| **Scolnick v Bank One, N.A.** |
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| 2014 NY Slip Op 30612(U) |
| March 7, 2014 |
| Supreme Court, New York County |
| Docket Number: 601035/10 |
| Judge: Saliann Scarpulla |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IA PART 39**

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ROBERT M. SCOLNICK, ADRIENNE SCOLNICK, and ROBERT M. SCOLNICK, M.D., P.C.

Plaintiffs,

- against -

**DECISION/ORDER**
Index No. 601035/10
Motion Seq. No. 001

BANK ONE, N.A., JPMORGAN CHASE & CO., AMERICAN EXPRESS COMPANY, MBNA AMERICAN, N.A., MBNA CORPORATION, BANK OF AMERICA COUNTRYWIDE BANK, N.A., COUNTRYWIDE FINANCIAL CORPORATION, CITIBANK, N.A., WACHOVIA CORP., and WELLS FARGO & COMPANY,

Defendants.

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**SALIANN SCARPULLA, J.:**

This is a motion by defendant JPMorgan Chase Bank, N.A., s/h/a Bank one, N.A. and JP Morgan Chase & Co. (Chase), for summary judgment, pursuant to CPLR 3212, dismissing plaintiffs' verified complaint. Defendant American Express Travel Related Services Company, Inc. i/s/h/a American Express Company (Amex) cross-moves for the same relief. Plaintiffs Robert M. Scolnick, Adrienne Scolnick and Robert M. Scolnick, M.D., P.C. (plaintiffs) also cross-move for summary judgment in their favor.

**FACTUAL ALLEGATIONS**

For a period of several decades, the plaintiffs employed Randal L. Kase (Kase) to handle their accounting and tax matters (Cmplt., ¶ 4). Plaintiffs admittedly authorized Kase to use his

own address for mailing and receiving income tax related correspondence, including refunds. (*id.*, ¶ 22). However, plaintiffs deny that Kase had any authority to negotiate refund checks on their behalf or sign their names (*id.*, ¶ 23), and contend that they "exercised prudence and due diligence at all times by reviewing the tax forms [prepared by Kase]," and that they "issued checks for KASE to submit with the forms after discussing the payments with KASE before signing the checks" (*id.*, ¶ 20). Robert Scolnick admits that sometimes Kase prepared the checks for plaintiffs' execution(Scolnick 8/10/12 Aff., ¶ 2), but he denies that Kase ever had plaintiffs' checkbooks in his possession; denies that Kase ever signed any checks on plaintiffs' behalf; and denies that Kase signed any of the tax returns (*id.*, ¶ 3).

During the years 2002 through 2008, Kase caused the plaintiffs to issue checks for payments to the Internal Revenue Service (IRS) and the New York State Department of Taxation and Finance (NYS) which were far in excess of the amounts actually due (Cmplt., ¶ 18). When refund checks were issued by these taxing authorities, they were mailed directly to Kase at his address (*id.*, ¶¶ 25, 26). During this period of time, and unbeknown to plaintiffs, the IRS and NYS issued numerous refund checks payable to the plaintiffs in the total sum of approximately $201,349.00. Kase forged the plaintiffs'

signatures on the back of the checks, made the checks payable to himself, and deposited the checks into his various accounts at the defendant banks (Amex) or used those checks to pay personal obligations, such as his Amex bill and mortgage (*id.*, ¶ 27; *see also* Scolnick Aff., ¶¶ 13, 18).

In early 2009, plaintiffs were made aware of Kase's fraud by Federal authorities. Kase was convicted under Federal law, was incarcerated (*id.*, ¶ 28, 29; Prunell Affirm., Exs. D & E), and was also ordered to pay plaintiffs restitution in the amount of $201,349.80 (*id.*, Ex. E).[1]

Plaintiffs commenced this action on April 21, 2010. In their complaint, plaintiffs contend that the defendant banks and Amex failed to follow commercially reasonable standards to detect and deter their acceptance of the forgeries, even though all of the refund checks were: (a) government issued tax refund checks; (b) contained a double endorsement - the first of which was the check's payee - who was not a bank depositor nor present at the time of the deposits; and © the third-party depositor was an individual, not an institution or entity in which the payees "might" have had an interest.

