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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ADRIANA RAYMOND and CAROLINA RAYMOND,

Plaintiffs,

-against-

JPMORGAN CHASE BANK, N.A.,

Defendant.

TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 012068-07

Motion Seq. Nos: 1, 2 & 3
Submission Date: 12/3/09

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JPMORGAN CHASE BANK, N.A.,

Third-Party Plaintiff,

-against-

CAROLINA ALES,

Third-Party Defendant.

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JPMORGAN CHASE BANK, N.A.,

Second Third-Party Plaintiff.

-against-

CARLA MAILLAZZO, CLELIA ALES and LORETTA FARZER,

Second Third-Party Defendants.

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The following papers have been read on these motions:

Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....x
Memorandum of Law in Support.....x
Cross-Notice of Motion, Affirmation in Support and Exhibits.....x
Affidavit of V. Jarymiszyn and Exhibits.....x
Memorandum of Law in Support of Cross Motion/Opposition to Motion.....x
Notice of Cross Motion, Affirmation of Support/Opposition,
Affidavit in Support/Opposition and Exhibit.....x
Reply Affirmation/Affirmation in Opposition,
Reply Affidavit in Support and Exhibits.....x
Reply Memorandum of Law in Opposition.....x
Affirmation in Opposition.....x
Reply Memorandum of Law in Support/Opposition.....x
Memorandum of Law in Opposition.....x
Affirmation in Support/Reply and Affidavit in Support/Opposition.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiffs Adriana Raymond ("A. Raymond") and Carolina Raymond ("C. Raymond") on August 26, 2009, 2) the cross motion filed by Defendant and Third-Party Plaintiff JPMorgan Chase Bank, N.A. ("Chase") on October 16, 2009, and 3) the cross motion filed by First Third-Party Defendant Carolina Ales ("Ales") and Second Third-Party Defendants Carla Milazzo ("Milazzo"), Clelia Ales ("Clelia") and Loretta Farzer ("Farzer") on November 4, 2009, all of which were submitted on December 3, 2009. The Court grants the motions in part and denies them in part. For the reasons set forth below, the Court 1) dismisses Plaintiffs' first, second, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action in the Complaint; 2) dismisses Plaintiffs' request for attorney's fees, and consequential and punitive damages, and denies Plaintiffs' application to amend the Complaint with respect to the request for damages; 3) dismisses Chase's cause of action against the First Third-Party Defendant for conversion; 4) dismisses Chase's cause of action against the Second Third-Party Defendants seeking to impose a constructive trust. The Court, otherwise, denies the parties' applications.

BACKGROUND

A. Relief Sought

In their motion, Plaintiffs A. Raymond and C. Raymond (collectively "Plaintiffs") move for an Order 1) pursuant to CPLR § 3212 granting Plaintiffs' motion for summary judgment on the First through Twelfth Causes of Action in the Amended Verified Complaint ("Complaint"); and 2) pursuant to CPLR §§ 3025 and 3017, amending the demands for relief in the first, second, third, fourth, fifth, sixth and eleventh causes of action to include consequential damages of $5,000,000, counsel fees and punitive damages in the sum of $6,000,000.

In its cross motion, Chase moves for an Order 1) granting Chase's cross motion for summary judgment dismissing the Complaint in its entirety; or, in the alternative, granting Chase summary judgment against Ales; 2) granting Chase an award of costs and counsel fees; and 3) denying Plaintiffs' motion for summary judgment in its entirety.

In their cross motion, First Third-Party Defendant Ales and Second Third-Party Defendants Milazzo, Clelia and Farzer move for an Order 1) dismissing the Second Third-Party actions against Milazzo, Clelia and Farzer pursuant to CPLR § 3211(a)(7); 2) dismissing the First Third-Party action against Ales and granting her summary judgment, pursuant to CPLR § 3212; 3) directing the release to Ales of monies in the sum of $89,287.50, with interest, currently held in escrow; and 4) awarding counsel fees to Milazzo, Clelia and Farzer based on the allegation that the Second-Party Actions against them are frivolous; or, in the alternative, directing Plaintiffs to provide proof of the allegations in their purported accounting.

B. The Parties' History

At issue in this action is the parties' entitlement to a lottery payment that was deposited at Chase, the Defendant bank. The Complaint alleges as follows:

A. Raymond resides in Valley Stream, New York and C. Raymond resides in Hewlett, New York. On or about January 17, 1987, A. Raymond was a $3,000,000 ("$3 million") winner of the New York Lottery ("Lottery"), which entitled her to receive twenty (20) annual installments of $142,000 after the first payment of $142,000 ("Winnings").

A. Raymond is the daughter of Ales and the mother of C. Raymond. With the lottery winnings, A. Raymond opened and maintained a Chase account, in the name of CALC Partners,

with Ales ("CALC Account"). A. Raymond and Ales were the only authorized signatories on the CALC Account.

On or about January 11, 2007, $107,145 of the Winnings were wired into the CALC Account, which previously contained a balance of $671.41, resulting in a total balance of $107,816.41. Also on or about January 11, 2007, A. Raymond closed the CALC Account and withdrew its balance via check number 099 in the sum of $107,816.41 ("Check"). Simultaneously with this withdrawal, A. Raymond deposited the Check into her own Chase account ("A. Raymond Account"). At or about the same time, A. Raymond transferred $100,000 of this deposit into a new Chase account that C. Raymond opened, in trust for her mother A. Raymond ("Trust Account").

On or about January 12, 2007, Chase unilaterally reversed all of the transactions outlined above on the grounds that the transactions were fraudulent. As a result of this reversal, Chase 1) closed the Trust Account, resulting in a zero balance; 2) reduced the balance in the A. Raymond Account by $107,816.41, resulting in the original balance of $7,816.41; and 3) reinstated the CALC Account in the amount of $107,816.41 ("Reinstatement").

