleged fraud]).

As Chase has noted in its reply memorandum of law, plaintiff's papers opposing the motion to dismiss indicate that the fraud allegation is based upon an alleged conspiracy between the defendant bank and the bank customer on whose account the check at issue was drawn, in this case

plaintiff's father, Marvin Friedman, to have the forged check cashed without an endorsement or identification (*see* Plaintiff's Opposition to Defendant's Motion to Dismiss, at 12, 14-16, 18). Assuming the truth of plaintiff's allegations of fraud, as amplified by his opposition papers, and assuming, for the sake of argument, that plaintiff has properly alleged the elements of fraud, which is not the case or the reasons set forth in Section 2, *infra*, then the six-year limitations period set forth in CPLR § 213(8) began to run in early December 2001, when Chase allegedly cashed the check. Accordingly, the fraud cause of action was time-barred, at the latest, in December 2007[3].

e. Plaintiff's Other Causes of Action

Plaintiff asserts additional causes of action, "defacement of character" and "conspiracy to frame", which are not viable for the reasons set forth in Section 2, *infra*. Assuming, for the sake argument, that the plaintiff has stated viable causes of action, these claims are most similar to the intentional torts, including slander and malicious prosecution, subject to the one-year limitations period in CPLR § 213 (8) and are, thus, time-barred.

2. The Complaint Fails to State a Cause of Action

The standard for determining a motion to dismiss pursuant to CPLR 3211 (a)(7) is whether the allegations in the four corners of the complaint, liberally construed, state any cognizable cause of action (*see Leon v Martinez*, 84 NY2d at 88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]; *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001]). The exception to the general principle that, on a motion to dismiss pursuant to CPLR 3211 (a)(7), the facts alleged in the complaint are assumed to be true and are accorded every favorable inference, is that "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Gertler v Goodgold*, 107 AD2d at 485; *quoted in Maas v Cornell Univ.*, 94 NY2d at 91). Plaintiff's complaint is replete with conclusory

[3] The two-year limitations period in CPLR § 213 (8) triggered from the discovery of the alleged fraud began to run, at the latest, when plaintiff was convicted after his criminal trial in December 2002. Accordingly, plaintiff's fraud cause of action was time-barred in December 2004, based upon the discovery limitations period.

allegations. The complaint fails to state legally cognizable causes of action for the reasons set forth below.

a. Collateral Estoppel Bars Plaintiff from Bringing a Civil Action to Litigate Issues Decided against him in the Prior Criminal Proceeding

Plaintiff was convicted of various counts after a jury trial in the criminal action and has exhausted his right to appeal within the New York State court system (*see People v Friedman*, 14 AD3d 713). Plaintiff appears to be asserting that he incurred damages as a result of his criminal conviction. The doctrine of collateral estoppel, however, precludes a party from relitigating issues in a civil action which have been decided against him in the prior criminal action (*see S.T. Grand, Inc. v City of New York*, 32 NY2d 300, 304-305 [1973]; *Hughes v Farrey*, 30 AD3d 244, 247 [1st Dept 2006], *lv dismissed* 8 NY3d 841 [2006]; *Grayes v DiStasio*, 166 AD2d 261, 262-263 [1st Dept 1990]). In order for the doctrine of collateral estoppel to apply, the issues raised in the criminal action and the present action must be identical and must have been decided in the criminal action and must be decisive of the present action. Additionally, plaintiff must have been afforded a full and fair opportunity to contest the determination in the prior criminal action (*see S.T. Grand, Inc. v City of New York*, 32 NY2d at 304; *Hughes v Farrey*, 30 AD3d at 247). Accordingly, to the extent that the criteria for the doctrine of collateral estoppel have been met, plaintiff may not use the instant civil action to relitigate issues concerning the check allegedly cashed by Chase which have been decided against him in the prior criminal proceeding.

b. The Testimony of the Chase Employee at Plaintiff's Criminal Trial is Protected by Absolute Privilege and Cannot be the Basis of Causes of Action for Slander and Other Torts

Plaintiff makes allegations of slander and other torts based upon the testimony of Chase's employee, Ms. Collazo, as a witness at his criminal trial (Complaint, at ¶ 13). Plaintiff's slander and other tort allegations based on the trial testimony of a witness are subject to dismissal as a matter of law, as statements made in the course of judicial proceedings are protected by an absolute privilege (*see Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007]; *Toker v Pollack*, 44 NY2d 211,

