[* 1]

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 115708/2007

145 HUDSON STREET ASSOCIATES

INDEX NO. ____

VS

MOTION DATE ____

FURIO, CARLA

MOTION SEQ. NO. ____

Sequence Number : 001

DISMISS DEFAULT

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 ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/19/09

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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145 HUDSON STREET ASSOCIATES &
STANLEY D. SCOTT, as general partner on
behalf of 145 HUDSON STREET ASSOCIATES,

Plaintiffs,

-against-

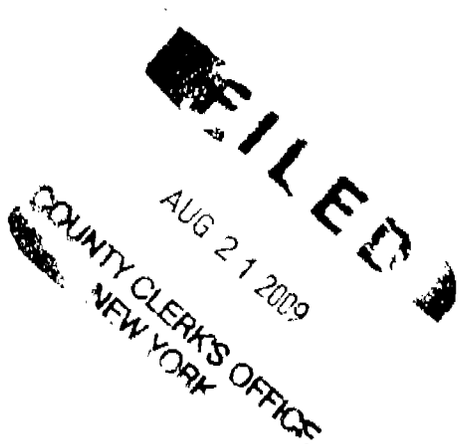
CARLA FURIO, FRANK FURIO, JOSEPH FURIO, FRANCESCA FURIO, CLAUDIA FURIO, VICTORIA MAYES, ANDREA HANSON, CHRISTINA HANSON, CHRISTINA WEAVER, JP MORGAN CHASE & CO., JPMORGAN CHASE BANK, NATIONAL ASOCIATION, WASHINGTON MUTUAL, INC. HSBC BANK NEVADA, N.A. and "JOHN DOE #1" through "JOHN DOE #25", the last twenty-five names being fictitious and unknown to the plaintiffs, the persons intended being the Persons, if any, involved in the acts or omissions described in the Second Amended Complaint,

Defendants.

----------X

Index No.: 115708/2007

DECISION and
ORDER



KORNREICH, SHIRLEY WERNER, J.:

This action is brought by plaintiffs 145 Hudson Street Associates (Hudson) and Stanley D. Scott, as general partner, to recover money taken by an employee. The employee, Carla Furio, wrote unauthorized checks to, among other things, pay her credit card account at Washington Mutual, Inc. (WMI). WMI is the successor in interest to Providian Financial Corp. (Providian). WMI now moves to dismiss the case against it pursuant to CPLR 3211(a)(7).

I. Facts

The second amended complaint sets forth the following allegations. Carla Furio worked as a bookkeeper and office manager for Hudson from January 1993 to May 2007. She had authority to sign

Hudson's checks, drawn on Hudson's account at JP Morgan Chase & Co. (Chase),[1] in amounts of $2,500 or less. In January 2004, Furio began writing unauthorized checks drawn on Hudson's account to pay her credit card bills. At or about the same time, in a letter signed by Stanley Scott, Chase was authorized to send all bank correspondence, including bank statements, to Furio directly. From January 2004 to May 2007, Furio wrote checks to pay her multiple credit cards, made electronic payments to her credit cards, wrote unauthorized checks to "Petty Cash" and arranged overpayments of her salary. Furio wrote 322 unauthorized checks, made 54 unauthorized electronic payments and, in total, took more than $550,000.

The first through sixth counts of the complaint allege conversion, breach of fiduciary duty, breach of contract, fraud, negligent misrepresentation and unjust enrichment against Carla Furio. The seventh and eighth causes of action allege money had and received and unjust enrichment against Ms. Furio's family members, the other individuals named as defendants. The twelfth, thirteenth and fourteenth causes of action allege breach of contract and violation of UCC 4-401 against Chase, and the tenth and eleventh causes of action allege violation of UCC 3-304 and unjust enrichment against WMI and HSBC Bank Nevada, N.A., the banks which held Furio's credit card accounts. At issue in this motion to dismiss is $383,774, the amount drawn on Hudson's account at Chase and paid to WMI by Furio.

