

Washington Mut. Bank v Young

2011 NY Slip Op 31887(U)

July 8, 2011

Sup Ct, NY County

Docket Number: 1000075/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan PART 36
Justice

Index Number : 100075/2008
WASHINGTON MUTUAL BANK
VS.
YOUNG, LESTER
SEQUENCE NUMBER : 010
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

In this motion to/for Summary judgment

PAPERS NUMBERED
1, 2, 3
4, 5, 6

Notice of Motion/ Order to Show Cause _____ Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment
by third-party defendant Capital One Bank
(f/k/a North Fork Bank) is decided in accordance
with the attached non-sensical decision.

(consolidated for disposition with motion
sequence numbers 008, 009, 011 + 012)

FILED

JUL 12 2011

Dated: 7/8/11
NEW YORK COUNTY CLERK'S OFFICE
HON. DORIS LING-COHAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 36

-----X

WASHINGTON MUTUAL BANK,
Plaintiff,

Index No.
100075/08

-against-

LESTER YOUNG, RAYMOND MAR, MARILYN
HARRIS, AKA MARILYN SELLER, US BANK
NATIONAL ASSOCIATION, NEW YORK CITY
DEPARTMENT OF HOUSING DEVELOPMENT
AND PRESERVATION, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, JOHN DOE (Said name being
fictitious; it being the intention of
Plaintiff to designate any and all
occupants of the premises that is
the subject of this action),

Motion Seq. No.:
008, 009, 010,
011, 012

Defendants.

FILED

JUL 12 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
MARILYN HARRIS,

Third-Party Plaintiff,

-against-

FIGARO DEZIL, JOHN A. DALLEY, ESQ.,
CAL STUART, UNION NATIONAL ABSTRACT LLC,
NORTH FORK BANK N/K/A CAPITAL ONE BANK,
CITIBANK, N.A., JOHN AND JANE SMITH NOS.
1-10, (said names being fictitious, it
being the intention of Third-Party
Plaintiff to designate all principals
of Union Nation Abstract LLC) and JOHN
AND JANE ROE, Third-Party Plaintiff to
designate all individual employees of
Washington Mutual Bank involved with
Loan No. 03-2013-068328747-8),

Index No.
590593/08

Third-Party Defendant.

-----X

CAL STUART,
Fourth-Party Plaintiff,

-against-

DAVID WARSHAW JOEL GRANICK, UNLIMITED
ABSTRACT and COMMONWEALTH TITLE
INSURANCE COMPANY,

Fourth-Party Defendants.

-----X
Doris Ling-Cohan, J.:

Motion Sequence Nos. 008-012 are consolidated for disposition. In Motion Sequence No. 008, defendant US Bank National Association (US Bank) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all claims against it. In Motion Sequence Nos. 009, 010 and 012, third-party defendant John Dalley (Dalley), third-party defendant Capital One Bank (f/k/a/ North Fork), and third-party defendant Citibank, N.A, respectively, move for similar relief. In Motion Sequence No. 011, plaintiff Washington Mutual Bank (WaMu) moves for an order amending the caption of this consolidated action, and the summons and complaint, nunc pro tunc, to properly identify the plaintiff as "J.P. Morgan Chase Bank, N.A., as Acquirer of Certain Assets and Liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation Acting as Receiver," and upon such amendment, granting it summary judgment dismissing the counterclaims of defendant/third-party plaintiff Marilyn Harris (Harris), directing the City Register of the City of New York, County of New York to record a copy of the February 10, 2005 deed conveying title in property located at 487 Manhattan Avenue, New York, NY (the Subject Premises) from Harris and defendant Raymond Mar (Mar) to Lester Young (Young); and

* 4]
granting it a judgment against Citibank in the amount of \$485,890.74.

In its complaint, WaMu alleges that, on February 10, 2005, Harris and Mar, owners of the Subject Premises, conveyed title thereof to Young; that, in conjunction with this transaction, Young borrowed \$800,000 from WaMu, and executed and delivered a mortgage to WaMu, which was recorded in the City Register of the City of New York on May 12, 2005 (the WaMu Mortgage). WaMu claims that the deed was misplaced or lost and not recorded, and that Mar, Harris and/or Young have failed and continue to refuse to re-execute a deed. WaMu therefore seeks, pursuant to Article 15 of the Real Property Actions and Proceedings Law, a judgment declaring defendant Young as the rightful owner of the Subject Premises.

