

Mir v Capital One Bank
2012 NY Slip Op 33115(U)
December 21, 2012
Sup Ct, Suffolk County
Docket Number: 26458/2012
Judge: Jerry Garguilo
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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
 Supreme Court Justice

 JEHAN ZEB MIR, MD,

Plaintiff,

-against-

CAPITAL ONE BANK
 Ellen Weber, an individual
 Jerry D'Antone, an individual
 Victoria Lesayt, an individual
 DOE 1-20,

Defendants.

ORIG. RETURN DATE: 10/26/2012
FINAL SUBMISSION DATE: 11/21/2012
MTN. SEQ. #001
MOTION: MD

PLAINTIFF PRO SE:

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DEFENDANTS' ATTORNEY:

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 (631) 761-0800

The Defendants, Capital One Bank, et al., petition the Court for an order pursuant to CPLR § 3211(a)(5) and (7), dismissing Plaintiff's complaint.

The Court has considered Defendants' moving papers, inclusive of Exhibits A and B; the Plaintiff's Opposition To Motion To Dismiss and a submission marked "Exhibit C In Support of Motion To Dismiss" as well as Defendants' Reply Affirmation In Further Support of Motion To Dismiss.

The operative facts are essentially not in dispute. Plaintiff maintained a savings account with Defendants' predecessor-by merger-North Fork Bank. On December 15, 2005, the Plaintiff obtained a Cashier's Check, numbered 68680578, in the amount of Twenty Five

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Thousand Dollars (\$25,000.00) payable to Imran Shah, a resident of Pakistan. December 15, 2005 was the issue date and the instrument is a Cashier's Check.

Within four (4) weeks of mailing the check, the Plaintiff claims he was informed the check was not delivered in due course to the payee, Imran Shah. At this point, the Plaintiff believed the check was either lost or stolen.

At that time, the Plaintiff attempted to stop payment of the Cashier's Check and to obtain a replacement check. The bank would not accommodate the Plaintiff without the return of the original Cashier's Check. Thereafter, approximately ninety (90) days later the check was found to be in possession of the appropriate payee. Now the problem begins to brew. The payee was unable to negotiate the check in Pakistan. The Plaintiff, once again, attempted to stop payment after the Cashier's Check was located. Once again, the bank notified the Plaintiff that it would only stop payment upon return of the original Cashier's Check.

The calendar moves forward without incident until 2009. Plaintiff alleges that he informed the Defendant in 2009 that he was in possession of the original Cashier's Check and that the bank should issue a replacement or cancel the check. Additionally, Plaintiff demanded interest from the bank on the funds that he had paid in order to obtain the Cashier's Check. At this time, the Plaintiff was informed that the funds (Twenty Five Thousand Dollars (\$25,000.00)) had been escheated to the State of Virginia as unclaimed property. Eventually, the Twenty Five Thousand Dollars (\$25,000.00) was returned to the Plaintiff by the State of Virginia. The Plaintiff now seeks to recover damages, inclusive of interest on said amount at the rate of ten percent (10%) per year for five years.

The first transaction between the parties occurred on December 15, 2005. A simple transaction. Plaintiff purchased a Cashier's Check. No claim for breach of contract lies. Both parties performed precisely as they should.

The second interaction between the parties came when shortly after the purchase of the now located, but not negotiated check, the Plaintiff attempted to have the bank issue a stop payment order. In the absence of the check, the bank would not stop payment. This occurring approximately ninety (90) days after the check was issued.

The Court has been provided with the Capital One Bank Rules Governing Deposit Accounts-New York, effective March of 2008. Incorporated therein, is the following provision:

You may not stop payment on a check that is used to purchase a Cashier's Check, on the purchased Cashier's Check (except as otherwise provided by applicable law), or on any item that has already cleared or has been paid.

As noted herein, the next interaction between the Plaintiff and the bank occurred when the check was found approximately ninety (90) days after its issuance, in the possession of the payee who was unable to negotiate the check in Pakistan. Plaintiff's complaint notes that he again attempted to stop payment after the Cashier's Check was located and that the bank would only stop payment upon the return of the original Cashier's Check. Plaintiff further alleges that he and the payee arranged for the return of the original Cashier's Check. This interaction occurred during the early part of 2006.