Plaintiffs contend that WMI serviced people with low income and poor credit ratings and "knew or should have known that something was wrong or should have inquired" when Furio: paid her credit card invoices with multiple checks from Hudson and/or made multiple payments during any monthly period; had two low credit-limit accounts; and substantially increased her spending after she started using the Hudson

[1] The complaint alleges that the checks were drawn on plaintiff's "former bank, JP Morgan Chase & Co. and/or its subsidiary JPMorgan Chase Bank, National Association (jointly and severally, "Chase")."

checks to pay off her accounts. Plaintiffs contend these suspicious circumstances were sufficient to establish that WMI acted with notice and/or in bad faith under UCC 3-304 (7).

WMI moves to dismiss, arguing that it was a holder in due course and took the checks free of all claims and defenses. Moreover, it contends that it was not unjustly enriched by plaintiffs, but rather was paid for an existing debt. The court agrees.

I. Conclusions of Law

CPLR 3211(a)(7) provides for dismissal of a complaint for failure to state a cause of action. In determining a motion under this section, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *Skillgames, LLC. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). Since the court's inquiry on such a motion is narrow, it must liberally construe the complaint, accepting as true both its material allegations and whatever reasonably can be inferred from them. *Demicco Bros., Inc. v Con. Ed. Co.*, 8 AD3d 99 (1st Dept 2004). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, id.* quoting *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 233-4 (1st Dept 1994).

A. UCC 3-304

A check is a negotiable instrument subject to Article 3 of the UCC. UCC 3-104(b). A payee of a negotiable instrument is a holder in due course if the payee takes the instrument for value, in good faith and without notice of any defense. UCC 3-302. A holder is defined as a person who possesses an instrument issued or indorsed to him [UCC 1-201(20)], and a holder takes an instrument for value if "the agreed consideration has been performed" or "he takes the instrument in payment of" an antecedent claim. UCC 3-

303 (a) & (b). Finally, good faith "means honesty in fact in the conduct or transaction concerned." UCC 1-201(19).

Addressing"good faith" as used in UCC 3-302, the Court of Appeals has stated that it requires a subjective standard of knowledge. *Chemical Bank of Rochester v Haskell*, 51 NY2d 85, 91. Thus, where a person clothed with apparent authority endorses a negotiable instrument, the subsequent holder of that instrument is entitled to recover on it unless a viable defense is established. *Id.* at 90-91. "[T]he inquiry is not whether a reasonable banker in the [holder's] position would have known, or would have inquired concerning the alleged breach [by the fiduciary], but rather, the inquiry is what [the holder] itself actually knew." *Id.*

UCC 3-304 provides:

> (1) The purchaser[2] has notice of a claim or defense if
> (a) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity...or to create an ambiguity as to the party to pay; or
> (b) the purchaser has notice that the obligation of any party is voidable in whole or in part...
> (2) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.
> * * *
> (4) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim
> * * *
> (e) that any person negotiating the instrument is or was a fiduciary:
> * * *
> (7) In any event, to constitute notice of a claim or defense, the purchaser must have knowledge of the claim or defense or knowledge of such facts that his action in taking the instrument amounts to bad faith.

[2] A purchaser is defined as someone who takes by purchase. UCC 1-201(33). Purchase means a voluntary transaction creating an interest in property.

In sum, the "notice" requirement of UCC 3-304 "demands nothing less than actual knowledge of the claim against the instrument or of facts indicating bad faith in taking the instrument" [citations omitted]. *Hartford Acc. & Indem. Co. v Am. Ex. Co.*, 74 NY2d 153, 162-163 (1989).

"A party challenging the good faith and lack of notice of a holder bears a substantial burden. *See Union Bank of India v Seven Seas Imports, Inc.*, 727 F Supp 125, 130 (SDNY1989). Complaints based on such allegations must be dismissed unless there exist material issues of fact ... which are 'genuine and based on proof, not shadowy and conclusory statements.' " *Fidelity Bank, N.A. v Avrutick*, 740 F Supp 222, 236 (SDNY1990) quoting *First Intn'l. Bank v L. Blankstein & Son, Inc.*, 59 NY2d 436 (1983).