In the third-party action, Harris alleges a fraudulent lending scheme involving third-party defendants Figaro Dezil (Dezil), a loan consultant from Washington Mutual Bank, Cal Stuart (Stuart), the title closer from Union National Abstract LLC (Union), and John A. Dalley, Esq. (Dalley), counsel obtained by Stuart and/or Dezil for Harris and Young. Harris asserts that Dezil and Dalley induced her to engage in a sale of her property located at 487 Manhattan Avenue, New York, New York to Young, which would include a long-term lease and an option to repurchase, rather than a refinancing. She also alleges, inter alia, that, at the loan closing, Dalley did not have Young sign an option agreement, that

Dalley received a check for \$9,500, from which he paid Dezil an illegal mortgage placement fee of 1% of the mortgage proceeds, and that the mortgage payoff check (the Check) made payable to Americas Servicing Company (ASC), was given to Stuart. Harris further asserts that the Check was not delivered to ASC, but was instead fraudulently endorsed by Stuart, and deposited into an account maintained at North Fork by Beneficial Settlement Services (Beneficial), which resulted in the inappropriate retention of the loan proceeds by Dezil, Dalley and Stuart. She also complains that the acceptance and payment of the Check by North Fork Bank (North Fork) and Citibank resulted in the theft of its underlying funds.

Harris' third-party complaint asserts 24 causes of action against the parties involved in the closing, Dezil, Dalley, Stuart and Union, as well Citibank and North Fork for paying on the fraudulently endorsed check. A default judgment has been entered against Dezil, and Union has failed to appear in this action.

Subsequent to the commencement of this action, this court granted the consolidation of the instant action with an action and third-party actions pending in the Supreme Court, Westchester County, entitled *Washington Mutual Bank v Citibank, N.A.*, (index No. 96/2007), *Citibank, N.A. v North Fork Bank* (index No. 96-07T), and *North Fork Bank v Beneficial Settlement Services* (index No. 96/07ST), which assert claims arising from the payment of the Check.

The parties now respectively move for summary judgment, relying on, inter alia, the parties' respective depositions, non-party depositions, and documentary evidence.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

This court shall first address Dalley's motion, in Motion Sequence No. 009, for summary judgment dismissing all the claims asserted against him by Harris in the third-party complaint. In support of his motion, Dalley argues that Harris's fraud and conversions claims are barred by the statute of limitations. Harris opposes this branch of the motion.

A cause of action sounding in fraud is subject to the limitations period prescribed by CPLR § 213 (8), which provides, in pertinent part, that the time in which a fraud claim must be commenced "shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have

discovered it" (see *Prichard v 164 Ludlow Corp.*, 49 AD3d 408 [1st Dept 2008]). The purported sale and closing of the Subject Premises, which was allegedly induced by Dezil and Dalley, occurred on February 10, 2005. Thus, in applying the six-year statute of limitations, Harris had until February 10, 2011, to commence her third-party action. Since it was commenced on July 7, 2008, her fraud claims (first and second causes of action) were timely.

The statute of limitations applicable to actions alleging conversion is three years (CPLR 214 [3]; *Herman v Depinies*, 273 AD2d 146 [1st Dept 2000]), which begins to run at the time of the alleged theft even if the plaintiff is then unaware of it (*Herman v Depinies*, 273 AD2d 146, *supra.*). Since the Check was deposited into the Beneficial account on March 11, 2005, Harris had until March 11, 2008 to bring her conversion claim. Thus, her conversion claim, commenced on July 7, 2008, more than three years after the alleged taking of the property occurred, is untimely (*Close-Barzine v Christie's Inc.*, 51 AD3d 444 [1st Dept 2008]).