Following the Reinstatement, on January 12, 2007, Ales withdrew $89,287.50 from the CALC Account, leaving a balance of $18,778.62. That same day, Chase 1) froze or "red-flagged" (Compl. at ¶ 15) all accounts that A. Raymond maintained at Chase; and 2) placed A. Raymond's name with Chase's Collections Department. This occurred notwithstanding Plaintiffs' presence at Chase and attempts to stop the reversals that Chase allegedly initiated at the request of Ales.

On or about January 22, 2007, Chase issued an advisory regarding the A. Raymond Account asserting that funds were returned due to counterfeit activity. Plaintiffs allege that, as a result of Chase's alleged "wrongful maneuvering of funds" (Compl. at ¶ 19), Chase improperly imposed bank charges against the A. Raymond and CALC Accounts.

In support of their motion, Plaintiffs provide an Affidavit of A. Raymond dated August 20, 2009 in which she affirms as follows:

A. Raymond affirms that, on January 17, 1987, she won the Lottery for $3 million, entitling her to twenty one (21) annual installments of $142,000, less taxes. The net amount of

her Lottery winnings was approximately $102,000 annually. In support thereof, A. Raymond provides a Certificate of Term Payment from the New York State Division of the Lottery (Ex. 4 to A. Raymond Aff.) which states that "Our Family, 51 Woodland St., East Islip, NY 11730" 1) won a total of $3 million; 2) is entitled to a payment of $142,800 on March 13, 1987 and twenty (20) subsequent annual payments of $142,860; and 3) A. Raymond, as the "Group Representative" accepted the conditions set forth on the Certificate.

Based on an oral understanding among family members, the Winnings were to be distributed in six (6) ways, as follows:

1/6 to A. Raymond

1/6 to Clelia, sister of A. Raymond

1/6 to Lauretta Frazer, sister of A. Raymond

1/6 to Carla Ales, sister of A. Raymond

1/6 to Ales, mother of A. Raymond, until 1996 when she began receiving 1/3 after the death of Paul Ales ("Father"), husband of Ales and father of A. Raymond, who had been receiving 1/6. After Father's death, his share was paid to Ales, who thereby received 1/3 of the Winnings.

A. Raymond affirms that, after she was notified of the Lottery award, the family accountant advised her to have the Winnings paid into a family partnership account for tax reasons. The first two annual installments were paid into an account initially referred to as "Our Family" and then called "CALC," with each of the letters in that name referring to the first name initials of the family's sisters (Clelia, Adriana, Lauretta and Clelia) (Aff. of A. Raymond at p. 2).

They opened the CALC Account at a Manufacturers Hanover Bank which later became Chemical Bank and then Chase. When Chase took over the CALC Account, a new signature card was executed on January 14, 1994 that authorized A. Raymond or Ales, her mother, to engage in all banking transactions related to the CALC Account. A. Raymond provides a copy of the corresponding signature card and partnership certificate (Exs. 2 and 3 to A. Raymond Aff.).

On January 11, 2007, A. Raymond and her daughter C. Raymond went to Chase to withdraw funds, purportedly as reimbursement for A. Raymond's satisfaction of her mother's financial obligations pursuant to an alleged "Accounting." A. Raymond provides a copy of the

Accounting ("Accounting"), Exhibit 5 to her Affidavit, which is dated September 17, 2008 and signed by Plaintiffs' counsel. The Accounting states that Plaintiffs "account for" A. Raymond's withdrawal of $107,816.41 from the CALC account by reference to 1) A. Raymond's investment of over $70,000 of her own money in premises located at 51 Woodland Street, East Islip, New York, 2) a statue and jewelry, and 3) proceeds from the sale of property in Bay Shore, New York, for which A. Raymond alleges she was never properly reimbursed. In her Affidavit, A. Raymond outlines the factual background regarding these items, and her explanation of why she believes she is entitled to compensation from her mother.

In her Affidavit, A. Raymond also provides details regarding the allegations that form the basis of the Complaint, including Chase's allegedly improper conduct in reversing certain transactions. For example, A. Raymond avers that on January 11, 2007, Cammy Mezrahi ("Mezrahi") the Manager of Chase's Valley Stream Branch, assisted Plaintiffs in transferring money from the CALC Account to the A. Raymond Account, and then to the Trust Account. She alleges, further, that Mezrahi told A. Raymond that Chase would not get involved in any dispute that arose from these transactions, and that Chase would not reverse disputed transactions, but rather would freeze the funds until the dispute was resolved.

After A. Raymond learned that Chase had, in fact, reversed the transactions, she went back to Chase to speak with Mezrahi. Plaintiffs waited for over an hour to speak with Ms. Mezrahi, who advised Plaintiffs that she had just learned that Chase had reversed the transactions, and that $107,816.41 had been redeposited into the CALC Account. When Plaintiffs learned that $89,287.50 of the funds in the CALC Account had been released to Ales, Mezrahi attempted to object to that payment, but another Chase employee told Mezrahi not to interfere or she would be held responsible for the funds. A. Raymond affirms, further, that Mezrahi told her that Mezrahi had "sternly admonished" (A. Raymond Aff. at p.6) numerous Chase employees that Chase should not involve itself in the dispute. A. Raymond submits that, notwithstanding Mezrahi's efforts, Chase improperly paid funds to Ales from the CALC Account.

A. Raymond affirms that, as a result of Chase's conduct, she suffered "emotional and physical upset and general distress" and has been diagnosed with "hypertension, severe anxiety,

sleeping disorders and eating problems." She provides a letter from Dr. Victor Dlugash with respect to those symptoms (Ex. 17 to A. Raymond Aff.). A. Raymond avers, further, that as a result of Chase's conduct, her daughter C. Raymond fainted and was hospitalized, and provides documentation regarding that hospitalization.

