ORIGINAL

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA PART 11
Justice

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LYDIA RODRIGUEZ and JANET DeCASTRO Index No.: 701534/2014

Plaintiffs, Motion Date: May 5, 2014

-against- Seq. No.: 1

BANCO POPULAR NORTH AMERICA, ET.AL.,

Defendants.

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The following papers numbered E3-E15 were read on the motion of the defendant, Banco Popular North America ("Banco"), seeking an order dismissing plaintiff's complaint, pursuant to CPLR 3211(a)(1), and on the cross-motion of the plaintiffs, seeking an order denying defendant Banco's motion and further, granting leave to plaintiffs, pursuant to CPLR 3025(b), to amend the complaint.

	PAPERS NUMBERED
Notice of Motion - Memo/Affirmation - Exhibits.....	E3-E7
Notice of Cross-Motion - Affirmation - Exhibits.....	E10-E14
Memo Opposition to Motion/Reply Affirmation.....	E15
Memo Opposition to Cross/Reply Affirmation.....	E16

Plaintiffs commenced the underlying action seeking to recover damages alleged to have been incurred when the money deposited into defendant Banco's vault box went missing. Specifically, plaintiffs allege that after they deposited $150,000.00 into a vault box at a branch of Banco's, the money disappeared from the box. Defendant submits a copy of the vault box agreement executed by the plaintiffs wherein it specifically states that "Lessees shall not use the safe deposit box to store (1) money, Federal Reserve Notes or currency of any kind or denomination . . ." Further, there is another provision in the agreement which states the following:

> "The Lessee assumes all risks of . . . loss or damage to the Contents in the safe deposit box. Any liability of the Lessor Bank with respect to the

> Contents deposited in the safe deposit box is limited to the use of ordinary care by employees and officers of the Lessor Bank in following the rules set by the Lessor Bank for operating the Safe Deposit area.
>
> The fact that Contents may be missing shall not be taken as evidence of neglience on the part of the Lessor Bank nor shall unauthorized access be inferable from loss or damage to any Contents of the safe deposit box."

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . . " In order to prevail on a CPLR 3211(a) (1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003], quoting *Trade Source v Westchester Wood Works*, 290 AD2d 437 [2d Dept 2002].)

It is undisputed that the vault box agreement relied upon by the defendant Banco was executed by the plaintiffs. "A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], rearg denied 46 NY2d 940 [1979]). Every term of a contract must be given effect and meaning, and "reasonable effort must be made to harmonize all of its terms ... " (citation omitted and internal quotation marks omitted) (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89 [4th Dept], lv denied 97 NY2d 603 [2001]). "In cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language" (*Jacobson v Sassower*, 66 NY2d 991, 993 [1985]).)" (*Martin v Citibank*, 2008 N.Y. Slip Op. 33398(U) [NY County 2008]["The $8,000.00 in cash that plaintiff claims was in the box is currency, and a provision prohibiting the deposit of currency is enforceable."][relying upon *Uribe v Merchants Bank of N. Y.*, 239 AD2d 128 [1st Dept 1997], affd 91 NY2d 336 [1998]].) The terms set forth in the agreement submitted by the defendant, executed by the plaintiffs, establishes that there was a valid, enforceable agreement between the parties. (See, Banking Law 96[3]; *Radelman v Manufacturers Hanover Trust Co.,* 61 Misc.2d 669 [NY County 1969].) As in *Radelman v Manufacturers Hanover Trust Co.*, supra, this Court finds that "the lease provision prohibiting the deposit of money in the box is neither unconscionable nor offensive to public policy which imposes no limitation or restriction on the freedom of contract between a bank and its depositors." (*Radelman v Manufacturers Hanover Trust Co.*, supra. [citations omitted].)

Based upon the clear terms of the vault box agreement, the underlying action must be dismissed. (See, *Levina a Citibank, N.A.,* 16 AD3d 160 [1st Dept. 2005]; *Uribe v Merchants Bank of N.Y.*, 91 NY2d 336 [1998][safe-deposit box agreement prohibiting storage of cash relieves bank from liability in the event of missing cash].) Additionally, as to plaintiffs' cause of action

seeking punitive damages, the court finds that the otherwise conclusory allegations, are insufficient to support the complaint. In an action for breach of contract, "punitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights. Punitive damages 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" (*Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 758 [2d Dept. 2008]). "Punitive damages are available where the conduct associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious to warrant the additional imposition of exemplary damages. A party must demonstrate not only egregious tortious conduct, but also that such conduct was part of a pattern of similar conduct directed at the public generally" (*id.*).

As to plaintiffs' claims pursuant to GBL 349, as it relates to allegations of deceptive practices and failure to provide adequate protection of the contents of plaintiffs' vault box, based upon the foregoing, same is also dismissed. As to the remainder of plaintiffs' complaint, alleging negligence, gross negligence and recklessness, breach of warranty, breach of bailment agreement; conversion, negligent hiring and retention and negligent supervision; such claims are also dismissed based upon the foregoing determination. Bare allegations are insufficient to support such causes of action. Furthermore, it was the plaintiffs themselves who violated the agreement at the very outset, depositing a large sum of cash into a deposit box after signing an agreement that specifically prohibited the storing of such items within the bank's vault.

As to plaintiffs' cross-motion seeking to amend their complaint, the court determines as follows:

Neither the pleadings nor the evidence submitted in support of plaintiffs' cross motion support a cause of action for fraud. In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*see Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]). Also, a cause of action alleging fraud must be pleaded with specificity (see CPLR 3016[b]; *Brualdi v IBERIA*, 79 AD3d 959 [2d Dept. 2010]; *Dumas v Fiorito*, 13 AD3d 332 [2004]; *107 Realty Corp. v National Petroleum U.S.A.*, 181 AD2d 817 [2d Dept. 1992]). Here, plaintiffs failed to properly plead the elements of misrepresentation of a material fact or scienter in his complaint with specificity, as the complaint did not contain factual allegations showing that the defendant made representations concerning a material fact which was false and known by the defendant to be false at the time it was made and that the defendant made the representations with the purpose of inducing the plaintiffs to rely upon them (see *Nationscredit Fin. Servs. Corp. v Turcios*, 55 AD3d 806 [2d De[t/ 2008]; *Maisano v Beckoff*, 2 AD3d 412 [2d Dept. 2003]).

Moreover, the fraud claim is duplicative of the breach of contract claim. A cause of

action alleging fraud does not lie where the only fraud claim relates to a breach of contract" (*Tiffany at Westbury Condominium* v *Marelli Development Corp.*, 40 AD3d 1073, 1076 [2d Dept. 2007]; see also *Ross v DeLorenzo*, 28 AD3d 631, 636 [2d Dept. 2006]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2d Dept. 2001]; *Morgan v Smith Corp.*, 265 AD2d 536, 536 [2d Dept. 1999]). Such misrepresentations are not collateral to the contract because they pertain to the exact allegations found in plaintiffs' breach of contract claim.

Accordingly, plaintiffs' cross-motion is denied.

Dated: June 6, 2014

SIDNEY F. STRAUSS, J.S.C.