Plaintiffs assert ten causes of action against each of the defendant banks and Amex: (1) breach of implied contract; (2)

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[1] Plaintiffs have recovered $16,256 from Kase pursuant to the criminal restitution order (Prunell Affirm., Ex. G, at 8).

fraud and breach of fiduciary duty; (3) strict liability under N.Y. §§ UCC 3-419 and 4-207; (4) common law conversion; (5) restitution based on unjust enrichment; (6) money had and received; (7) aiding and abetting the Kases' breaches; (8) negligence and negligent misappropriation; (9) violation of GBL § 349; and (10) legal fees.

Plaintiffs have settled their claims against all defendants with the exception of Chase and Amex (Prunell Reply Affirm., Exs. A, B & C). Plaintiffs allege that Amex is liable for five of the refund checks, totaling $28,644.25 payable to three different accounts, xxx7004, xxx2007,[2] and xxx9000 (the Amex Refund Checks) (Cmplt., ¶ 33 [A]; *see also* Furman Affirm., Ex. F).). Bank One (now Chase) is sued on four of the refund checks, totaling $40,127.67, which were all payable to account no. xxx6712 (the Bank One Refund Checks) (Cmplt., 33 [B]). Chase is allegedly liable for ten additional checks totaling $46,881.75 (the Chase Refund Checks) (*id.*, ¶ 33 [C]; Scolnick Aff., ¶ 16 [C]). Five of the Chase Refund Checks were made payable to Chase account xxx4625, one check was made payable to Chase account xxx 9865,[3] another check payable to Amex account xxx7004, with the

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[2]Amex contends, without any evidentiary support, that this account was an American Express Business Management Account maintained by Kase (*see* Amex Mem. of Law, at 6).

[3]The documentary evidence establishes that account xxx9865, was a checking account maintained at Chase by Kase and his wife. (*see* Prunell Affirm., Ex. C).

remaining three checks tied to Chase in some fashion (*id.*). With one exception, neither Chase, Amex nor plaintiffs furnish any evidence explaining what types of accounts (i.e, checking, credit, or mortgage) to which the checks were deposited and/or credited.

## DISCUSSION

### Application of the Statute of Limitations to All Claims

Chase and Amex both argue that because the Complaint was filed on April 21, 2010, and the longest possible applicable limitations period is six years, any claims arising before April 22, 2004 are time-barred. Check no. 2306-00711504 in the amount of $1,537.92 is dated December 2, 2003 and, according to the entries on the back of the check, was cashed on or about December 17, 2003. Thus, with the exception of the fraud claims, plaintiffs' claims against both Amex and Chase based on this check are time-barred, because the loss occurred and the statute of limitations began to run, when the drawee made payment upon the forged endorsement (*Mount Vernon Trust Co. v. Federal Reserve Bank of N.Y.*, 267 App Div 882 [2d Dept], *affd* 293 NY 653 [1944]). However, check no. 2036-01600839 in the amount of $83.78, while dated February 6, 2004, was cashed on May 4, 2004. Thus, the plaintiffs' claims with respect to this check are not time-barred under a six-year statute of limitations.

Plaintiffs argue that their claims are timely because they were brought within two years of the discovery of Kase's fraud by the IRS in early 2009, citing CPLR 203 (g). They maintain that they could not have discovered Kase's fraud through reasonable diligence within the six-year statute of limitations, because of Kase's fiduciary relationship and control of the plaintiffs' tax matters, and did not discover Kase's wrongdoing until they were contacted by federal authorities in early 2009 (Cmplt., ¶ 28). However, only fraud claims are measured from the discovery of the wrongdoing (CPLR 213 [8]), and, as discussed infra, the complaint fails to state a claim against Chase or Amex for intentional fraud or aiding and abetting Kase's fraud. Nor does the doctrine of equitable tolling help plaintiffs, because plaintiffs fail to allege any separate wrongdoing by Chase or Amex that prevented the plaintiffs from bringing timely suit on check no. 2306-00711504 (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]; *Melcher v Greenberg Traurig, LLP*, 102 AD3d 497, 501 [1st Dept 2013]).