In support of its motion, Chase provides an Affidavit of Vittoria M. Jarymiszyn ("Jarymiszyn"), a Personal Banker of Chase, dated October 7, 2009. In that Affidavit, Jarymiszyn affirms as follows:

When A. Raymond and Ales signed the signature card for the CALC Account, they agreed to be bound by the terms and conditions of the Account Agreement, a copy of which is annexed as Exhibit B to the Jarymiszyn Affidavit. Pages 31 and 32 of that Account Agreement provide, in pertinent part:

> Upon receipt of oral or written notice from any party of a claim regarding the Account, we may place a hold on your Account and shall be relieved of any and all liability for our failure or refusal to honor any item drawn on your Account or any other withdrawal instruction. We may file an action in interpleader with respect to any Account where we have been notified of disputed claims to that Account. If any person asserts that a dispute exists, we are not required to determine whether that dispute has merit in order to refuse to honor the item or withdrawal instruction, or to interplead any funds in the Account.
>
> YOU AGREE THAT WE SHALL NOT BE LIABLE FOR INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES REGARDLESS OF THE FORM OF ACTION AND EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
>
> [capitals in original]

Jarymiszyn affirms that, from 1994 to 2007, the Lottery deposited funds into the CALC Account in the amount of approximately $100,000 per year, and provides bank statements reflecting those transfers (Ex. C to Jarymiszyn Aff.). Each year, the funds in the CALC Account were divided among family members, including A. Raymond and Ales, with each member receiving 1/6 of the annual Winnings.

On January 11, 2007, the balance in the CALC Account was $107,816.41. On January 11, 2007, A. Raymond withdrew all the funds in the CALC Account via check number

099 (Ex. E to Jarymiszyn Aff.) ("Check"). This withdrawal was in contrast to the manner in which the funds in the CALC Account had been distributed since 1994. That same day, 1) A. Raymond deposited those funds into the A. Raymond Account; 2) C. Raymond opened the Trust Account; and 3) A. Raymond transferred $100,000 from the A. Raymond Account to the Trust Account.

On or about January 12, 2007, Ales told Jarymiszyn that she wished to withdraw funds from the CALC Account. This was consistent with Ales' pattern of withdrawing money shortly after the Lottery had deposited funds into the CALC Account. Jarymiszyn advised Ales of the Check, prompting Ales to advise Jarymiszyn that the Check must have been fraudulent, as neither Ales nor A. Raymond ever wrote checks on the CALC Account, and the Check was inconsistent with the family's agreement regarding the distribution of the Winnings. Jarymiszyn affirms that she showed a copy of the Check to Ales who said that the signature on the Check was not that of A. Raymond.

Jarymiszyn affirms that Ales advised Chase's Fraud Department that the Check was fraudulent. In light of this information, Chase reversed the transactions and issued its standard advisory in cases involving allegations of fraud. Ales thereafter transferred $89,287.50 from the CALC Account to a Chase checking account held in the name of the Ales Family Trust ("AFT Checking Account"). Ales left $17,857.50 in the CALC Account, which was the amount that A. Raymond had received each year from the Winnings. A. Raymond withdrew that sum from the CALC Account.

After Plaintiffs served the Complaint on Chase, Chase placed a hold on $105,620.85 in a savings account in the name of the Ales Family Trust ("AFT Savings Account"). Ales is the sole signatory on the AFT Savings Account, which is linked to the AFT Checking Account. Pursuant to a stipulation that was so-ordered by the Court (Austin, J) on June 25, 2008, $89,297.50 was released from the AFT Savings Account to be held in an interest-bearing escrow account. That stipulation is annexed as Exhibit M to the Jarymiszyn Affidavit.

In their Cross Motion, Third-Party Defendants provide an Affidavit in Support of Milazzo dated October 28, 2009 in which she affirms as follows:

Milazzo [1] is the sister of A. Raymond, Clelia and Farzer. She characterizes A. Raymond as "delusional" or a "pathological liar" (Milazzo Aff. at ¶ 3). She affirms that it was, in fact, her grandmother Octivia Ales and her father Paul J. Ales who won the lottery in 1986, and confirms that the Winnings were always divided into six (6) shares.

Milazzo avers that A. Raymond created the Accounting in response to Justice Austin's concerns, expressed at a court conference on this matter, whether A. Raymond could demonstrate her right to the funds that she withdrew from the CALC Account. Milazzo disputes A. Raymond's claims regarding her entitlement to compensation with respect to the real property, statutes and jewelry referred to in the Accounting, and characterizes A. Raymond's claims as an "attempt to justify her improper actions in withdrawing all the monies from the CALC account" (Milazzo Aff. at ¶ 5).

Specifically, with respect to A. Raymond's claims in the Accounting, Maillazzo maintains that 1) the Bay Shore home was sold at a loss, that only $5,671.06 was realized and that all involved agreed to give it to their mother, Ales; 2) the statue was a gift that A. Raymond gave to her father, that passed to their mother upon his death; 3) the Hummel was a gift A. Raymond gave to their mother; 4) the jewelry in question was a gift from their father to their mother; and 5) A. Raymond is owed no money in connection with the family's East Islip residence, where A. Raymond and her family lived cost-free for approximately 18 years.

Third-Party Defendants also provide an Affidavit of Ales dated December 2, 2009 in which she affirms as follows:

After learning that A. Raymond had withdrawn funds from the CALC Account on or about January 11, 2007, Ales called A. Raymond who, during a "heated discussion," admitted taking the funds and said that she "didn't care" whether her conduct was appropriate (Ales' Aff. at ¶ 3). Ales disputes Chase's claim that Ales said that A. Raymond's withdrawal was fraudulent, and denies signing any documentation alleging such a fraud.

Ales also submits that Plaintiffs have provided no proof in support of their claims in the Accounting. Ales affirms that she and her husband supported A. Raymond and her daughter

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[1] Milazzo's name is spelled "Maillazzo" in the Second Third-Party Complaint.

without asking anything in return, and that A. Raymond never made any claim as to the items she now refers to in the Accounting. Finally, Ales avers that she is 77 years old and this litigation has taken a physical and emotional toll on her. She asks the Court to release the monies currently held in escrow unless A. Raymond proves the allegations in the Accounting. Alternatively, Ales asks the Court to release $10,000 to her to help her pay her expenses.