Moving forward, Plaintiff alleges that he informed the bank in 2009 that he was in possession of the original Cashier's Check and he requested the bank either reissue a replacement or cancel the Cashier's Check. Additionally, at that time, Plaintiff demanded interest from the bank on the funds that he had used to purchase the Cashier's Check. Unfortunately, by that time the Twenty Five Thousand Dollars (\$25,000.00) in funds had been escheated to the State of Virginia as unclaimed property. Thankfully, the State of Virginia returned the Twenty Five Thousand Dollars (\$25,000.00) to the Plaintiff.

In this action, Plaintiff seeks to recover interest on the sum of Twenty Five Thousand Dollars (\$25,000.00) at a rate of ten percent (10%) per annum for five (5) years.

Plaintiff pleads a cause of action sounding in breach of contract. An action for breach of contract is governed by the six (6) year statute of limitations as set forth in CPLR § 213(2).

As noted hereinabove, the initial transaction occurred on December 15, 2005 when the Plaintiff paid the Defendant (or its predecessor) the sum of Twenty Five Thousand Dollars (\$25,000.00) in return for a Cashier's Check. Clearly, there is no claim pled which could sustain anything that occurred within that transaction. Additionally, anything surrounding that transaction is barred by the applicable statute of limitations. The Court's file demonstrates this action was commenced on August 27, 2012, more than six (6) years prior to the first event.

The second prong of Plaintiff's claim of breach of contract must also be dismissed. Plaintiff is certain that the Defendant breached a contractual obligation in declining to stop payment on the Cashier's Check or issue a replacement check. Reading the Plaintiff's

pleading liberally, the event triggering the claim was made "within four (4) weeks of mailing the check on or about December 16, 2005." If that is a triggering event, meaning commencing the claim, it too is time barred and dismissed.

The third prong of the Plaintiff's claim for breach of contract, as noted above is, in fact, unfounded as well as time barred. The Plaintiff claimed that ninety (90) days after the issuance day of the Cashier's Check (December 15, 2005) he, once again, requested a stop payment order. This event also occurred more than six (6) years prior to the commencement date of August 27, 2012. It too, is therefore dismissed.

Following established precedent, the Court notes that upon a motion to dismiss for failure to state a cause of action, "a court should 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 with in any cognizable legal theory." *See, T.V. v. New York State Dept. of Health*, 88 A.D.3d 290, 306, 929N.Y.S.2d 139, 150 (2nd Dept. 2011). "A motion to dismiss should be granted only where, even viewing the allegations as true, the Plaintiffs still cannot establish a cause of action."

Defendant alleges that Plaintiff's claim for breach of contract, aside from being outside of applicable statute of limitations, fails to meet the minimum notice requirement of CPLR § 3013. That section requires a complaint to be sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense. In the case before the Court, the Plaintiff has failed to plead, attach and/or submit the necessary terms of the contract it seeks to enforce.

There are circumstances when a bank can stop payment on a Cashier's Check. Under the New York Uniform Commercial Code § 4-403(2) the specific available events allowing stop payment are as follows:

that the check was destroyed, its whereabouts cannot be determined,
or it is the wrongful possession of an unknown person or a person that
cannot be found or is amenable to service of process.

Given Plaintiff's contentions that the first request to stop payment was made within four (4) weeks of the issuance date and was thus within the ninety (90) day period during which the bank

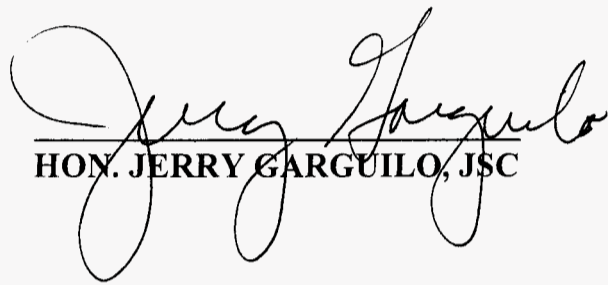
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promptly declined to stop payment on the Cashier's Check as per New York Uniform Commercial Code § 4-403(2); and Plaintiff's second request was made after the Cashier's Check had been found, the circumstances allowing stop payment under the statute were not present. It was not until 2009 when the Plaintiff was in possession of the Cashier's Check that the bank informed the Plaintiff of escheatment. Thereafter, the funds were claimed and delivered.

Given the Court's determination that Plaintiffs' claim is untimely, it is unnecessary to rule upon other defenses set forth by the defendant. The Complaint is **DISMISSED** as time barred.

The foregoing constitutes the decision and Order of this Court.

Dated: December 21, 2012


HON. JERRY GARGUILO, JSC