However, as argued by Harris, equitable estoppel may be invoked to defeat a statute of limitations defense where the "plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Kaufman v Cohen*, 307 AD2d 113, 122 [1st Dept 2003], quoting *Simcuski v Saeli*, 44 NY2d

442, 448-449 [1978]). The doctrine of equitable estoppel "requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action" (*Kaufman v Cohen*, 307 AD2d at 122; see also *Powers Mercantile Corp. v Feinberg*, 109 AD2d 117 [1st Dept 1985], *affd* 67 NY2d 981 [1986]). Here, Harris alleges that Dalley willfully concealed his involvement as a partner of Beneficial and a signatory of the checks that dispersed the underlying funds from Beneficial's account, which prevented the discovery of such information in a timely manner. The record relied on by Dalley to oppose Harris's equitable estoppel argument raises issues of fact, inter alia, as to whether Harris was aware of Dalley's relationship with Beneficial, prior to the expiration of the statute of limitations, and therefore whether the doctrine of equitable estoppel should be applied in the within circumstances. In particular, Dalley alleges that three (3) months after the closing date, Harris received a Beneficial check dated May 5, 2005, signed by Dalley, raising a factual issue as to whether Harris was aware of Dalley's connection to Beneficial, prior to the expiration of the statute of limitations. Thus, that branch of Dalley's motion to dismiss the fraud and conversions claims on the grounds of the statute of limitations is denied.

Dalley further argues that Harris's conversion claim should be dismissed, since she did not have a legal ownership right over the funds of the Check. "Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]). To establish a cause of action for conversion, a plaintiff must have exercised ownership, possession or control of the property in the first place (see *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; see also *City of New York v 611 W. 152nd St.*, 273 AD2d 125 [1st Dept 2000]). Here, arguably, Harris has an immediate superior right of possession to the purportedly converted funds in that the funds of the Check were part of the proceeds that Harris was to receive at the closing, and which she requested be made payable to Americas Serving Company to satisfy her outstanding mortgage. Thus, contrary to Dalley's argument, Harris has standing to bring a conversion claim.

Dalley also seeks dismissal of the claims asserted against him for fraud, legal malpractice, breach of fiduciary duty, unjust enrichment and intentional infliction of emotional distress. A review of the record discloses that there are numerous factual issues regarding, inter alia, the relationship between Dalley, Dezil, and Stuart, Dalley's role in the alleged fraudulent scheme, whether he made misrepresentations to Harris or concealed

material facts from her, including his partnership interest and signatory authority of Beneficial's account, and whether he breached his fiduciary duty to Harris, committed legal malpractice and/or was unjustly enrichment by his purported conduct, which includes his receipt of a portion of the funds from the Check.

However, that branch of Dalley's motion for summary judgment dismissing Harris's claim for intentional infliction of emotional distress is granted. To establish a claim for the tort of intentional infliction of emotional distress, "a plaintiff must establish ... extreme and outrageous conduct; ... intent to cause, or disregard of a substantial probability of causing, severe emotional distress; ... a causal connection between the conduct and the injury; and ... severe emotional distress" (*Suarez v Bakalchuk*, 66 AD3d 419, 419 [1st Dept 2009]; see also *Howell v New York Post Co.*, 81 NY2d 115 [1993]). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983] [internal quotations marks and citation omitted]).

Here, Dalley demonstrates that his alleged conduct, consisting of, inter alia, inducing Harris to sell her house to Young, not disclosing his signatory authority in the Beneficial

account to Harris, and authorizing the disbursement of the loan proceeds from the Beneficial account, while deplorable, if true, did not rise to the level of being so extreme, outrageous and beyond the bounds of human decency to constitute the requisite conduct necessary to sustain a claim for intentional infliction of emotional distress under prevailing case law (see *Murphy v American Home Prods. Corp.*, 58 NY2d 293, *supra*). Further, Dalley establishes that Harris failed to make any evidentiary showing that the alleged conduct caused any mental or physical symptom or injury that would indicate the existence of severe emotional distress (see *Howell v New York Post Co.*, 81 NY2d 115, *supra*; see also *Elbogen v Esikoff*, 266 AD2d 15 [1st Dept 1999]).

Additionally, a cause of action for intentional infliction of emotional distress should not be entertained "where the conduct complained of falls well within the ambit of other traditional tort liability" (*Fischer v Maloney*, 43 NY2d 553, 558 [1978]). As noted by Dalley, the alleged conduct attributed to him by Harris falls entirely within the scope of Harris's more traditional tort claims for, inter alia, fraud and breach of fiduciary duties.

Therefore, Dalley's motion, in Motion Sequence No. 009, is granted only to the extent of granting summary judgment dismissing Harris's fourteenth cause of action for intentional infliction of emotional distress as asserted against him.