Plaintiffs have advanced twelve causes of action against Chase. In the first and second causes of action, the Plaintiffs seek to recover for money had and received. In the third and fourth causes of action, they seek to recover for strict liability for diversion of funds pursuant to UCC § 4-402. The fifth and sixth causes of action are based on breach of contract. The seventh and eighth causes of action sound in negligence, gross negligence and bad faith. In the ninth and tenth causes of action, the Plaintiffs seek to recover for conversion. In the eleventh cause of action, the Plaintiffs seek to recover for strict liability pursuant to Banking Law § 676. Finally, in the twelfth cause of action, the Plaintiffs seek to recover for libel based upon Chase's issuance of an advisory, called an Advice Copy D-383533, upon learning of the allegedly fraudulent Check. Plaintiffs also seek to recover attorney's fees pursuant to General Obligations Law § 5-327, punitive damages and consequential damages consisting of, *inter alia*, personal injuries allegedly suffered as a result of Chase's conduct and the related medical costs.

Chase submits that its conduct was appropriate in light of 1) Ales' representation that A. Raymond's closing of the CALC Account was fraudulent, 2) the fact that checks had never been written on the CALC Account, and 3) Ales' statement that it was not A. Raymond's signature on the Check. In addition, Jarymiszyn alleges that the fact that the Check was not a pre-printed CALC check raised her suspicions as to its genuineness.

Chase then commenced the First Third-Party action against Ales, who has interposed counterclaims against Chase. Chase also commenced the Second Third-Party action against A. Raymond's sisters, Maillazzo, Clelia and Frazer.

In the First Third-Party Complaint against Ales, Chase seeks 1) to deposit the remaining funds with the court and to restrain the parties from proceeding against Chase for recovery of the funds, 2) indemnification if Chase is held liable, 3) apportionment of any liability, 4) judgment against Ales, based on her alleged misrepresentation, if Chase is held liable, 5) judgment against

Ales, based on her alleged breach of contract, if Chase is held liable, 6) a set-off against Ales' funds at Chase, if Chase is held liable, and 7) judgment against Ales, for conversion, if Chase is held liable. Ales has interposed counterclaims against Chase alleging that its freezing of the funds was negligent and grossly negligent and that she has suffered mentally, emotionally and physically as a result. She seeks special, compensatory and punitive damages.

In its Second Third-Party Complaint, Chase seeks recovery from the Second Third-Party Defendants Maillazzo, Clelia Frazer under the theories of 1) unjust enrichment, 2) constructive trust, 3) indemnification, 4) apportionment of any liability, and 5) an injunction prohibiting the Second Third-Party Defendants from transferring or dissipating any funds they received from the CALC account.

C. The Parties' Positions

Plaintiffs seek summary judgment against Chase. Chase seeks summary judgment dismissing the Complaint or in the alternative, summary judgment on its Third-Party Complaint granting it indemnification from Ales. Ales seeks summary judgment dismissing the Third-Party Complaint against her as well as release of the funds to her. The Second Third-Party Defendants seek dismissal of the Complaint against them pursuant to CPLR § 3211(a)(7).

Plaintiffs submit that they have demonstrated their right to summary judgment by establishing, *inter alia*, that Chase did not 1) investigate the truth of Ales' allegations before reversing the transactions; 2) verify A. Raymond's authority to close the CALC Account; 3) return the confiscated funds to Plaintiffs after their demand for those funds; 4) contact Plaintiffs for instructions or guidance prior to reversing the transactions; or 5) notify Plaintiffs of the confiscation of the funds. Plaintiffs also seek the Court's permission to include, in the Complaint, a request for the additional relief of reasonable counsel fees, punitive damages of $6 million and consequential damages of $5 million.

Chase opposes Plaintiffs' motion, and submits that Chase is entitled to summary judgment. Chase submits that the first and second causes of action, for money had and received, fail as a matter of law because Plaintiffs have not alleged that Chase retained or benefitted from the funds at issue. Chase contends, further, that it is entitled to summary judgment on the third

and fourth causes of action for diversion of funds because 1) Chase acted in good faith; and 2) § 673 of the Banking Law, on which Plaintiffs rely, applies to the misapplication of the bank's funds by bank employees, not to the misapplication of account holder's funds. Chase argues that the fifth and sixth causes of action cannot survive both because Chase acted in conformity with its Account Agreement, and because Plaintiffs have not sufficiently alleged that their damages flowed directly from any alleged breach. Chase submits that the Court should dismiss the seventh and eighth causes of action, sounding in negligence, gross negligence and bad faith, because 1) in light of their debtor-creditor relationship with Chase, Plaintiffs may not proceed on a negligence theory; and 2) Plaintiffs have not met their burden of demonstrating Chase's alleged bad faith. Chase argues that the Court should dismiss the ninth and tenth causes of action, sounding in conversion, because 1) Chase's allegedly mistaken conduct does not state a cause of action for conversion; and 2) funds deposited into a bank account are not sufficiently specific or identifiable to form the basis for a conversion claim. Chase submits that the eleventh cause of action, based on strict liability pursuant to Banking Law § 676, is inapplicable to the matter at bar because that statute applies to a withdrawal based on an unauthorized signature. Finally, Chase submits that the twelfth cause of action, sounding in libel, fails as a matter of law because Plaintiffs have not alleged 1) publication, 2) malice or 3) damages flowing from the alleged libel.

Chase also submits that the Account Agreement specifically precludes the consequential damages that Plaintiffs seek in the Complaint. Moreover, even assuming, *arguendo,* that the Account Agreement is inapplicable, Plaintiffs have not demonstrated that their consequential damages were foreseeable. Chase also opposes Plaintiffs' request for counsel fees, submitting that 1) the Account Agreement only entitles Chase, not Plaintiffs, to recover counsel fees in the event of litigation related to the Account; and 2) the Account Agreement is not a consumer contract that would entitle a plaintiff to counsel fees pursuant to General Obligations Law § 5-327. Finally, Chase characterizes Plaintiffs' request for punitive damages as utterly lacking in merit.

