

Lenahan v TD Waterhouse Bank, N.A.

2008 NY Slip Op 33529(U)

November 20, 2008

Supreme Court, Suffolk County

Docket Number: 04663-2008

Judge: Emily Pines

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Short Form Order

Index Number: 04663-2008

Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:**Hon. Emily Pines**

Justice Supreme Court

Motion Date: 11-14-2008

Submit Date: 11-19-2008

Motion No.: 001 MG

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<p>_____ X</p> <p>JAMES LENAHAN, as the Administrator CTA of the ESTATE OF LAWRENCE LENAHAN,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">-against-</p> <p>TD WATERHOUSE BANK, N.A. n/k/a TD BANK USA N.A.,</p> <p style="text-align: right;">Defendant.</p> <p>_____ X</p>	<p><u>Attorney of Plaintiffs</u> Seth E. Lipner, Esq. Deutsch & Lipner 1325 Franklin Avenue, Suite 225 Garden City, New York 11530</p> <p><u>Attorney of Defendant</u> Theodore R. Snyder, Esq. Krebsbach & Snyder, PC One Exchange Plaza New York, New York 10006</p>
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Defendant, TD Waterhouse Bank N.A. n/k/a TD Bank USA N.A. ("Waterhouse Bank") moves, by Notice of Motion (motion sequence number 001) for an Order dismissing Plaintiff's complaint pursuant to CPLR §§ 3211 (a) (1) and (a) (7) or, in the alternative under CPLR § 7501. Essentially, Plaintiff, Administrator, is suing, seeking repayment of monies improperly paid on eleven (11) checks, allegedly by Waterhouse Bank, after the account holder decedent's death. The amount sought in the complaint is \$138, 241.25.

In July, 2001, the Decedent, Lenahan, signed several documents in connection with the opening of a brokerage account with non party TD Waterhouse Institutional Services,

a division of non party TD Waterhouse Investor Services, Inc ("TD Investor Services"). The documents include a New Account Application, an Investors Money Market Management Form (IMM) and an Investors Money Management Signature Card for listing additional "Check Users". The IMM form states that Lenahan agrees "(t)o be bound by the terms and conditions of the TD Waterhouse Investors Money Market Agreement" The IMM Agreement, attached to the motion papers , states that TD Waterhouse Bank, the Defendant herein, is an affiliate of T.D. Waterhouse Investor Services. Such Agreement also provides that as part of Lenahan's opening of his brokerage account with TD Waterhouse Investor Services, he would be entitled to "(a) Designated Sweep Account that may be accessed by Check or ATM/Visa Check Card". In pertinent part, the Agreement further provides, with regard to the check writing privileges accorded the brokerage account holders that "(T)he IMM service consists of a Brokerage Account that is linked to a Designated Sweep Account. The IMM service permits me to write Checks and use the Card issued to me to access my Brokerage Account. . . . I understand that my checks are provided to me by TD Waterhouse and not by the Bank although they are payable through the Bank. I understand that the Checks are drawn against my Brokerage Account. I further understand that the Checks are not drawn on an account in my name at the Bank although they are payable through the Bank. . . ."

The IMM Signature Card, which lists, inter alia, the name of Ravi Kothare as an "authorized user" of Lenahan's

IMM account, authorizes TD Waterhouse Investor Services to charge Lenahan's account in the amount of any checks written by Kothare. More significantly, the form specifically states that Lenahan will hold harmless and indemnify TD Waterhouse Investor Services and its affiliates from any liability arising out of the IMM signature card agreement.

The New Account Application also states that the enclosed customer Agreement contains a pre-dispute Arbitration clause. That clause, contained in paragraph 9 of the IMM Agreement states, in pertinent part: "I agree that any controversy relating to any of my accounts or any agreement that I have with you will be submitted to arbitration. . . ."

In its Complaint, Plaintiff, Administrator of Lenahan's estate, alleges that in 2002, Lenahan opened a securities account with TD Waterhouse, Inc and that as part of this transaction, Lenahan also opened a checking account with the Defendant herein, TD Waterhouse Bank. The complaint continues by stating that although Ravi Kothare had a General power of Attorney to conduct business on behalf of Lenahan, upon Lenahan's death, such authority expired. According to Plaintiff, Kothare wrote twenty checks after such time, eleven of which were made out to entities controlled or owned by Kothare. Asserting that the Defendant Bank improperly authorized the payment on such eleven checks, Plaintiff Administrator seeks payment of damages in the amount of \$138,241.25.