**Non-Chase Checks**

Chase argues that five of the ten Chase Refund Checks listed in the verified complaint at paragraph 33 © were deposited with other institutions, were never touched by Chase, thus Chase should not be responsible for damages relating to those checks. These include: (1) IRS check no. 2306-00711504 in the amount of

$1,537.92, dated December 2, 2003, which was credited to an Amex account (xxx7004); (2) IRS check no. 2036-01600839 in the amount of $83.78, dated February 6, 2004, which was deposited at Citibank; (3) NYS check no. 56554169 in the amount of $2,896.05, dated March 3, 2006, which was deposited at Citibank; (4) NYS check no. 63296080 in the amount of $3,016.15, dated February 23, 2007, which was allegedly credited to a mortgage account maintained at Countrywide;[4] and (5) NYS check no. 71240890 in the amount of $3,000.00, dated August 22, 2008, deposited at Wachovia Bank.[5] Chase argues that it had nothing to do with these checks, and thus plaintiffs' demands for damages against Chase must be reduced by the face amounts of these five checks.

Plaintiffs make no arguments with respect to the first two checks, and, in any event, claims with respect to the first check are time-barred. With respect to the other three NYS checks, plaintiffs argue that Chase was the drawee bank, as opposed to the depository bank, on these three checks. A payee has a cause of action sounding in conversion against a drawee bank which pays on a forged endorsement (UCC 3-419 [1] [c]; White & Summers, Uniform Commercial Code § 15-4, at 596 [2d ed 1980]; *see also*

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[4]Plaintiffs also sought recovery for this check, which is actually dated February 23, 2007, from Countrywide (*see* Cmplt., ¶ 33 [E]).

[5]Plaintiffs also sought recovery against Wachovia for this check (*see* Cmplt., ¶ 33 [F]).

*Mouradian v Astoria Fed. Sav. & Loan Assn.*, 91 NY2d 124, 128-129 [1997]). However, a drawee bank's absolute liability for paying on a forged endorsement will not preclude a setoff where the payee has received all or part of the proceeds of the converted instrument from either the forger or the paying bank (*Mouradian v Astoria Fed. Sav. & Loan Assn.*, 91 NY2d at 129, citing UCC 1-106; *see also* General Obligations Law § 15-108 (amount recoverable by plaintiff from a non-settling defendant is reduced in proportion to amount settled with the other defendants).

As plaintiffs have recovered $16,256 from Kase, they cannot now insist on recovering the full value of these three checks from Chase as the drawee bank. In addition, to the extent that plaintiffs have recovered a portion of the value of any of these three checks from the other settling defendants, their damages must be suitably reduced.

However, for the reasons stated above, all claims against Chase with respect to IRS check no. 2306-00711504 in the amount of $1,537.92, dated December 2, 2003, and IRS check no. 2036-01600839 in the amount of $83.78, dated February 6, 2004, are dismissed.

**Chase - No Improper Endorsement**

Chase argues that each of the Bank One and Chase Refund Checks were made payable as follows:

[Plaintiff]
c/o R Kase CPA
19 Random Farms Drive
Chappaqua NY 10514-1016

(Chase's Mem. of Law, at 3). Chase argues that a check payable to two payees separated by the virgule symbol ("/") is payable in the alternative (*see L.B. Smith, Inc. v Bankers Trust Co. of Western N.Y.*, 80 AD2d 496, 496-97 [4th Dept 1981], *affd* 55 NY2d 942 [1982] [check made payable to "A/B" only requires the endorsement of one payee for negotiation]). Relying on UCC 3-116 (a), Chase argues that where a negotiable instrument is payable to two alternate payees, either of the payees may negotiate, enforce or discharge the instrument. In Chase's view the Bank One and Chase Refund Checks were payable to either plaintiffs or Kase, thus they were properly endorsed by one payee.

Chase's alternate payee argument fails for a number of reasons. First, four of the Chase Refund Checks were payable solely to Mr. and Mrs. Scolnick or payable to Robert M. Scolnick, M.D., P.C. While these checks were mailed to Kase's home/office, he is not named on the payee line or anywhere on the checks. And on one of the Bank One Refund Checks, NYS check no. 0000467007, dated July 30, 2004, in the amount of $4,670.07, the payee is listed as:

**"to the order of SCOLNICK - ROBERT M & ADRIENNE A"**

Underneath is a bar code, and then under the bar code, the check reads, in smaller type print that is not highlighted:

SCOLNICK - ROBERT M & ADRIENNE A
19 RANDOM FARMS DR/KASE CPA
CHAPPAQUA NY 10514-1016

There is no doubt that the payee here is only Robert and Adrienne Scolnick. Thus, Chase's alternate payee argument does not apply to five of the Bank One and Chase Refund Checks.