Third-Party Defendants submit that the Court should conduct a hearing, to determine A. Raymond's right to the funds she refers to in the Accounting. If A. Raymond cannot prove her right to those funds, the Court should release the funds to Ales. Third-Party Defendants also

submit that the Court should reject Chase's claim that Ales asserted that A. Raymond engaged in fraud, in light of the absence of any Chase documentation supporting that claim. Accordingly, Third-Party Defendants ask the Court to dismiss the Third-Party Actions, release the money in escrow to Ales and grant Third-Party Defendants an award of counsel fees.

RULING OF THE COURT

A. Standard for Summary Judgment

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the party moving for summary judgment fails to establish a *prima facie* entitlement to judgment as a matter of law, the motion must be denied. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Widmaier v. Master Products, Mfg.*, 9 A.D.3d 362 (2d Dept. 2004); and *Ron v. New York City Housing Auth.*, 262 A.D.2d 76 (1st Dept. 1999). CPLR § 3212(b) further requires that, in ruling on a motion for summary judgment, the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action has no merit." In making this determination, the Court must view the evidence submitted by the moving party in a light most favorable to the non-movant. *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420.

Summary judgment is the procedural equivalent of a trial. *Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974). It is a drastic remedy that will only be granted where the proponent establishes that there are no triable issues of fact. *Alvarez,* 68 N.Y.2d at 324. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations. *Zuckerman,* 49 N.Y.2d at 562. On a motion for summary judgment, the court should refrain

from making credibility determinations. *Ferrante v American Lung Assn.*, 90 N.Y.2d 623, 631 (1997).

B. Standard for Dismissal Pursuant to CPLR § 3211(a)(7)

On a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, the Court must deny the motion if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez*, 84 N.Y.2d 83 (1994). On such a motion, the Court will not, however, presume as true bare legal conclusions, inherently incredible assertions and factual claims that are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002); *Daub v. Future Tech Enterprise, Inc.*, 885 N.Y.S.2d 115, 116-117 (2d Dept. 2009), *quoting Well v. Yeshiva Rambam*, 300 A.D.2d 580, 581 (2d Dept. 2002); *see also Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91-92 (1999); *Kaisman v. Hernandez*, 61 A.D.3d 565, 566 (1st Dept. 2009).

C. Application of Principles to Causes of Action in Complaint

1. The Plaintiffs' First and Second Cause of Action: Money Had and Received

The elements of a claim for money had and received are 1) the defendant received money belonging to the plaintiff; 2) the defendant benefitted from receipt of the money; and 3) under principles of equity and good conscience, the defendant should not be permitted to keep the money. *Matter of Estate of Witbeck*, 245 A.D.2d 848(3rd Dept. 1997), quoting 22A N.Y. Jur. 2d Contracts, § 520 at 244. Plaintiffs have not alleged that Chase benefitted from the funds retained by it or paid to any of the Third-Party Defendants. Indeed, the funds that are no longer in the account have been retained by a third-party and for that reason, too, this claim fails. *Calisch Associates, Inc. v. Manufacturers Hanover Trust Co.*, 151 A.D.2d 446 (1st Dept. 1989), citing *Parsa v. State*, 64 N.Y.2d 143, 151 (1984), *rearg. den.* 64 N.Y.2d 885 (1985). Furthermore, where, as here, there is an express contract between the parties, an action for money had and received does not lie. *Fesseha v. TD Waterhouse Investors Services, Inc.*, 305 A.D.2d 268, 269

(1st Dept. 2003), citing *Phoenix Garden Rest. v. Chu*, 245 A.D.2d 164, 166 (1st Dept. 1999); *Yeterian v. Heather Mills*, 183 A.D.2d 493, 494 (1st Dept. 1992). Accordingly, the Court concludes that these causes of action are not viable and dismisses the first and second causes of action sounding in money had and received.

2. The Plaintiffs' Third and Fourth Causes of Action: Diversion of Funds

Liability for the diversion of a depositor's funds may lie where the funds are diverted by an agent, officer, employee, trustee, or other fiduciary, "depending upon [the bank's] connection with the diversion such as being chargeable with knowledge thereof." 9 NY Jur. 2d, Banks § 419. Liability lies where the bank has actual knowledge of a diversion of funds or knowledge of such facts as would give it notice that the check is being diverted. *Epstein v. Chatham Phoenix Nat. Bank & Trust Co.*, 138 Misc. 765 (New York City Court 1930), quoting *Fidelity & Deposit Co. of Maryland v. Queens County Trust Co.*, 226 N.Y. 225 (1919); *Cheever v. Pittsburg, S. & L. E.R. Co.*, 150 N.Y. 59 (1896). "A bank may not argue that it is ignorant of facts clearly disclosed in its customer's transactions nor may a bank close its eyes to the clear implication of such facts." 9 NY Jur 2d, Banks § 419. Plaintiffs allege, and the submitted motion papers suggest, that Chase not only diverted the funds back to the CALC Account, but also permitted Ales to divert the funds to herself despite Chase's knowledge of the controversy between Adriana and her. Under these circumstances, Chase has not established its entitlement to summary judgment with respect to the third and fourth causes of action sounding in diversion. Plaintiffs, also, have not demonstrated their right to summary judgment, as they have not established as a matter of law their entitlement to the funds at issue. While the Plaintiffs maintain that Ales owed A. Raymond these sums, the Third-Party Defendants dispute that. Accordingly, the Court denies the motions of Chase and Plaintiffs for summary judgment as to these causes of action.

3. The Plaintiffs' Fifth and Sixth Causes of Action: Breach of Contract

The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). The plaintiff must establish the provisions of the contract the defendant is alleged to have breached. *Sud v. Sud*, 211 A.D.2d 423 (2d Dept. 1995); *Atkinson v. Mobil Oil Corp.*, 205 A.D.2d

719 (2d Dept. 1994).

A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562 (2002); *Katina, Inc. v. Famiglietti*, 306 A.D.2d 440 (2d Dept. 2003). The terms of an agreement are to be interpreted in accordance with their plain meaning. *Greenfield v. Philles Records, Inc., supra; Tikotzky v. New York City Transit Auth.*, 286 A.D.2d 493 (2d Dept. 2001). The court is to give practical interpretation to the language employed and the parties' reasonable expectations. *Slamow v. Del Col*, 174 A.D.2d 725, 726 (2d Dept. 1991), *aff'd.* 79 N.Y.2d 1016 (1992).