In Motion Sequence No. 011, WaMu initially moves for an order granting the amending of the caption of this consolidated action, and the Summons and Complaints, nunc pro tunc, to reflect the plaintiff as "J.P. Morgan Chase Bank, N.A., as Acquirer of Certain Assets and Liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation Acting as Receiver" ("Chase"), in place of WaMu. Eric Wheeler, Chase's HL Risk Research Specialist, alleges that Chase seeks amendment of the caption to properly identify it as the plaintiff due to its acquisition of certain assets and liabilities of WaMu, including the WaMu Mortgage. Leave to amend a pleading should be freely given (see CPLR 3025 [b]), except where the proposed amended pleading clearly lacks merit or there is prejudice or surprise resulting directly from the delay (see *Barbour v Hospital for Special Surgery*, 169 AD2d 385 [1st Dept 1991]). Since the amendment requested is not prejudicial or a surprise, and there is no opposition to WaMu's request, this branch of its application is granted.

WaMu also moves for summary judgment dismissing Harris's counterclaims against it for fraud, conspiracy and negligence, and directing a copy of the deed made by Harris and Mar, as grantors, to Young on February 10, 2005 be recorded. Since a review of the record discloses factual issues, inter alia, as to the extent and manner of wrongdoing by Dezil, WaMu's

loan officer in the subject transaction, this branch of Wamu's motion is denied.

Additionally, WaMu moves for summary judgment in the amount of \$485,890.74, the amount of the Check, against Citibank. Wheeler notes that, as a result of the underlying mortgage transaction, WaMu transmitted the mortgage proceeds to its closing attorney, Steven R. Sutton, which were placed into Sutton's attorney escrow account maintained at Citibank. He further maintains that the Check was issued by Citibank on February 10, 2005, that the Check was deposited into Beneficial's account at North Fork, and then processed through the Federal Reserve System for presentment and delivery for payment to Integrated Payment Systems (IPS), the purported agent of Citibank. He thus argues that, under the New York Uniform Commercial Code § 4-401, Citibank is strictly liable for payment of the Check containing a forged unauthorized endorsement.

Citibank opposes the motion, and moves for summary judgment dismissing the claims asserted against it by WaMu and Harris, essentially claiming that, pursuant to a Payment Instruments Trust Agreement (the Trust Agreement) it entered into with IPS, it transferred funds covering the face amount to IPS the day after the Check was issued. Citibank maintains IPS then held such funds in trust for the payment of the Check, until it was processed by North Fork in March 2005. Citibank, thus,

denies any liability, contending that it did not have any involvement in honoring, accepting or paying the Check after the funds were transferred to IPS on Friday, February 11, 2005 and that there is no evidence to establish that IPS was its agent or that IPS honored the Check. It also argues that there are no allegations or proffered evidence of wrongdoing by Citibank that could reasonably support the commercial bad faith claim asserted against it by WaMu and Harris. Additionally, Citibank contends that, if summary judgment is entered in favor of WaMu against Citibank, then summary judgment should be granted in its favor against North Fork Bank for indemnification on its breach of warranty claims.

In reply, WaMu argues that Citibank should not be allowed to shield itself from its strict liability under the UCC by its transfer to IPS of the funds underlying the Check.

The Uniform Commercial Code imposes strict liability on a bank that "charges against its customer's account any 'item' that is not 'properly payable'" (*Monreal v Fleet Bank*, 95 NY2d 204, 207 [2000]; UCC 4-401). A check which has been cashed on the forged endorsement of the payee is not "properly payable," and, thus, may not be charged by the drawee bank against the drawer's account (*Id*). Thus, "[l]osses caused by a forged instrument are in the first instance allocated to the drawee bank because, as between that bank and its drawer, the drawee bank is

in the better position to detect the forgery before payment" (*Getty Petroleum Corp. v American Express Travel Related Servs. Co.*, 90 NY2d 322, 327 [1997]). "UCC 3-405 (1) (c) creates an exception to the general principle that a drawer is not liable on an unauthorized indorsement" (*Prudential-Bache Sec. v Citibank*, 73 NY2d 263, 270 [1989]). It places the loss from the forged endorsement on the drawer, who is considered to be in the best position to prevent wrongdoing by carefully selecting and supervising its employees (*Prudential-Bache Securities, Inc. v Citibank, N.A.*, 73 NY2d 263, *supra*; *Sybedon Corp. v Bank Leumi Trust Co. of N.Y.*, 224 AD2d 320 [1st Dept 1996]), and "in situations in which the drawer's own employee has perpetrated the fraud or committed the crime giving rise to the loss" (*Prudential-Bache Securities, Inc. v Citibank, N.A.*, 73 NY2d at 270, quoting *Merrill Lynch, Pierce, Fenner & Smith v Chemical Bank*, 57 NY2d 439, 455 [1982]).