Second, the remaining Chase Refund Checks were not payable using a plain virgule or slash symbol (i.e., "/"), instead either a "c/o" or "%" symbol is used.[6] Third, none of the checks were actually endorsed by Kase, using his own name, but were endorsed by forging the plaintiffs' signatures.

Assuming, as Chase does, that the symbol means "c/o," there is a paucity of case law on the meaning of such a symbol in connection with the negotiation of a check. Under facts similar to those presented here, the Superior Court of New Jersey held that a check made payable to a principal and its agent, the names appearing on the payee line of the check in vertical alignment, separated by the symbol "c/o," was payable in the alternative to either of the named payees, thus making the sole endorsement by the agent effective and valid (*Matson Intermodal Sys., Inc. v. Kubis Enterprises, Ltd.*, 385 NJ Super 105, 895 A2d 1242 [Law Div 2005]). The New Jersey court stated that, pursuant to N.J.S.A.

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[6] While both Chase and the plaintiffs contend the symbol used on the checks is "c/o," Amex contends it is "%". Due to the poor quality of the copies attached to these motion papers, the court cannot readily determine the symbol on the checks.

12A:UCC 3-110d[7], an instrument that is ambiguous about the relationship between designated payees is an instrument that is payable in the alternative. The court noted that the checks at issue use neither "and" nor "or" in its designation of payees, but "c/o" meaning "care of" which, "[i]n its most literal sense . . . means to take charge of, oversee or manage" (385 NJ Super at 113, 896 A2d at 1247).

This Court disagrees with the New Jersey Superior Court on whether a c/o symbol is ambiguous. The use of the symbol "c/o" in a vertical alignment between a taxpayer and the taxpayer's paid preparer on a tax refund check plainly indicates only that the refund check was mailed, via a government computer, care of the paid preparer, as the taxpayer's designated representative. Objectively, the symbol can not be construed to mean that the tax refund is payable to the tax preparer, or that the tax preparer has the authority to negotiate the check on the client's behalf.

Cases from other jurisdictions have held that the symbol "c/o" does not infer that the check is payable to alternate payees.

> "[T]he symbol 'c/o' ... [is] not ambiguous and [does] not operate to designate . . . an alternative co-payee

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[7]N.J.S.A. 12A:3-110d provides, in pertinent part: "If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively."

> . . . .; [it] means "in care of" and means that another only has 'custody' or 'temporary charge' over an item belonging to another . . . . The symbol is 'used especially in the phrase care of or in care of on mail sent to a person through another person or other agency. . . .'"

(*Geraldo v First Dominion Mut. Life Ins. Co.*, 2002 WL 31002770, *6 (Ohio Ct App Sept. 6, 2002], quoting *Buckeye Foods v Cuyahoga County Bd. Of Revision*, 78 Ohio St 3d 459, 678 NE2d 917, 919 [1997]; cf. *National Union Fire Ins. Co. of Pittsburgh, PA v Castellano*, 102 AD3d 662, 663 [2d Dept 2013] [payroll tax refunds checks payable to "Cannon U.S.A., Inc., ATTN: Jim Castellano" were not payable in the alternative]). And in *Matter of Cerbone* (295 AD2d 66 [2d Dept 2002]), an attorney for an estate was disciplined for negotiating a NYS tax refund check payable to the executrix of the estate "c/o" of the attorney without the "endorsement, knowledge, or consent" of the executrix.

Even if the use of the symbol "c/o" could be considered ambiguous, New Jersey and New York law differ on the presumption to be accorded such an ambiguity. New Jersey has adopted the revised Article 3 of the Uniform Commercial Code, and Revised UCC 3-110 (d), as was noted in the *Matson Intermodal* case, "represents a significant shift in policy reflected in the predecessor statute" (895 NJ super at 112, 895 A2d at 1247). New York is still governed by the old code articles, which do not contain this presumption (*see* N.Y.U.C.C. 3-110; L. 1962, c.

553). Case law in New York holds that when a check is ambiguous as to whether payees are joint or alternative, it will be considered as payable jointly in order to give each payee the maximum protection by requiring the endorsement of both payees to negotiate the paper (*C.H. Sanders Constr. Co. v Bankers Trust Co.*, 123 AD2d 251, 252 [1st Dept 1986]). For these reasons, the Court finds meritless Chase's argument that the Bank One and Chase Refund Checks were properly endorsed by Kase.