As outlined above, the Account Agreement permitted Chase to place a hold on an account upon its receipt of notice from any party of a claim regarding the account. Where language has a generally prevailing meaning, it is interpreted in accordance with that meaning. Restatement 2d, Contracts § 202. Applying these hornbook principles of contractual interpretation, this Court may not interpret "may" as requiring or mandating Chase to act. To the extent that Plaintiffs allege that a Chase employee made any representation regarding whether the funds would be frozen, the Agreement governs.

The Court is also not persuaded by Plaintiffs' argument that the language in the Chase agreement in connection with the A. Raymond Account ("Chase Personal Customer Agreement") compels a different result because it obligated Chase to conduct additional investigation before placing a hold on the funds. That Personal Customer Agreement provides, in pertinent part, as follows:

> The Bank may refuse to pay out any money from your account until any dispute over the funds has been resolved by a court, or by agreement of the parties which is documented to the Bank's satisfaction. . . . If any person asserts that a dispute exists, the Bank is not required to determine whether that dispute has merit in order to refuse to pay funds or interplead the funds.

In light of the language of the Agreements, which authorized Chase's conduct, the Court dismisses the fifth and sixth causes of action sounding in breach of contract.

4. The Plaintiffs' Seventh and Eighth Causes of Action: Negligence, Gross Negligence, Bad Faith

A cause of action sounding in tort may be alleged by a depositor against its bank only

when an independent duty to the plaintiff apart from the obligations of the bank-depositor contract is violated. *Stella Flour & Feed Corp. v. Chase Manhattan Bank*, 285 A.D. 182, 187 (1st Dept. 1954), *aff'd.* 308 N.Y. 1023 (1955); *Tevdorachvili v. Chase Manhattan Bank*, 103 F. Supp. 2d 632, 643-644 (E.D.N.Y. 2000). Plaintiffs have not alleged the existence of an independent duty and, absent such a duty or gross negligence, a depositor may not sue his bank in negligence based solely on the bank-depositor relationship. *Id.* at 643, citing *Calisch Assocs., Inc. v. Manufacturers Hanover Trust Co., Inc., supra*; *Bouquet Brands Div. of J&D Food Sales, Inc. v. Citibank, N.A.*, 97 A.D.2d 936, 937 (3rd Dept. 1983); *Luxonomy Cars, Inc. v. Citibank, N.A.*, 65 A.D.2d 549, 550 (2d Dept. 1978). In addition, while the bank-depositor relationship is contractual in nature, New York law has explicitly refused to recognize any cause of action for negligent breach of contract. *Tevdorachvili*, 103 F. Supp. 2d at 643, citing *Megaris Furs, Inc. v. Gimbel Bros., Inc.*, 172 A.D.2d 209, 211 (1st Dept. 1991); *Calisch Associates, Inc. v. Manufacturers Hanover Trust Co., supra*, at 447.

Gross negligence is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing. *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821 (1993), quoting *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540 (1992). No allegations distinguish the Plaintiffs' gross negligence claim from their negligence claim. Under the circumstances, the Plaintiffs have not established any conduct by the bank that rises to the level of gross negligence.

With respect to Plaintiffs' bad faith claim, the Second Department has held that " 'a lapse of "wary vigilance" ' " or a disregard of 'suspicious circumstances which might well have induced a prudent banker to investigate' is insufficient to state a cause of action against a depository bank." *Diamore Realty Corp. v. Stern*, 50 A.D.3d 621, 623 (2d Dept. 2008), quoting *Prudential-Bache Sec. v. Citibank*, 73 N.Y.2d 263, 276 (1989), citing *Retail Shoe Health Commn. v. Manufacturers Hanover Trust Co.*, 160 A.D.2d 47, 51 (1st Dept. 1990). Here, Plaintiffs have failed to present evidence of "'out-and-out dishonesty' or 'complicity by principals of the bank in alleged confederation with the wrongdoers.' " *Diamore Realty Corp. v. Stern, supra*, at 623, quoting *Prudential-Bache Sec. v. Citibank, supra*, at 277; *Retail Shoe Health Commn. v. Manufacturers Hanover Trust Co., supra*, at 5.

In light of the foregoing, the Court dismisses the seventh and eighth causes of action sounding in negligence, gross negligence and bad faith.

5. The Plaintiffs' Ninth and Tenth Causes of Action: Conversion

A cause of action alleging conversion of funds must allege legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights. *Zendler Const. Co., Inc. v. First Adjustment Group, Inc.*, 59 A.D.3d 439, 440 (2d Dept. 2009), citing *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d 766 (2d Dept. 2008), quoting *Whitman Realty Group, Inc. v. Galano*, 41 A.D.3d 590, 592 (2d Dept. 2007). Funds deposited in a bank account are not sufficiently specific and identifiable, in relation to the bank's other funds, to support a claim for conversion against the bank. *Chemical Bank v. Ettinger*, 196 A.D.2d 711, 714 (1st Dept. 1993), citing *Geler v. National Westminister Bank USA*, 770 F. Supp. 210, 215 (S.D.N.Y. 1991); *see also Calisch Assocs., Inc. v. Manufacturers Hanover Trust Co.*, 151 A.D.2d at 448. In light of these principles, and the Plaintiffs' failure to point to specific and identifiable funds that Chase converted, the Court dismisses the ninth and tenth causes of action.

6. The Plaintiffs' Eleventh Cause of Action: Strict Liability

Plaintiffs seek to hold Chase strictly liable pursuant to Banking Law § 676. That statute obligates the bank to protect a depositor's account from withdrawals by an unauthorized person. *Coulter v .Seneca Federal Sav. and Loan Ass'n.*, 171 A.D.2d 1046 (4th Dept. 1991), citing *Payne v. White*, 101 A.D.2d 975, 976 (3d Dept. 1984); *American Lodge Ass'n. v. East N.Y. Sav. Bank*, 100 A.D.2d 281 (2d Dept. 1984). Banking Law § 676 does not apply here, as the Plaintiffs do not allege that Chase paid funds out of the Accounts pursuant to an unauthorized signature. Accordingly, the Court dismisses the eleventh cause of action.

