Visalli v Giannattasion
2014 NY Slip Op 33792(U)
December 16, 2014
Supreme Court, Rockland County
Docket Number: 031344/2014
Judge: William A. Kelly

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

PRESENT:
HON. WILLIAM A. KELLY
SUPREME COURT JUSTICE

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AMELIA VISALLI, individually and MELINDA WRIGHT, as EXECUTOR OF THE ESTATE OF ALFRED VISALLI,

Plaintiffs,

Index No. 031344/2014

-against-

DECISION & ORDER

ANTHONY GIANNATTASION, J.P. MORGAN CHASE, N.A.,

Defendants.

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The following papers were read on the motion of the defendant for an Order, pursuant to CPLR Rule 3211, dismissing plaintiff's complaint:

Notice of Motion - Affirmation - Memorandum of Law	1 - 3
Affirmation in Opposition - Affidavit in Opposition	4 - 5
Reply Memorandum of Law	6

Upon the foregoing papers it is hereby ORDERED that the motion is granted to the extent set forth herein.

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005) (citing Goshen v Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002)). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. Id.

"Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (citations omitted)." Guggenheimer v Ginzburg, 43 N.Y.2d 268, 275 (1977). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate (citations omitted)." Id.

The instant action concerns unauthorized ATM withdrawals by defendant Giannattasio, a former employee of defendant Chase. In 2009, due to suspected fraud, the plaintiffs instructed defendant Chase to close the plaintiffs' account. According to the complaint, on several occasions, Chase made assurances that the account would be closed.

On October 4, 2011, the plaintiffs notified Chase that withdrawals were still being made from the account. On October 17, 2011, defendant Giannattasio was arrested. He was subsequently convicted and ultimately convicted of stealing from the account.

With respect to the first cause of action, the plaintiff successfully plead a *prima facie* case of breach of contract based upon the alleged contractual agreement to "release funds from the accounts only upon receipt of properly authorized and authenticated payment orders."

The second cause of action alleges a violation of NY UCC §4-A-201. However, that section does not apply to transfers covered by the Electronic Fund Transfer Act. Banque Worms v. BankAmerica International, 77 N.Y.2d 362, n. 4 (1991). "The purpose of the EFTA is the provision of "a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems," with the "primary objective" being "the provision of individual consumer rights." The statute covers a wide range of electronic money transfers—from ATM withdrawals and debit-card payments to banking by phone, and subjects them to a litany of procedural requirements designed to protect consumers from transactions made in error or without their consent." Wike v. Vertrue, Inc., 566 F.3d 590 (6th Cir. 2009). As the EFTA covers the complained of transactions, the UCC does not apply.

The causes of action alleging negligence and breach of fiduciary duty must also be dismissed. As set forth above, the unauthorized transactions are governed by the contractual relationship between the bank and the depositor. "Where, as in the case before us, the contractual relationship occupies fully the rights and responsibilities of the parties to the account on deposit, there exists a completely enforceable and well understood contractual undertaking. The breach of such contract, long recognized and enforced at law according to a consistent policy of the court, and in consonance with the accepted custom of the business community, should not be treated as some other kind of 'wrong' separately actionable." Stella

Flour & Feed Corp. v. National City Bank, 285 A.D. 182 (1st Dep't 1954); See also Gonik v. Israel Discount Bank of New York, 2010 WL 9115345 (Sup. Ct. N.Y. 2010).

Finally, the fourth cause of action alleging a violation of EFTA is untimely. 15 U.S.C.A. §1693m(g) provides that "any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." In this case, the last violation occurred in October of 2011. The instant action was not commenced until March 20, 2014.

Accordingly, with the exception of the first cause of action, the complaint is dismissed.

This Decision shall constitute the Order of the Court.

ENTER

Dated: New City, New York
December 16, 2014

HON. WILLIAM A. KELLY
J.S.C.