219 [1978]; *Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 170-171 [1st Dept 2007]), and this privilege extends to trial testimony by witnesses (*see id.* at 171; *Arts4All, Ltd. v Hancock*, 5 AD3d 106, 108 [1st Dept 2004]). As the Appellate Division observed in *Sexter & Warmflash, P.C. v Margrabe* (38 AD3d at 171-172):

> "As a matter of public policy, the possible harm to individuals barred from recovering for defamatory statements made in connection with judicial proceedings is deemed to be 'far outweighed by the need ... to encourage parties to litigation, as well as counsel and witnesses, to speak freely in the course of judicial proceedings'" (*quoting Martirano v Frost*, 25 NY2d 505, 508 [1969]).

"The rule is that 'a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation'" (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d at 171, *quoting Lacher v Engel*, 33 AD3d 10, 13 [1st Dept 2006]). Moreover, "an offending statement pertinent to the proceeding in which it was made is absolutely privileged, regardless of any malice, bad faith, recklessness or lack of due care with which it was spoken or written, and regardless of its truth or falsity" (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d at 172). The standard is extremely liberal for determining whether a statement is "at all pertinent to the litigation" (*id.* at 173). The pertinence of a statement made in the course of judicial proceedings may be determined by the Court, as a matter of law, on a motion addressed to the sufficiency of the pleadings, and any doubts are to be resolved in favor of pertinence (*id.*). The excerpts of trial testimony by the Chase employee, annexed to plaintiff's complaint, are pertinent to the criminal proceeding, despite plaintiff's disagreement with the substance of the testimony. Accordingly, the testimony of the Chase employee is protected by absolute privileged and cannot be the basis for a slander cause of action, or any other tort allegations.

c. Fraud

Plaintiff's complaint is replete with conclusory allegations that Chase acted fraudulently or with fraudulent intent (see Complaint, at ¶ 10, 12). In order to state a cause of action for fraud, however, plaintiff must allege the following elements:

> "'(1) defendant made a representation as to material fact; (2) such representation was false; (3) defendant[ ] intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff sustained pecuniary loss'"

(*Ross v Louise Wise Servs., Inc.*, 8 NY3d at 488, *quoting Juman v Louise Wise Servs.*, 159 Misc 2d 314, 320 [Sup Ct, NY County 1994], *affd* 211 AD2d 446 [1st Dept 1995]). Plaintiff has failed to allege any of the above elements in the complaint and, thus, the fraud claim must be dismissed, as legally insufficient.

d. Other Intentional Torts

The complaint contains conclusory allegations of other intentional torts, notably "defacement of character" and "conspiracy to frame", none of which constitute a legally cognizable cause of action. The "defacement of character" claim appears to be most similar to the slander cause of action, which is legally insufficient for the reasons stated in Section 2(b), *supra*.

The "conspiracy to frame" claim appears to be most similar to a cause of action for malicious prosecution. In order to state a cause of action for malicious prosecution, plaintiff must allege the following elements:

> "'(1) the commencement and continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice'"

(*Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000], *quoting Broughton v State of New York*, 37 NY2d 451, 457, *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929). Plaintiff has failed to allege all of the above elements. Notably, plaintiff was convicted after a jury trial in his criminal proceeding, and any criminal charges concerning the check at issue in this action were affirmed on appeal (*see People v Friedman*, 14 AD3d 713). Accordingly, plaintiff is precluded from bringing a cause of action against Chase for malicious prosecution, as a matter of law.

Accordingly, it is

ORDERED that defendant's motion for an order, pursuant to CPLR 3211 (a)(5) and (7), dismissing the complaint is granted and the Clerk shall enter judgment dismissing the action, and it

is further

ORDERED that, within 30 days of entry, defendant shall serve on plaintiff a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: July 11, 2008

ENTER: _____,
Doris Ling-Cohan, JSC

Check One: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION
***Check if Appropriate:* [ ] DO NOT POST [ ] REFERENCE**

S:\Supreme Court\Dismiss\Friedman.JP Morgan Chase - pro se plaintiff - civil allegations related to criminal conviction.wpd