**Fiduciary Arguments - UCC 3-117 (b) and 3-403 (1)**

Both Chase and Amex argue that a check made payable to a named person, with words describing or indicating him to be a fiduciary of another payee, is payable to the fiduciary and may be endorsed by him. Defendants rely on UCC 3-117 (b), which states in full:

> "An instrument made payable to a named person with the addition of words describing him
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> * * *
>
> (b) as any other fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him"

The Official Comments to this section show that it is intended to cover such descriptions of a payee as "John Doe, Executor of the Estate of Richard Roe," and make clear that John Doe can negotiate the check, albeit subject to Doe's fiduciary obligations to the estate (McKinney's Cons Laws of NY, Book 62½, UCC 3-117, Official Comments at 85-86). Thus, UCC 3-117 (b) stands only for the unremarkable principle that there is no

requirement that a check payable to a fiduciary be deposited to a fiduciary account'" (*Matter of Knox*, 64 NY2d 434, 437 [1985], quoting *Bradford Trust Co. v Citibank*, 60 NY2d 868, 870 [1983]). However, the fiduciary must be a named payee in the first instance.[8]

Citing UCC 3-403 (1), Chase next argues that the endorsement of the plaintiffs' names on the checks by their accountant was valid, because the plaintiffs cloaked Kase with the authority to sign their names. UCC 3-403 (1) states that:

> "[a] signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority."

Chase argues that the use of the "c/o" designation and Kase's professional title and address on the Chase checks establish Kase's apparent authority as a fiduciary of the plaintiffs. Amex proffers a similar agency theory.

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[8] In the case Chase relies on, *Feinstein v Chemcial Bank* (84 AD2d 514 [1st Dept 1981], *affd* 56 NY2d 571 [1982]), a teller's check in settlement of a divorce was made payable to "Herbert Mildner, Att., Selma Goldin." The court rejected the client's contention that the check was payable to her and Mildner, her divorce attorney, jointly, based on the wording of the check, on the husband's uncontroverted testimony that he instructed the bank teller to make the check payable to the attorney, and on the client's failure to object to another check handled in the same manner. Thus, contrary to Chase's argument, the check at issue in *Feinstein* was not made payable to the client and her attorney, and does not support Chase's argument that, because Kase is identified as a CPA on some of the checks, he could endorse and negotiate the checks into his own accounts.

Defendants' reliance on the doctrine of apparent authority is misplaced. Apparent authority arises where words or conduct of the principal, communicated to a third party, lead to the appearance and belief that the agent possesses authority to enter into a particular transaction (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]). While plaintiffs authorized Kase to prepare tax returns on their behalf and to receive correspondence from the IRS and NYS, including tax refund checks, there is no indication in the record that Kase was authorized to sign checks payable to the IRS or NYS or to endorse or negotiate refund checks received from the IRS or NYS on the plaintiffs' behalf. In addition, the duty owed by an accountant to a client is generally not fiduciary in nature (*Bitter v Renzo*, 101 AD3d 465 [1st Dept 2012]; *Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 444 [1st Dept 2010]; *DG Liquidation v Anchin, Block & Anchin*, 300 AD2d 70, 70-71 [1st Dept 2002]).

In *Matson Intermodal* the alternate payee endorsed the check in his own name, treating the check itself as being payable to alternate payees. Here, in contrast, Kase did not endorse the checks in his own name, and treat the checks as payable in the alternative. Instead, Kase forged the plaintiffs' name to the checks. In *Wen Kroy Realty Co. v Public Nat. Bank & Trust Co.* (260 NY 84 [1932]), the Court of Appeals rejected a claim that a corporate president had apparent authority to negotiate a check

payable to the corporation. In that case, the president signed the name of the plaintiff corporation on the check, signed his own name as president thereunder, and then induced his son to sign his name as secretary, though in fact the son was not the secretary and had no authority from the plaintiff corporation, actual or apparent, to act as its agent. The Court explained:

> "The basis for a finding of apparent authority is completely lacking; for there was no assumption of apparent power by the president to bind the corporation by his sole signature; no representation of any authority to so act and no reliance by the bank upon the existence of such power."

(260 NY at 93).