As argued by WaMu, Citibank does not demonstrate how it can avoid its strict liability under UCC § 4-401 by delegating its responsibility of payment on bank checks to another entity. In any event, in view of the numerous disputed factual issues in the record regarding, *inter alia*, Dezil's conduct and role in the underlying transaction, and whether WaMu was the party best able to prevent the loss under the circumstances herein (see *Guardian Life Ins. of Am. v Chemical Bank*, 94 NY2d 418, 421-422 [2000]), a

determination, as to which party should ultimately be liable for the loss resulting from the forged instrument, cannot be made at this juncture.

With respect to a claim for commercial bad faith, a plaintiff must establish facts demonstrating that the defendant bank itself acted dishonestly by becoming an actual participant in a fraudulent scheme (*LPP Mtge, Ltd. v Card Corp.*, 17 AD3d 103 [1st Dept], lv denied 6 NY3d 702 [2005]; see also *Touro Coll. v Bank Leumi Trust Co. of N.Y.*, 186 AD2d 425 [1st Dept 1992]). As argued by Citibank, the record does not disclose any facts establishing that Citibank knowingly or intentionally participated in a fraudulent scheme.

Therefore, that branch of WaMu's motion for summary judgment on its claim against Citibank is denied. That branch of Citibank's motion for summary judgment dismissing the claims asserted against it by WaMu and Harris is granted only to the extent of the commercial bad faith claims. In view of the numerous issues of fact, including what party is liable for the loss resulting from the forged endorsement, that branch of Citibank's motion, in Motion Sequence No. 012, for summary judgment on its indemnification claims against Capital One North Fork, and Capital One's motion, in Motion Sequence No. 010, for summary judgment against Citibank, WaMu, Harris, Dalley and Stuart, are denied.

In Motion Sequence No. 008, U.S. Bank moves for summary judgment dismissing WaMu's complaint and all claims against it. Pursuant to the order of Jacqueline W. Silbermann, U.S. Bank's action to foreclose on its mortgage on the Subject Premises was stayed pending the resolution of the two actions commenced by WaMu, and Harris's third-party complaint, which, at this juncture, remain unresolved (U.S. Bank's moving papers, Exhibit M, *US Bank Natl. Assn. v Mar*, Sup Ct, NY County, July 29, 2008, Silbermann, J., index No. 603474/04). Therefore, U.S. Bank's motion for summary judgment is also denied.

Accordingly, it is

ORDERED that the summary judgment motions, in Motion Sequence Nos. 008, and 010, respectively by US Bank National Association, and Capital One f/k/a North Fork, are denied; and it is further

ORDERED that the summary judgment motion of third-party defendant John A. Daley, Esq., in Motion Sequence No. 009, is granted only to the extent of dismissing Marilyn Harris's fourteenth cause of action for intention infliction of emotion distress; and it is further

ORDERED that the summary judgment motion of Washington Mutual Bank, in Motion Sequence No. 011, is granted only to the extent of the allowing the amendment of the caption of this consolidated action, and the summons and complaint, nunc pro

tunc, to reflect the plaintiff as "J.P. Morgan Chase Bank, N.A., as Acquirer of Certain Assets and Liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation Acting as Receiver"; and it further

ORDERED that Washington Mutual shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the summary judgment motion of Citibank, in Motion sequence No. 012, is granted only to the extent of dismissing the commercial bad faith claims asserted by Washington Mutual Bank (fifth cause of action) and Harris (eighth cause of action) against it; and it is further

ORDERED that the action shall continue as to the remaining causes of action.

Dated:

7/8/11

FILED

JUL 12 2011

**NEW YORK
COUNTY CLERK'S OFFICE**



Doris Ling-Cohan, J. S. C.

J:\Summary Judgment\WashMutualsj2.mcgibbons.wpd