Municipal Credit Union v Integrated Payment Sys., Inc.
2013 NY Slip Op 33246(U)
January 17, 2013
Sup Ct, NY County
Docket Number: 651831/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Municipal Credit Union
-v-
Integrated Payment Systems, et al.

INDEX NO. 651831/12
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 1/17/13

CK
CYNTHIA S. KERN J.S.C., J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MUNICIPAL CREDIT UNION,

Plaintiff,

Index No. 651831/2012

-against-

DECISION/ORDER

INTEGRATED PAYMENT SYSTEMS, INC., FIRST DATA CORPORATION and JPMORGAN CHASE BANK, N.A.,

Defendants.

----------x

INTEGRATED PAYMENT SYSTEMS, INC. and FIRST DATA CORPORATION,

Third-Party Plaintiffs,

-against-

CAPITAL ONE, N.A.,

Third-Party Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : Motion to Dismiss

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages arising from an allegedly

improperly cashed check. Defendant JPMorgan Chase Bank, N.A. ("Chase") now moves for an order pursuant to CPLR § 3211(a) dismissing plaintiff's four causes of action asserted against it. Plaintiff does not oppose dismissal of the fourth cause of action, which is hereby dismissed. For the reasons set forth below, the remainder of Chase's motion is granted in part and denied in part.

The relevant facts are as follows. On or about February 14, 2006, plaintiff Municipal Credit Union ("MCU") entered into an agreement with defendant/third-party plaintiff Integrated Payment Systems Inc. ("IPS"), which enabled plaintiff to issue certain payment instruments such as official checks as IPS's agent. IPS banks with Chase. Thus, the checks presented to plaintiff were drawn from IPS's bank account with Chase.

On or about May 23, 2008, MCU's account holder Zelia Noel ("Noel") applied for an auto loan with MCU in the amount of $54,000.00 to purchase a new car. MCU approved the loan and drew an official check for the amount requested made payable to the order of "DREAM MOTOR CLUB INC. AND ZELIA NOEL" (the "Check"). The face of the Check identifies MCU as the "Drawer" and states that it was:

> "Issued by Integrated Payment Systems Inc., Englewood, Colorado
> JP Morgan Chase Bank, N.A. Columbus, Ohio."

Sometime thereafter, the Check was cashed and accepted for deposit at a branch of third-party defendant Capital One, N.A. ("Capitol One"). The Check did not contain an endorsement from Noel. The Check passed through the normal channels of presentment until it was eventually posted and paid by Chase, which debited the account on which the Check was written. Noel did not receive the automobile or proceeds of the cashed Check.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed

to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). "A complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990).

Chase has moved to dismiss the second and third causes of action on the ground that they are barred by a three-year statute of limitations. Plaintiff argues that these causes of action are governed by a six-year statute of limitations. Plaintiff's second cause of action is brought pursuant to New York Uniform Commercial Code ("UCC") § 3-116, which provides, in relevant part: "An instrument payable to the order of two or more persons . . . if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them." N.Y.U.C.C. § 3-116(b). Plaintiff's third cause of action is brought pursuant to UCC § 4-401(1), which provides that a drawee bank may charge its customer's account "any item which is otherwise properly payable." *Id.* at § 4-401(1). Plaintiff alleges that Chase, as drawee of the check, violated these sections by paying on the Check without the endorsement of Noel. The UCC itself does not provide an express statute of limitations for claims brought pursuant to these provisions. Thus, Chase argues that CPLR § 214(2), which provides a three-year statute of limitations for any action "to recover upon a liability, penalty, or forfeiture created or imposed by statute," applies to both claims. Plaintiff, on the other hand, argues that the claims are contractual in nature and, thus, subject to a six-year statute of limitations pursuant to CPLR § 213.

It is well established that for a claim to fall within the confines of CPLR § 214(2), the statute must impose a liability "'for wrongs not recognized in the common or decisional law.'"

State v. Stewart's Ice Cream Co., 64 N.Y.2d 83,88 (1984) (quoting *State v. Cortelle Corp.*, 38 N.Y.2d 83, 86 (1975)). As the Court of Appeals stated: "we have consistently held that [CPLR § 214(2)] only governs liabilities which would not exist but for a statute. It does not apply to liabilities existing at common law which have been recognized or implemented by statute. Thus, if the [applicable statute] merely codifies or implements an existing liability, the three-year statute [of limitations] would be inapplicable." *Aetna Life & Casualty Co. v. Nelson*, 67 N.Y.2d 169, 173-74 (1986) (internal citations omitted). Thus, in *Aetna*, the court applied CPLR § 214(2)'s three-year statute of limitations because Insurance Law § 637, the statute sued upon therein, had created a new liability by modifying the common-law system of reparation for personal injuries under tort law. *Id.* at 175. In *Stewart's Ice Cream Co.*, on the other hand, the court applied a six-year statute of limitations to plaintiff's indemnity claim brought pursuant to Navigation Law § 181 because "[i]t [could not] be said that liability for damage to land caused by an oil spill would not exist but for the statute." *Stewart's Ice Cream Co.*, 64 N.Y.2d at 88.