Even if Kase was in a fiduciary relationship with plaintiffs, that would not necessarily mean he had authority to negotiate checks on their behalf. An attorney, although in a fiduciary relationship to the client, possesses no implied authority to sign a check payable to its client (*Lawyers' Fund for Client Protection of the State of N.Y. v Gateway State Bank*, 171 Misc 2d 485, 488 [Sup Ct, Albany County 1996]), *affd in part, revd in part on other grounds*, 239 AD2d 826 [3d Dept 1997]; *Lawyers Fund for Client Protection v Manufacturers Hanover Trust Co.*, 153 Misc 2d 360, 362 [Sup Ct, Albany County 1992]).[9]

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[9] *Andre Romanelli, Inc. v Citibank, N.A.* (60 AD3d 428 [1st Dept 2009]), upon which both Chase and Amex rely, is distinguishable. In that case, the dishonest accountant had express authority to endorse checks payable to the plaintiff corporations as well as apparent authority by virtue of his being a signatory on the plaintiffs' accounts.

In sum, neither defendant has come forward with any evidence to show that Kase had apparent authority to negotiate the refund checks.

**Plaintiffs' Negligence - UCC 3-406**

Citing UCC 3-406, Chase maintains that plaintiffs' negligence in detecting their accountant's fraud is a complete bar to their recovery. This section provides, in pertinent part:

> "Any person who by his negligence substantially contributes . . . to the making of an unauthorized signature is precluded from asserting . . . the lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business."

To prevail, Chase must prove first that it acted in good faith and in accordance with reasonable commercial standards in accepting the forged checks. If it does, Chase must then show that the plaintiffs were negligent, and that negligence substantially contributed to the forgery. Chase bears the burden of proof as to all these elements (*Lund v Chemical Bank*, 797 F Supp 259, 268 [SD NY 1992]; *see also Mouradian v Astoria Fed. Sav. & Loan*, 91 NY2d 124, 131 [1997]).

Good faith is statutorily defined as "honesty in fact in the conduct or transaction concerned" (UCC 1-201 [19]). There is no showing of dishonesty on Chase's part.

The UCC contains no definition of "reasonable commercial standards." Plaintiffs, however, contend that Chase may have

violated its own internal policies in accepting the Bank One and Chase Refund Checks. According to counsel for plaintiffs, Chase provided, in discovery, selected portions of their internal rules regarding the handling of checks. According to this document, tellers need special approval to accept double-endorsed checks (defined as where the payee and the depositor are not the same) that are issued by the government, which Chase considered "high risk" (Feder Affirm., Ex. B: Chase000025-26, -39). The record on these motions is devoid of any evidence of whether such approval by a manager was obtained when Kase deposited the Bank One and Chase Refund Checks in his own accounts. In addition, Chase advised tellers that checks made payable to a business such as "ABC Inc." "**must only be deposited** into that business's account (emphasis in original)" (*id.*: Chase000029-30). Here, ten of the Bank One and Chase Refund Checks were payable to Robert M. Scolnick, M.D., P.C., professional corporation, but were made payable to accounts belonging to Kase and/or his wife. Several courts have held that a bank's failure to adhere to its own policies is evidence that it did not act in a commercially reasonable manner (*Lund v Chemical Bank*, 797 F Supp at 270, citing *American Sec. Bank, N.A. v American Motorists Ins. Co.*, 538 A2d 736, 738 [DC Ct Appeals 1988]; *Seattle-First Natl. Bank v Pacific Natl. Bank of Washington*, 22 Wash App 46, 587 P2d 617 (1978]).

On this motion Chase has failed to establish, as a matter of law, that it acted in a commercially reasonable manner or that the plaintiffs were negligent in failing to detect their accountant's fraud. These are questions of fact that must be resolved at trial.

**Amex - Holder In Due Course and The Imposter Rule**

Amex claims that its status as a holder in due course, pursuant to UCC 3-302, is a complete bar to all of the plaintiffs' claims with respect to the Amex Refund Checks. Additionally, Amex contends that Kase's forged indorsement of the refund checks was effective to pass good title pursuant to UCC 3-405 (1) (a), known as the "Imposter Rule."