7. The Plaintiffs' Twelfth Cause of Action: Libel

Defamation is injury to one's reputation via a written (libel) or oral (slander) expression. *See Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453 (1967). The elements of a cause of action to recover damages for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. *Epifani v.*

Johnson, 65 A.D.3d 224, 233 (2d Dept. 2009), citing *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dept. 2007), quoting *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999).

The elements of libel are: (1) a false and defamatory statement of and concerning the plaintiff, (2) publication by defendant of the statement to a third party, 3) fault on the part of the defendant, and (4) injury to the plaintiff. *Idema v Wager*, 120 F. Supp. 2d 361, 365 (S.D.N.Y. 2000). Slander is generally not actionable unless plaintiff suffers special damages, which involve the loss of something having economic or pecuniary value. *Liberman v. Gelstein*, 80 N.Y.2d 429, 434-35 (1992). Special damages are not required, however, where the complained of statement constitutes slander *per se*. Those exceptions, which do not require proof of special damages, are statements (1) charging plaintiff with a serious crime; (2) tending to injure another in his or her trade, business or profession; (3) stating that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman. *Id.* at 435.

A false and malicious utterance or writing by one employee to another can be actionable. *Loughry v. Lincoln First Bank, N.A.*, 67 N.Y.2d 369, 378 (1986), quoting *Ostrowe v. Lee*, 256 N.Y. 36 (1931). There exists a qualified privilege, however, where the communication is made to persons who have some common interest in the subject matter. *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996). This defense of privilege is defeated, however, if the plaintiff demonstrates that the defendant spoke with malice, *Foster,* 87 N.Y.2d at 752, citing *Liberman v. Gelstein, supra*; *Park Knoll Assocs. v. Schmidt*, 59 N.Y.2d 205, 209 (1983), or where the motivation for making such statements was spite or ill will (common-law malice) or where the statements are made with a high degree of awareness of their probable falsity (constitutional malice). *Foster*, 87 N.Y.2d at 752, quoting *Liberman v. Gelstein*, 80 N.Y.2d at 438.

In the matter at bar, Plaintiffs allege that Chase issued an Advisory asserting that funds were removed from the Account as a result of counterfeit activity that involved A. Raymond and that this statement was published to third parties. Plaintiffs' failure to identify the time, place and manner of the allegedly false statement and to whom it was made requires dismissal of the libel cause of action. *See Lesesne v. Lesesne*, 292 A.D.2d 507, 509 (2d Dept. 2002), citing *Sirianni v. Rafaloff*, 284 A.D.2d 447 (2d Dept. 2001). Moreover, the "common interest" present here affords the bank a qualified privilege, *Liberman v Gelstein,* 80 N.Y.2d 437, citing *Loughry*

v. Lincoln First Bank, 67 N.Y.2d 369 at 376. The Plaintiffs' failure to submit any evidence to establish that Chase acted out of personal spite or ill will, with reckless disregard for the statement's truth or falsity, or with a high degree of belief that its statement was probably false also requires dismissal of this cause of action. Furthermore, the dearth of proof of special damages, specifically the loss of something having economic or pecuniary value, also requires dismissal of this claim. In light of the foregoing, the Court dismisses the twelfth cause of action.

8. Damages

a) Consequential Damages

Indirect, special or consequential damages are barred by the parties' Account Agreement, and there is no evidence of intentional wrongdoing to otherwise defeat the Account Agreement. *See Metropolitan Life Ins. Co. v Noble Loundes Intern., Inc.*, 84 N.Y.2d 430, 438-439 (1994), *reh. den.* 84 N.Y.2d 1008 (1994) (conduct necessary to pierce an agreed-upon limitation of liability in a commercial contract must smack of intentional wrongdoing). Moreover, the consequential damages sought here were neither foreseeable nor within the contemplation of the parties. *Fernandez v. Price*, 63 A.D.3d 672, 676 (2d Dept. 2009), citing *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co.*, 10 N.Y.3d 187, 192-193 (2008). Finally, the Plaintiffs' self-serving assertions regarding their emotional and medical problems, and the medical evidence submitted in reply, do not suffice to establish the validity of their claims. *Bissonette v. Campo,* 307 A.D.2d 673, 674 (3rd Dept. 2008); *Duglisi v. Total County Mgmt.,* 254 AD2d 401, 402 (2d Dept. 1998). Accordingly, the Court dismisses Plaintiffs' request for indirect, special and/or consequential damages, and denies Plaintiffs' motion to amend the Complaint to seek those damages via their first, second, third, fourth, fifth, sixth and eleventh causes of action.

b) Punitive Damages

Even when a defendants' conduct was unintentional, punitive damages may be awarded when the defendant's conduct is grossly negligent, wanton or so reckless as to amount to a conscious disregard of the rights of others. *Home Ins. Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 201 (1990). The purpose of punitive damages is both to punish the perpetrator for his morally culpable conduct; and to deter repetition of such acts. *Id.* at 203; *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Ordinarily, punitive damages are not

recoverable for breach of contract, and are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally. *Tartoro v. Allstate*, 56 A.D.3d 758 (2d Dept. 2008). Chase's conduct does not meet this threshold and, accordingly, the Court dismisses Plaintiffs' request for punitive damages.

9. Plaintiffs' Request for Attorneys' Fees

Attorney's fees are an incident of litigation and are not recoverable unless authorized by agreement, statute or court rule. *Campbell v. Citibank, N.A.*, 302 A.D.2d 150, 154 (1st Dept. 2003), citing *Hooper Assoc. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989); *Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5 (1986). Plaintiffs are not entitled to attorney's fees pursuant to any of those exceptions.

