

Grossman v Chase J.P. Morgan Bank, N.A.
2008 NY Slip Op 33403(U)
December 16, 2008
Supreme Court, New York County
Docket Number: 600364/2008
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 600364/2008

GROSSMAN, ELLEN B.

VS.

JPMORGAN CHASE BANK, N.A.

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO.

600364-08

MOTION DATE

9/14/08

MOTION SEQ. NO.

#001

MOTION CAL. NO.

be read on this motion to/for

PAPERS NUMBERED

1-5

6

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 AND ORDER.

FILED

DEC 18 2008

COUNTY CLERK'S OFFICE NEW YORK

Dated:

12/16/08

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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 54

-----X
ELLEN B. GROSSMAN,

Plaintiff,

Index No.: 600364/2008

-against-

CHASE J.P. MORGAN BANK, N.A.,

Defendant,

-----X
SHIRLEY WERNER KORNREICH, J.

**DECISION and
ORDER**

FILED
DEC 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action against Chase J.P. Morgan Bank (defendant or bank) by a depositor arising from the payment of monies to an unauthorized person, the defendant bank moves to dismiss the complaint pursuant to CPLR 3211(a). The grounds for the motion are that: 1) pursuant to the account agreement between plaintiff and the bank, plaintiff had to notify the bank within thirty days of any unauthorized transaction; and 2) plaintiff's negligence claim is merely a breach of contract claim couched in tort language. Plaintiff opposes the motion, arguing that under the provisions of UCC 4-406, the account agreement does not relieve the bank of the duty to exercise ordinary care, which it failed to do. Plaintiff does not oppose the motion insofar as it is directed to the first cause of action for breach of contract. For the reasons that follow, the motion to dismiss the first cause of action is granted in the absence of opposition, but the motion to dismiss the second cause of action for negligence is denied.

We start with the general standard that on a motion to dismiss, the facts alleged in the complaint are accepted as true and the plaintiff is entitled to the benefit of every favorable

inference. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 A.D.3d 273, 275 (1st Dep't 2005).

Affidavits and other evidence may be freely used to preserve inartfully pleaded claims. *R.H. Sanbar Projects, Inc. v. Gruzen Partnership*, 148 A.D.2d 316 (1st Dep't 1989).

Accordingly, the following facts alleged in the complaint, as supplemented by plaintiff's affidavit in opposition, must be accepted as true and given the benefit of every favorable inference. On August 11, 2006, a representative of the defendant bank called plaintiff to ask whether she had made an on-line transfer in the amount of \$9,500 from her savings account to an account in Commerce Bank. Plaintiff told defendant that she had not authorized that transaction and that she never did on-line banking. Defendant's representative told plaintiff that someone had opened an on-line account using her savings account number, but that the transfer of funds to Commerce Bank could still be stopped. Plaintiff told the bank to stop the transfer. The following day, upon the advice of defendant's representative, plaintiff changed her savings and checking account numbers at her local branch office in Manhattan. Plaintiff's affidavit states that she was assured by the representative that her accounts were safe and that the bank would notify her of any further unusual activity.

On April 17, 2007, plaintiff made a deposit into her savings account in a branch near her office in Manhattan. The deposit receipt reflected a balance of approximately \$1,600, which she knew to be too low. Plaintiff went to defendant's branch manager, who told her that between January 22 and 25, 2007, someone had made withdrawals amounting to approximately \$23,800.00 from her checking and savings accounts. The withdrawals were made in Brooklyn and the Bronx, places where plaintiff never banked, and never lived or worked. The bank

manager told plaintiff that someone had appeared at a branch in Brooklyn on January 22, 2007 and, upon presentation of a Florida driver's license with plaintiff's identification on it, defendant issued an ATM card linked to plaintiffs' accounts, but bearing a different number than plaintiff's ATM card. Defendant's Brooklyn branch then permitted the thief to process the first unauthorized withdrawal in the amount of \$5,000. Defendant never contacted plaintiff prior to issuing the ATM card and did not take the precaution of mailing the ATM card to plaintiff's address on file with the bank. Plaintiff continued to use her previously issued ATM card until April 17, 2007, without knowing that a second one with a different number had been issued by defendant. Defendant never contacted plaintiff about suspicious activity on her account. The transactions appeared on plaintiff's February 6, 2007 statement.

The parties agree that the Account Rules and Regulations for plaintiffs' accounts (Account Agreement), the provisions of which plaintiff assented to when she executed the signature cards, provide as follows:

You agree to reconcile your statement promptly upon receipt. If we honor a check or other item drawn on or posted to your Account that is altered in any way or was not drawn or otherwise authorized by you ("unauthorized item") or if your Account statement contains any errors, you agree to notify us in writing of such unauthorized item or error within 30 days of the date on which the unauthorized item, or the Account statement that contained a description of the unauthorized item or error, was mailed, transmitted or otherwise made available to you....Failure to report an unauthorized item or error, or that you did not receive your scheduled statement, within the 30-day time frame set forth above, or to abide by the conditions set forth herein, shall be deemed conclusive proof that you failed to exercise reasonable care and promptness in examining the items and statements of the affected Account and in notifying us of the unauthorized item or error. You agree that such items and errors shall therefore be fully enforceable against you and you shall have no claim against us for same and shall be barred from bringing any action against us that is in any way related to the unauthorized item or errors.