UCC 3-302 states, in relevant part, that "(1) A holder in due course is a holder who takes [an] instrument: (a) for value; and (b) in good faith; and © without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any other person." UCC 3-304 (7) provides "to constitute notice of a claim or defense, the purchaser must have knowledge of the claim or defense or knowledge of such facts that his action in taking the instrument amounts to bad faith." The Court of Appeals has interpreted this section as "demand[ing] nothing less than actual knowledge" (*Hartford Acc. & Indem. Co. v American Express Co.*, 74 NY2d 153,162-163 [1989]). "To the extent that a holder is a holder in due course he takes the instrument

free from (1) all claims to it on the part of any person" (UCC 3-305; *see also Hartford Acc. & Indem. Co.*, 74 NY2d at 158-159).

Plaintiffs do not deny that Amex is a holder (*see* UCC 1-201 [20]; *Getty Petroleum Corp. v American Express Travel Related Servs. Co.*, 90 NY2d 322 [1997] [American Express was holder when it accepted checks with forged endorsements of payees' names in payment of credit card obligations]), or that it took the Amex Refund Checks "for value" (*see* UCC § 3-303). Plaintiffs argue only that Amex did not take the checks in good faith and without notice of a claim or defense. Although they offer no evidence of any actual knowledge by Amex of Kase's forgeries or fraudulent conduct, they rely on UCC 3-304 (2), which provides, in full:

> "The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty."

According to plaintiffs, Amex was on notice of the following three facts, each of which would have led an ordinary prudent person to refuse acceptance or at least investigate prior to accepting the Amex Refund Checks: (1) the origin of the checks - government-issued tax refunds; (2) the method of their delivery to Amex -- double endorsement; and (3) the use of the checks - payment of Kase's personal liability to Amex.

UCC 3-304 (2) is not applicable here. It covers a situation where a fiduciary uses a check or other negotiable instrument payable to his principal to pay the fiduciary's own debts. For example, when a corporate president endorses a check payable to the corporation, but directs the check be used to pay his own debts (*see e.g. Ward v City Trust Co. of N.Y.*, 192 NY 61 [1908]). The Amex Refund Checks were not endorsed by Kase as the fiduciary or agent of the plaintiffs, rather he forged plaintiffs' signatures and added a special endorsement making the checks payable to various Amex accounts belonging to him and/or his wife (*see* Furman Affirm., Ex. F). Thus, absent any actual notice of the forgeries by Kase, Amex cannot be said to have had any knowledge that Kase, assuming he was plaintiffs' fiduciary, negotiated the checks in payment of his own debts.

As Amex is entitled to holder in due course status, all of the claims asserted by plaintiffs fail as a matter of law, and Amex is granted summary judgment in its favor.

**Failure to State a Claim For Relief**

Chase seeks dismissal of each of the plaintiffs' ten causes of action for failure to state a claim for relief.

The first cause of action is pleads breach of an implied contract, while the fifth and sixth causes of action seeks restitution based on a theory of unjust enrichment and money had and received. All of these common law contract-based claims,

although duplicative, are adequately pled against Chase (*B.D.G.S., Inc. v Balio* , 8 NY3d 106 [2006]; *Henderson v Lincoln Rochester Trust Co.*, 303 NY 27, 32-33 [1951]; *Lawyers' Fund for Client Protection of the State of N.Y. v Gateway State Bank*, 273 AD2d 565 [3d Dept 2000]; *Sonnenberg v Manufacturers Hanover Trust Co.*, 87 Misc 2d 202, 204 [Sup Ct, NY County 1976]).

The second cause of action against Chase alleges fraud and breach of fiduciary duty. Plaintiffs do not state with particularity (a requirement of pleading fraud under CPLR 3016 [b]) any facts tending to show "misrepresentation or concealment of a material fact, falsity, scienter by [either defendant], justifiable reliance on the deception, and resulting injury" (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]). In fact, plaintiffs allege that they were unaware of the refund checks or Kase's forgeries, thus, as a matter of law, they were not defrauded by Chase's conduct in accepting the checks for deposit and/or credit on a forged endorsement.

The breach of fiduciary claim is similarly deficient. A claim for breach of fiduciary duty must allege, as its most basic element, the existence of a fiduciary relationship (*Cornwell v NRT New York LLC*, 95 AD3d 637, 637-638 [1st Dept 2012]). Here, Chase was either the drawee of checks drawn on the account of NYS or the bank where Kase, its customer, deposited the checks into a checking account or negotiated the checks to pay off a Chase

credit card. Chase had no relationship with any of the plaintiffs.

