

ACM Advanced Currency Mkts., S.A. v Bauer

2009 NY Slip Op 31234(U)

June 8, 2009

Supreme Court, New York County

Docket Number: 601554/07

Judge: Judith J. Gische

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

JUDITH J. GISCHÉ, J.S.C.

PRESENT: _____

PART 10

Justice

Index Number : 601554/2007

ACM ADVANCED CURRENCY

vs.

BAUER, RACHEL

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED

JUN 09 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/8/09

JUDITH J. GISCHÉ, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 10**

-----X
ACM ADVANCED CURRENCY MARKETS, S.A.,

Plaintiff

-against-

RACHEL BAUER,

Defendant.
-----X

DECISION/ORDER

Index No.: 601554/07

Seq. No.: 002/003

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 - motion seq. 002

Pltf n/m (reargue/renew), PLK affirm, RJD affid, exhs	1
Def PTG affirm in opp, exhs	2
Pltf PLK reply affirm, exhs	3
Transcript, 4/16/09	

Papers - motion seq. 003

Pltf n/m (3212), RJD affid,	1
Def RB affid in opp, exhs	2
Pltf PLK reply affirm, exhs	3

FILED
 JUN 09 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Upon the foregoing papers the court's decision is as follows:

Plaintiff moves for summary judgment in its favor (motion sequence number 003) and to reargue this court's prior decision dated November 21, 2008 wherein the court denied plaintiff's motion to compel defendant to provide certain discovery responses (motion sequence number 002). Since these motions are interrelated, they are hereby consolidated for the court's consideration in a single decision and order.

The motion for summary judgment is timely brought because issue has been

joined, but no note of issue has yet been filed. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). It will, therefore, be decided on the merits.

The following facts are undisputed and/or are based upon documentary evidence. Plaintiff is a Swiss corporation which engages in online foreign currency investment transactions. Plaintiff is licensed in New York. Defendant, a New York resident, opened a foreign exchange ("forex") account with plaintiff in or about March 2005. At that time, defendant requested wire transfers from her brokerage accounts with Morgan Stanley, TD Waterhouse and Vectra Bank to her forex account with plaintiff. Defendants Morgan Stanley and TD Waterhouse account statements indicate that the following transfers were made: [1] \$66,154.44 from Morgan Stanley on March 7, 2005; [2] \$129,250.28 from TD Waterhouse on March 9, 2005; [3] \$185,000 from Vectra Bank on March 17, 2005; [4] \$129,235.28 from TD Waterhouse on March 23, 2005; and [5] \$66,098.25 from Morgan Stanley on March 24, 2005.

Of these five wire transfers, both the Morgan Stanley and TD Waterhouse transfers were returned by plaintiff's bank to the accounts of origination. Defendant's Morgan Stanley and TD Waterhouse account statements have been provided to the court which clearly reflect these returned funds.

The dispute between the parties arises from plaintiff's claim that although the March 23, 2005 and March 24, 2005 transfers were returned, plaintiff's records were not updated to reflect these debits to defendant's account. On April 28, 2005, defendant requested that her forex account be closed. Plaintiff closed the forex account on May 6, 2005, and claims that it wired to plaintiff \$195,333.53 more than it should have (in

total, plaintiff wired to defendant \$340,304.56), based upon plaintiff's inaccurate records.

On June 6, 2005, plaintiff sent defendant a letter wherein plaintiff sought a return of the aforementioned funds. Defendant has refused to return same. In its complaint, plaintiff has asserted three causes of action, to wit: [1] monies paid under mistake of fact; [2] unjust enrichment; and [3] conversion. ACM seeks to recover \$195,333.53 as money damages.

Defendant, in opposition, does not dispute these facts. Rather, defendant claims that a person named Robert Rivera co-conspired with an employee of plaintiff, Patrick Meier, "in an effort to defraud [plaintiff] of [her] investment." Defendant steadfastly maintains that she invested \$380,000 with plaintiff, yet has produced no records to support this claim. Instead, defendant argues that plaintiff is a "disreputable foreign investment firm" with records that "are no more reliable than the statements produced by Bernie Madoff." Defendant contends that summary judgment should be denied because more discovery is needed for her to defend against plaintiff's claims.

Discussion

The court will first consider the motion for summary judgment since its resolution may impact the motion to renew/reargue.

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 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 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 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 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 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 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 AD2d 459 (2d Dept 2003).

Defendant's argument that summary judgment is premature because she needs further discovery is unavailing. CPLR § 3212 (f) broadly provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is

premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept 2006). Defendant has not shown that there may be any information not already known to her which is material and relevant to her defenses and solely within plaintiff's possession. Therefore, this argument fails.

Turning to the substantive aspects of the motion, the court's analysis follows. Plaintiff's causes of action for money paid under mistake of fact, and unjust enrichment, are both equitable in nature. Ball v Shepard, 202 NY 247; see, e.g., Manufacturers Trust Co. v Diamond, 17 Misc 2d 909 [App Term, 1st Dept]; Mutual Life Ins. Co. v William B. Kessler, Inc., 25 Misc 2d 242, 243). Miller v Schloss, 218 NY 400. Based on the undisputed facts on this record, plaintiff has established that it overpaid to defendant \$195,333.53, under a mistake of fact. Further, it is not in dispute that in equity and good conscience, plaintiff should be permitted to recover this money from defendant. Plaintiff's claims that there was some fraudulent scheme between her former financial adviser and plaintiff's employee is uncorroborated and irrelevant to the singular inquiry of how much money defendant deposited in the forex account. Plaintiff has not demonstrated a triable issue of fact as to either the first or second cause of action. Accordingly, plaintiff is entitled to summary judgment on both claims.

Plaintiff also seeks an award of prejudgment interest, pursuant to CPLR §5001. Since neither side has argued at what rate interest on the money should accrue, the court, in its discretion, will set the interest rate at the average treasury bill rate for fiscal

year 2005, 2.25%. Interest should neither be a windfall to the recipient nor a punishment to the payor. It is an award that merely reflects use and possession of the monies. Love v. State, 78 NY2d 540 (1991). Interest shall accrue from the date of plaintiff's first demand from defendant for return of the money, June 6, 2005.

Plaintiff's conversion claim, however, must be dismissed. Plaintiff alleges that it mistakenly transferred to plaintiff the \$195,333.53. Therefore, plaintiff cannot establish that defendant took dominion or control over these funds wrongfully and without plaintiff's acquiescence to same. Accordingly, the third cause of action is hereby severed and dismissed.

Based on the court's decision herein, plaintiff's motion to reargue/renew is denied as moot.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment is granted to the extent that plaintiff is entitled to judgment on the first and second causes of action and a money judgment against defendant in the total sum of \$195,333.53 together with interest thereon at the rate of 2.25% per annum from June 6, 2005; and it is further

ORDERED that defendant's motion for summary judgment is otherwise denied and the third cause of action for conversion is hereby severed and dismissed; and it is further


ORDERED that plaintiff's motion to renew/reargue is hereby denied as moot; and it is further

ORDERED that the Clerk is hereby directed to enter a money judgment in favor of plaintiff ACM Advanced Currency Markets, S.A. and against defendant Rachel Bauer in the total sum of \$195,333.53 together with interest thereon at the rate of 2.25% per annum from June 6, 2004, along with costs and disbursements.

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

This constitutes the decision and order of the court.

Dated: New York, New York
June 8, 2009

So Ordered:


Hon. Judith J. Gische, JSC

FILED
JUN 09 2009
COUNTY CLERK'S OFFICE
NEW YORK