Both parties rely upon section §4-406 of the Uniform Commercial Code, entitled "Customer's Duty to Discover and Report Unauthorized Signature or Alteration," which provides as follows:

(1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration....

The Account Agreement did operate "to abbreviate a statutory one-year condition precedent to actions against banks based on negligence in detecting a customer's forged signature." UCC 4-103(1) provides that:

The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which

[* 6]

such responsibility is to be measured if such standards are not manifestly unreasonable.

See also, Gluck v. JPMorgan Chase Bank, 12 A.D.3d 305, 306 (1st Dep't 2004)(one year period in UCC4-406(4) can be shortened by agreement between bank and customer).

However, plaintiff is correct that pursuant to 4-406(3), the bank can still be held liable if plaintiff can establish "lack of ordinary care on the part of the bank in paying the item(s)." *New York Credit Men's Adjustment Bureau, Inc. v. Manufacturers Hanover Trust Co.*, 41 A.D.2d 912, 913 (1st Dep't 1973); *Herzog, Engstrom & Koplovitz, P.C. v. Union Nat'l Bank*, 226 A.D.2d 1004 (3d Dep't 1996)(while bank and customer may agree to vary provisions of UCC article 4, agreement may not abrogate bank's responsibility to exercise good faith and ordinary care); *Aikens Constr. of Rome, Inc. v. Simons*, 284 A.D.2d 946, 947 (4th Dep't 2001). The term "ordinary care" in the statute is the normal tort definition, which a customer can prove by "presenting any type of proof that the bank failed to act reasonably." *Putnam Rolling Ladder Co. v. Manufacturers Hanover Trust Co.*, 74 N.Y.2d 340, 346 (1989)(lack of ordinary care consisting of evidence that bank's inspection procedures were "so superficial as to offer no realistic opportunity to detect forged checks."). Section 4-103(1) also explicitly provides that no agreement may absolve a bank for "lack of good faith or failure to exercise ordinary care."

Plaintiff's allegations are sufficient to plead a failure to exercise ordinary care. It cannot be said that the bank's actions were reasonable as a matter of law. Without notifying plaintiff, the bank issued an ATM card with a new number to a person with a Florida license and paid out more than \$23,000 in a few days. This occurred when the bank was aware that someone previously had illegally used plaintiff's identity to open an on-line account and the bank had

promised to watch for unusual activity. The bank could have taken the precaution of mailing the ATM card to plaintiff's account address or contacting her by phone. The size of the transactions, their close proximity and the branches at which the transactions occurred allegedly were unusual for plaintiff's account, over which the bank had agreed to be vigilant.

Gluck v. JP Morgan Chase Bank, 12 A.D.3d 305 (1st Dep't 2004), relied on by the bank, is distinguishable because in that case the plaintiff argued that, pursuant to the customer agreement, damages were recoverable for the bank's gross negligence in cashing forged checks for the customer's employee. The customer argued that it was gross negligence not to ask the employee for a check-cashing card or to compare the forged signatures on checks with the signature card on file with the bank. The First Department held that the bank's conduct was not grossly negligent within the meaning of the customer agreement. In dismissing the plaintiff's claims, the First Department cited to precedent involving dishonest employees falling under a different section of the UCC 3-405(1)(c). That section was written to cover a situation where the employer's agent or employee prepares the check for signature or otherwise furnishes the signing officer with the name of the payee. 62 ½ *McKinney's Cons. Laws of NY*, ©2001, UCC 3-405, Official Comment, p.231. The principle embodied in that section is that the loss should fall upon the employer as a risk of business rather than upon the bank because the employer is normally in a better position to prevent such forgeries by using reasonable care in the selection or supervision of his employees or, if he is not, to cover the loss with fidelity insurance. *Id.* *Gluck* is distinguishable because in this case the thief was not plaintiff's employee and the bank allegedly facilitated the theft by issuing an ATM card to the wrong person, without notifying plaintiff, when the bank was on notice of prior fraud activity in plaintiff's accounts. Moreover, the section

* 8]
of the UCC that plaintiff relies upon only requires her to prove lack of ordinary care, not gross negligence, as was the case in *Gluck*.


Plaintiff's cause of action for negligence is not just a breach of contract couched in new terms. The negligence plaintiff alleges is the breach of a separate common law duty, codified in the UCC, to exercise ordinary care. Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is granted solely to the extent that the first cause of action for breach of contract is dismissed in the absence of opposition and in all other respects the motion is denied, and defendant is directed to answer the complaint within twenty days of service upon it of a copy of this order with notice of entry; and it is further

ORDERED that, pursuant to CPLR 325(d), this action is removed from this court to the Civil Court, New York County, and is continued in that court as if originally commenced in that court, and upon the entry of this order, the Clerk of this court shall deliver all papers and records in this action now on file in his office to the Clerk of the Civil Court, New York County.

Dated: December 16, 2008

ENTER:



J.S.C.
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