The third and fourth causes of action are based on violations of UCC 3-419 and 4-207 and common law conversion. Chase argues that plaintiffs cannot establish either a common law or statutory claim for conversion, the latter pursuant to UCC 3-419 (1) ( c), because Kase's endorsement of the checks was proper and authorized. The court has rejected this contention, so there is no basis to dismiss these claims. To the extent the third cause of action is based on UCC 4-207, the claim is dismissed. The warranties in this UCC section run from a customer or collection bank, and extend only to "the payor bank or other payor" or a "transferee and any subsequent collecting bank who takes the item in good faith" (UCC 4-207 [1], [2]). Plaintiffs were the payees in all of these transactions.

The seventh cause of action purports to state a claim for "aiding and abetting" "all of the breaches by KASE and/or ELLEN of their duties to the plaintiffs" (Cmplt., ¶ 104). A claim for aiding and abetting a breach of fiduciary duty requires a showing that the defendant knowingly induced or participated in the breach; constructive knowledge is not enough (*AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 23 [2d Dept 2008]; *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). Here, plaintiffs offer no evidence showing that Chase had actual

knowledge of Kase's fraud. The claim that Chase did not adhere to its own internal policies regarding double-indorsed government checks and checks payable to a business is insufficient to impose aiding and abetting liability.

The eighth cause of action is based on "simple negligence and negligent misappropriations" (Cmplt., ¶ 110). "To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011], citing *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Chase argues for dismissal of this claim on the ground that it owed no duty of care to the plaintiffs, who were not its customers. Plaintiffs cite no case imposing a duty of care on a drawee or depository bank to a non-customer payee. *Five Towns College v Citibank* (108 AD2d 420 [2d Dept 1985]); *Critten v Chemical Nat. Bank* (60 App Div 241 [1st Dept 1941]) and *Pippo v Fleet Bank, N.A.* (2002 WL 226734, *1 [NY Sup, Albany County Jan. 30, 2002]), each involved actions by a drawer-customer against its bank (the drawee or payor bank) for paying checks that either were altered and/or where the drawer's signature was forged. Accordingly, The eighth cause of action is dismissed.

In their ninth cause of action, plaintiffs allege that section 349 of the General Business Law was violated by the defendants' acceptance of the refund checks with a forged indorsement. "To successfully assert a section 349 . . . claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]). Consumer-oriented conduct is conduct that has a "broad impact on consumers at large; '[p]rivate contract disputes unique to the parties . . . would not fall within the ambit of the statute'" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]; *U.S. Bank N.A. v Pia*, 73 AD3d 752, 754 [1st Dept 2010]). The verified complaint is bereft of any allegations that would support a GBL § 349 claim, and thus the ninth cause of action is dismissed. The tenth cause of action seeking the recovery of legal fees is also dismissed. Plaintiffs do not identify any contract or statute authorizing the recovery of legal fees, other than GBL § 349.

In sum, Chase has demonstrated its entitlement to dismissal of all but the first, third, fourth and sixth causes of action, leaving plaintiffs' claims for breach of an implied contract

(first), common law conversion and strict liability pursuant to UCC 3-419 (third and fourth), and money had and received (sixth).

**Plaintiffs' Cross Motion for Summary Judgment In Its Favor**

Plaintiffs' cross motion for summary judgment in its favor is denied. There are triable issues of fact regarding whether plaintiffs' were negligent in not detecting their accountant's fraud, whether that negligence substantially contributed to the forged endorsements, whether Chase acted in accordance with reasonable commercial standards, and to what extent plaintiffs' settlement with the other defendants and partial receipt of restitution from Kase reduces any recovery on the three NYS state checks where Chase was the drawee.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that Chase's motion for summary judgment is granted to the extent of dismissing:

--all claims based on IRS check no. 2306-00711504 in the amount of $1,537.92, dated December 2, 2003 and on IRS check no. 2036-01600839 in the amount of $83.78, dated February 6, 2004;

--the second, fifth, seventh, eighth, ninth and tenth causes; and it is further

**ORDERED** that Amex's cross motion for summary judgment dismissing the complaint is granted, and the complaint is

dismissed it is entirety as against this defendant, and the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the action is severed and continued against the remaining defendant; and it is further

**ORDERED** that plaintiffs' cross motion for summary judgment is denied.

This constitutes the decision and order of this Court.

Dated: March 7, 2014

SALIANN SCARPULLA
J.S.C.

SALIANN SCARPULLA