In the instant action, the court determines that the liabilities imposed by UCC §§ 3-116 and 4-401(1) existed in common law, making CPLR § 214(2)'s three-year statute of limitations inapplicable. Courts have consistently recognized that prior to the enactment of the UCC, a drawee of a check was liable in contract to the drawer for paying on a check bearing an improper endorsement of the payee. *See Henderson v. Lincoln Rochester Trust Co.*, 303 N.Y. 27 (1951); *Smith Barney, Harris Upham & Co. v. Citibank*, 162 A.D.2d 108 (1st Dept 1990). As the court explained in *Henderson*: "The drawee in paying on a check bearing a forged indorsement of the payee breaches its contractual obligation to the drawer to apply only on the latter' written direction." *Henderson*, 303 N.Y. at 31. Therefore, UCC § 3-116, by requiring a drawee to only pay on a check made payable to the order of two or more persons when the check bears the

endorsement of both payees, and UCC § 4-401, by only allowing a drawee to debit its customer's account on a "properly payable" check, merely codify the common law contractual liability between a drawer and drawee. These statutes do not create new liability. Accordingly, it cannot be said that the liability for damage to a drawer caused by a drawee paying on a check with an improper endorsement would not exist but for UCC §§ 3-116 and 4-401(1). As a result, the six year contract statute of limitations governs plaintiff's second and third causes of action.

The cases relied upon by Chase for its argument that a three-year statute of limitations applies are distinguishable as they do not deal with the specific UCC provisions at issue in the instant action. *See Banca Commerciale Italiana, New York Branch v. Northern Turst Int'l Banking Corp.*, 160 F.3d 90, 94-95 (2d Cir. 1998); *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, 1999 WL 558141 (S.D.N.Y. 1999); *Samuel L. Hagan II, P.C. v. J.P. Morgan Chase Bank, N.A.*, 2011 WL 4975311 (N.Y. Sup. Ct. Kings County, Oct. 19, 2011); *Friedman v. JP Morgan Chase Manhattan Bank*, 2008 WL 2891302 (N.Y. Sup. Ct. N.Y. County, July 11, 2008). The cases did not, contrary to Chase's contention, hold that all UCC provisions are subject to a three-year statute of limitations. Instead, in each case the court applied CPLR §214(2)' three-year statute of limitations because it had determined that the particular UCC provisions sued upon in that action did not have a common law antecedent but created new liability.

Additionally, the court cannot entertain Chase's remaining arguments, raised for the first time in its reply papers, that "MCU is not the drawer of the check, as it relates to Chase" and that even if it was "MCU's claims would be barred by UCC § 4-406(4)'s one year statute of limitations," at this time. It is well established that "[t]he function of reply papers is to address argument made in opposition to the position taken by the movant and not to permit the movant to

introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415 (1st Dept 1992). As Chase failed to raise these grounds for dismissal in its moving papers, the court cannot consider them on this motion.

Finally, the portion of Chase's motion seeking to dismiss plaintiff's fifth cause of action for money had and received is granted. A claim for money had and received is an action based on a contract implied in law. However, it is not an action founded on contract at all, "it is an obligation which the law creates in the absence of agreement when one party possess money that in equity and good conscience he ought not to retain and that belongs to another." *Parsa v. State of New York*, 64 N.Y.2d 143, 148 (1984). A claim for money had and received "allows a plaintiff to recover money which has come into the hands of defendant impressed with a species of trust because under the circumstances it is against good conscience for the defendant to keep the money." *Board of Educ. of Cold Spring Harbor Cent. School Dist. v. Rettaliata*, 78 N.Y.2d 128, 138 (1991) (internal citations and quotation marks omitted). Thus, in order to properly plead a claim for money had and received a plaintiff must show that: (1) defendant is in possession of money; (2) acquired with "a species of trust;" and (3) that it would be against "good conscience" for the defendant to keep said money. *See id.*

Here, plaintiff has failed to state a cause of action for money had and received against Chase as it cannot establish that Chase is wrongfully withholding sums to which it is entitled. Plaintiff alleges that "Chase received funds from MCU . . . Chase then improperly paid out those funds." Thus, by its own recognition, plaintiff concedes that Chase is no longer holding the $54,000.00. Indeed, it is undisputed that Chase paid out the $54,000.00 to Capitol One. Accordingly, a claim for money had and received cannot be maintained against Chase and

plaintiff's fifth cause of action must be dismissed. Finding that plaintiff's claim for money had and received can not be maintained, the court need not consider Chase's other argument pertaining to which state law is applicable.

Based on the foregoing, Chase's motion is granted in part and denied in part and it is hereby ordered that plaintiff's fourth and fifth causes of action are dismissed as to defendant Chase. This constitutes the decision and order of the court.

Dated: 1/17/13

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.