In response to the Defendant's motion to dismiss,

Plaintiff asserts that the account number on which the items that give rise to the action were drawn is Account No. 8812228677, whereas the Account under the Agreements on which Defendant relies is Account No. 50712676, raising an issue of fact concerning Defendant's claims. Plaintiff submits the checks themselves, which list the name "TD Waterhouse Bank" on their printed front as evidence that the named Defendant was the Drawee Bank on the eleven checks involved. Plaintiff alleges that payment of these checks after Lenahan's death was in violation of UCC §4-401. With regard to the issue of arbitration, Plaintiff asserts that the Bank is not a party to any agreement to arbitrate; and, therefore, it cannot seek relief under CPLR Article 75. Finally, Plaintiff asserts that, as a matter of law, any authority Kothare had to draw checks on Lenahan's account, terminated upon Lenahan's death.

On a motion to dismiss brought pursuant to CPLR 3211, the court must afford the pleading a liberal construction, and, therefore, the reviewing court accepts the allegations set forth in the Complaint as true and accords Plaintiff the benefit of all potential inferences, determining whether the facts set forth fall within any cognizable claim. **Matter of Casamassima v Casamassima**, 30 AD 3d 596, 818 NYS 2d 233 (2d Dep't 2007).

As stated by the Court of Appeals, "(a) written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms". **Greenfield v Philles Records**, 98 NY 2d 562, 750 NYS 2d 565, 780 NE 2d 166 (2002). Where the language of an agreement

between parties is free from ambiguity, contract meaning is to be determined by the court as a matter of law on the basis of the writing alone without need for resort to extrinsic evidence. **Huntingdon Coach Corp. v Board of Education**, 49 AD 2d 761, 372 NYS 2d 171 (2d Dep't 1975), *aff'd*, 40 NY 2d 892, 389 NYS 2d 362, 357 NE 2d 1017 (1976); **L & S Motors, Inc v Broadview Networks, Inc**, 25 AD 3d 767, 808 NYS 2d 777 (2d Dep't 2006). When interpreting a contract, it will be considered "unambiguous" by the Court, where "(o)n its face, (it) is susceptible of only one meaning". **Greenfield, supra**. In such instance, there exists no basis for a difference of opinion and the otherwise drastic relief of dismissal is appropriate. **See, L&S motors, Inc., supra**.

Applying these principles to the case at Bar, the Court finds that the Complaint fails to state a cognizable claim, based on the clear documentary evidence, constituting an agreement between Plaintiff and non party TD Waterhouse Investor Services. The New Application Account, the IMM form, the IMM Signature Card and the IMM Agreement, when read together, are clear and susceptible to only one interpretation. First, as set forth in the IMM Agreement, the Plaintiff's decedent had an agreement with TD Waterhouse Investor Services and not at any time with the Defendant herein. Accordingly, the Article 4 UCC provisions cited by Plaintiff do not apply in this matter. Second, the Plaintiff's decedent agreed in writing that his account was opened with the non party and not with the Bank. Third, Plaintiff signed a statement on the IMM signature card specifically holding harmless both the drawee, TD Waterhouse

Investor Services, and any of its affiliates (defined in the IMM Agreement to include the Defendant herein), to the extent relevant herein, for any actions arising out of Plaintiff's IMM Agreement. Finally, Plaintiff agreed in the IMM Agreement to arbitrate any and all disputes with TD Waterhouse Investor Services, the only party against whom it could possibly have a claim. Based on the clear language of the documents, the Court finds dismissal of the Plaintiff's complaint against TD Waterhouse Bank appropriate under CPLR § 3211 (a)(1). The Court notes, that Plaintiff's attempt to create an issue with regard to the numbering of the accounts and the printed name on the checks written by Ravi Kothare are belied by the documents attached to Plaintiff's and Defendant's papers. Written at the top of the IMM form, as well as the Investors Money Management Signature Card are both the numbers "507 12676 and "8812228677", the number referred to in Plaintiff's papers in opposition to the motion. In addition, the checks attached to Plaintiff's papers set forth that the moneys are "Payable Through" TD Waterhouse Bank, precisely what the IMM Agreement states.

Accordingly, for all the foregoing reasons, the complaint should be dismissed based upon the documentary evidence set forth. This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 20, 2008
Riverhead, New York



EMILY PINES
J. S. C.