Plaintiffs' reliance on General Obligations Law § 5-327(2), which creates a reciprocal right to attorney's fees in consumer contracts, is misplaced. That statute defines a consumer contract as:

> a written agreement entered into between a creditor, seller or lessor as one party with a natural person who is the debtor, buyer or lessee as the second party, and the money, other personal property or services which are the subject of the transaction are primarily for personal, family or household purposes;
>
> (b) "Creditor" means a person who regularly extends, or arranges for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required;
>
> (c) "Seller" means a person who sells or provides or agrees to sell or provide the subject of a consumer transaction.
>
> (d) "Lessor" means a person who regularly leases, or arranges for the lease of, personal property which is the subject of a consumer contract.

Chase is not a creditor, seller or lessor as defined by this statute and the Account Agreement does not qualify as a "consumer contract" as defined at Section 1 of this statute. In light of the foregoing, the Court denies Plaintiffs' application for counsel fees.

10. Conclusion

The Court grants Chase's motion for summary judgment dismissing the Complaint to the extent that the Court dismisses Plaintiffs' first, second, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action. The Court also dismisses Plaintiffs' request for attorney's fees, and consequential and punitive damages.

D. Chase's Motion for Summary Judgment Against Ales on the First Third-Party Complaint

In its Third-Party Complaint, Chase seeks indemnification from Ales pursuant to the following provision in the parties' agreement:

> "If any action [. . .] is brought against you or your account, you agree to indemnify, defend and hold us harmless from all actions, claims, liabilities, losses, costs and damages."

A contract that provides for indemnification will be enforced so long as the intent to assume such a role is sufficiently clear and unambiguous. *Bradley v. Feiden, Inc.*, 8 N.Y.3d 265, 274 (2007), citing *Rodrigues v. N & S Bldg. Contrs., Inc.*, 5 N.Y.3d 427, 433 (2005). As there is no dispute that Ales withdrew the sums disputed in this action, pursuant to its agreement with Ales as well as principles of common law equity, it appears that Chase is entitled to indemnification by Ales for any "liabilities, losses, costs and damages" sustained as a result of this action. Nevertheless, given that Chase has requested summary judgment on this indemnification claim "if it is ultimately determined that Chase is liable to plaintiffs for the funds Ales withdrew," the Court denies Chase's request for indemnification as a matter of law, without prejudice as to its renewal.

E. The Third-Party Defendant's (Ales') Summary Judgment Motion

Chase seeks apportionment, indemnification and a set-off and to recover for fraud, breach of contract and conversion from Ales. As set forth above, the indemnification and apportionment claims survive.

The elements of a cause of action alleging fraud in the inducement are representation of a

material existing fact, falsity, scienter, reliance and injury. *Urstadt Biddle Properties, Inc. v. Excelsior Realty Corp.*, 65 A.D.3d 1135, 1136-37 (2d Dept. 2009), citing *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403, 406-407 (1958); *Urquhart v. Philbor Motors, Inc.*, 9 A.D.3d 458, 458-59 (2d Dept. 2004). In light of the evidence Chase has adduced that all of its challenged actions were based upon Ales' representations that A. Raymond's withdrawal was unauthorized and fraudulent, Chase's fraud in the inducement claim survives summary judgment.

Chase's breach of contract claim against Ales also survives. It is in dispute whether Ales acted for and on behalf of the business, as required by the parties' agreement, or on behalf of herself as an individual partner, which the parties' agreement prohibited.

Chase has demonstrated its right to set off, *vis a vis* Ales, should the Plaintiffs be successful in their claims in the Complaint. This is demonstrated by the paragraph in the Account Agreement titled "Set-off." That paragraph provides, in pertinent part:

> You agree that we may, without prior notice or demand, apply or set off the funds in your Account at any time to pay off any debt, whether direct or indirect, you have with us or any of our affiliates . . . and you grant us a security interest in each Account to secure such debt, as it may arise.

Ales is, however, entitled to summary judgment on Chase's claim for conversion against Ales. That claim fails for the same reason that Plaintiffs' conversion claim *vis a vis* Chase failed, namely Chase's failure to point to specific and identifiable funds that Ales converted.

F. The Second Third-Party Defendants' Motion Pursuant to CPLR § 3211(a)(7)

Chase has asserted claims against the Second Third-Party Defendants, who are sisters, for unjust enrichment, constructive trust and apportionment and indemnification, as well as to enjoin their dissipation of the funds.

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d

415, 421 (1972). A plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

Assuming, *arguendo*, that Plaintiffs establish that A. Raymond is entitled to any of the funds disbursed to any of the Second Third-Party Defendants, it follows that those Third-Party Defendants were unjustly enriched, and thus dismissal of that cause of action is inappropriate. Chase's claims for common-law indemnification and apportionment survive for similar reasons.

The necessary elements for the imposition of a constructive trust are: 1) a confidential or fiduciary relationship, 2) a promise, 3) a transfer in reliance on that promise, and 4) unjust enrichment. *Maiorino v. Galindo*, 65 A.D.3d 525 (2d Dept. 2009), citing *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976). A constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. *Sharp v. Kosmalski*, *supra*, at 121, quoting *Beatty v. Guggenheim Exploration* Co., 225 N.Y. 380, 386 (1919). The remedy is flexible and a constructive trust may be imposed even without an express promise where, given reliance upon the confidential relationship of the parties, a promise may be implied or inferred from the very transaction itself. *Watson v. Pascal*, 65 A.D.3d 1333 (2d Dept. 2009), quoting *Sharp v. Kosmalski*, *supra*, at 122. There is not a confidential or fiduciary relationship between Chase and the Second Third-Party Defendants, nor is there any basis to imply or infer a promise or a transfer in reliance on that promise. Accordingly, the Court dismisses Chase's cause of action against the Second Third-Party Defendants seeking to impose a constructive trust.

Finally, under all of the circumstances, Chase's application for injunctive relief regarding release of the funds is appropriate. Accordingly, the Court will not release the funds pending the resolution of the ongoing dispute.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court on February 8, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
February 2, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.