The allegation that WMI "knew" without any evidentiary proof or facts to show "knowledge," does not establish actual notice of the claimed defense. Nor is plaintiffs' further claim, that WMI "should have known" or "should have inquired," viable.

Plaintiffs argue that there is a threshold objective bad faith inquiry. Relying on *MCC Proceeds, Inc. v Advest, Inc.*, 293 AD2d 331, 334-35 (1st Dept), *lv denied* 98 NY2d 613 (2002), they argue, "If the circumstances known to the purchaser are so obviously suspicious that no honest person not just a reasonably prudent person could turn a blind eye thereto, the purchaser must investigate. Thus, there is a threshold objective inquiry, although the emphasis remains on subjective bad faith and dishonesty (*see, Sec. & Exch. Commn. v Lehman Bros., Inc.*, 157 F3d 2, 6-7) and will be met only in the most rare and egregious circumstances." Plaintiffs contend that the circumstances here reach that level. The court disagrees. *MCC* involved a single broker handling fraudulent stock transfers who had actual knowledge of unusual activity--approximately $16 million dollars of stock transferred over the course of one month. Here, the payments were made over more than three years, in much smaller amounts, and were not processed by a single broker. The facts of this case do not come close to reaching the "rare and egregious circumstances" of *MCC*.

A bank's acceptance of multiple checks for a single credit card payment does not amount to commercial bad faith (UCC3-405), which requires actual knowledge. *Getty Petroleum Corp. v Am. Ex.*, 90 NY2d 322, 331, *rearg denied* 97 NY2d 937 (1997). In *Getty* an employee used forged, employer checks to pay her American Express credit card bill. The court found "American Express routinely processed stale checks, checks payable to neither American Express nor the customer, checks where neither American Express nor the customer was listed on the check, checks from unrelated third parties and multiple checks from multiple third parties with different addresses in different states for a single transaction." *Id.* at 331-332. Nonetheless, the Court held that the plaintiff failed to meet its burden of proof in showing that American Express's conduct "amounted to dishonesty or complicity" required to show bad faith. *Id.* at 331. Similarly, the acceptance of multiple checks by WMI for a single payment is not enough to show its knowledge or dishonesty. "Holders in due course are to be determined by the simple test of what they actually knew, not by speculation as to what they had reason to know, or what would have aroused the suspicion of a reasonable person in their circumstances." *Hartford,* 74 NY2d at 163.

Indeed, *Hartford* speaks to the policy underlying the check fraud rules of the Commercial Code. It notes that the Code favors:

> ready negotiability of commercial paper, assuring that good-faith purchasers need not stand as insurers of the honesty of a drawer corporation's employees. And it assigns losses by the relative responsibility of the parties, allocating liability to the party best able to prevent them (see, Prudential-Bache Sec. v Citibank, 73 NY2d 263, 269; Comment, Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code, 62 Yale LJ 417 [1953]). As among the parties to this dispute [the employer]--whose misplaced trust or inattention enabled its employee to misappropriate funds, undetected for several years--was plainly the party best able to prevent the losses and to protect itself by insurance. The losses were therefore properly allocated to [the employer], not defendants."

Hartford at 165.

Here, Hudson, who employed and supervised Furio, was in a better position than WMI to discover

her fraud and insure against it. Hudson authorized Furio's ability to sign checks on their account, and Scott signed a letter to Hudson's bank authorizing it to send the bank statements and correspondence to Furio. WMI, who took the checks for value, in good faith, without notice of any defect, to pay an antecedent debt, is a holder in due course, and the tenth cause of action is dismissed.

B. Unjust Enrichment

Having found WMI is a holder in due course, the claim for unjust enrichment, the eleventh cause of action, is dismissed. Accordingly, it is

ORDERED that motion of WMI is granted, all claims against Washington Mutual, Inc. are severed and dismissed and the Clerk is to enter judgment accordingly.

Date: August 19, 2009

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