

Caruso v HSBC Private Bank
2015 NY Slip Op 30736(U)
April 29, 2015
Supreme Court, New York County
Docket Number: 650347/2010
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 45

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CARLOS ANGEL CARUSO and	:
TERESA ISABEL LIVETTI,	:
	:
Plaintiffs,	:
- against -	:
	:
HSBC PRIVATE BANK, a Division of	:
HSBC BANK USA, N.A.,	:
	:
Defendant.	:
-----X	

Index No. 650347/2010
DECISION AND ORDER
Motion Sequence No. 002

ANIL C. SINGH, J.:

Plaintiffs Carlos Angel Caruso (Caruso) and Teresa Isabel Livetti bring this action against defendant HSBC Private Bank, a division of HSBC Bank USA, N.A. (collectively, HSBC), seeking to recover funds that were wired out of their bank account on allegedly forged authorizations.¹ The three-count complaint asserts causes of action for: (1) violation of New York Banking Law § 676; (2) breach of contract; and (3) breach of the implied covenant of good faith and fair dealing.

On May 5, 2014, plaintiffs filed the note of issue, requesting a trial by jury. HSBC now moves for summary judgment dismissing the complaint or, in the alternative, partial summary judgment limiting plaintiffs' damages to the credit balance of their account and striking the jury demand. Plaintiffs cross-move for leave to amend the complaint to add claims for gross negligence and consequential and punitive damages.

¹ HSBC Bank USA, N.A. claims that it is sued incorrectly as HSBC Private Bank.

Background

As a preliminary matter, the court notes that the parties have each submitted a statement of facts pursuant to Rule 19-a of the Rules of the Commercial Division of the Supreme Court (Rule 19-a statement). However, plaintiffs' Rule 19-a statement fails to controvert HSBC's recitation of the material facts and consists entirely of a series of statements, each beginning with "whether," identifying issues purportedly requiring a trial. In addition, plaintiffs' Rule 19-a statement fails to provide the required "citation to evidence submitted in support of or in opposition to the motion." 22 NYCRR 202.70 (d). Therefore, unless indicated otherwise, the following facts are taken from HSBC's Rule 19-a statement and the supporting, undisputed evidence.

On May 4, 1990, plaintiffs opened a joint bank account at Republic National Bank (Republic) with an account number ending in 0538 (Account). In connection with the Account, plaintiffs signed an account opening application (Application), which authorized Republic to open a "Checking Account" and a "Call or Time Deposit Account." Schultz aff, exhibit B. Pursuant to the Application, plaintiffs agreed that they would be bound by that Account which would be "subject to . . . all terms and conditions set forth in the agreement which [accompanied the Application]" (Terms and Conditions). *Id.* Paragraph 21 of the accompanying agreement provided that the bank "reserve[d] the right to change the [Terms and Conditions] by mailing notice of the change to the depositor fifteen (15) days before the effective date of the change, to the last address of the depositor on the Bank's records." *Id.*

In late 1999, HSBC acquired Republic. The Account was converted into an HSBC account maintained at HSBC's Private Bank. In subsequent years, HSBC revised the Terms and

Conditions on numerous occasions, including in October 2007 and September 2008. In relevant part, the October 2007 Terms and Conditions provided:

“6. Bank’s Liability

...

“Subject to the foregoing, our sole liability and obligation with respect to any account or any agreement between us shall be to pay you (a) any credit balance in such account, after giving effect to the applications to, set-offs against, transfers from, reductions of and deductions from such account which are permitted or required to be made by the Bank and (b) any net proceeds payable under the provisions of any such other agreement.

...

“26. Facsimile and Electronic Mail-Transmittal Instructions

“(a) The Bank is authorized to accept, rely and act on any facsimile or electronic mail (‘email’)-transmitted Instructions concerning your account(s) (‘Instructions Document(s)’), which the Bank believes, without any need to inquire or investigate as to, or verify, the genuineness or authenticity of such instructions, to be from you, without first requiring you to deliver any executed original of such Instruction Document, and the Bank shall not be liable to you or third party for so acting or refraining from acting, except in the case of gross negligence or willful misconduct by the Bank.

“(b) the Bank shall in particular not be under any duty to make any inquiry or investigation with respect to, or verification of, such facsimile or email-transmitted instructions, except (i) to confirm your account number(s), (ii) to confirm that the name of the person issuing or purporting to issue such instructions on your behalf is shown on the Bank’s records as an authorized person of yours. Any action or omission taken by the Bank pursuant to such facsimile or email-transmitted instructions shall be binding upon you, whether ultimately made with or without your actual authority, knowledge or consent.

...

“38. Consent to Jurisdiction; Waiver of Jury Trial

...

“In any such action, suit or proceeding in respect or arising out of your relationship with the Bank or these Terms and Conditions, the Client Application and Agreement or any documents or agreements relating thereto in such court, you and the Bank agree to waive trial by jury, and you agree also to waive (a) the right to interpose any setoff or counterclaim of any nature or description, (b) any objection based on forum non conveniens or venue, and (c) any claim for consequential, punitive or special damages.”

Id., exhibit C at 8, 23-24, 27-28. The September 2008 Terms and Conditions contained the identical provisions. *Id.*, exhibit D at 8, 23-24, 27-28. According to HSBC’s internal records, the October 2007 revised Terms and Conditions, with the appropriate notice, were included with the Account’s November 2007 monthly statement and sent to plaintiffs’ address of record.

On November 3, 2008, after reviewing the September 2008 Account statement, Caruso telephoned HSBC to notify it of unauthorized wire transfer activity. HSBC reviewed the transactions and identified seven outgoing wire transfers between September 3, 2008 and October 31, 2008, totaling \$1,050,088.21. The transfers were as follows:

Date	Amount	Beneficiary	Country
9/3	\$369,088.21	Juan Carlos Porro Maciel	Uruguay
9/11	\$100,000	Ji Chun Yan	China
9/17	\$170,000	Ningo Merica Trading	China
10/6	\$150,000	Ideal Gestion SL	Spain
10/31	\$87,000	Marco Bernasconi	Spain
10/31	\$87,000	Marco Bernasconi	Spain
10/31	\$87,000	Marco Bernasconi	Spain

Id., exhibit E. According to plaintiffs, they did not authorize any of these transfers, did not know any of the beneficiaries and did not conduct any business in the destination countries. HSBC effectuated the transfers pursuant to facsimile-transmitted wire instructions it received from an

individual claiming to be Caruso. Pursuant to these instruction, HSBC liquidated certain securities in the Account to generate the cash necessary for the transfers.

HSBC was able to recover a portion of the transferred funds from the receiving banks and refunded plaintiffs \$630,112.03. It was unable to recover the remaining funds. Plaintiffs commenced the instant suit, seeking to recover the outstanding balance of the Account.

1. Analysis

a. HSBC's Motion for Summary Judgment

HSBC contends that it is entitled to summary judgment dismissing plaintiffs' complaint because the Terms and Conditions, which governed the parties' relationship at the time of the unauthorized wire transfers, contained an exculpatory provision. In the alternative, HSBC argues that, pursuant to the Terms and Conditions, it is entitled to partial summary judgment dismissing plaintiffs' claims for consequential and punitive damages and striking their demand for a jury trial. Plaintiffs counter that HSBC was grossly negligent, rendering the exculpatory provision inoperative, and that, at a minimum, whether the bank's conduct amounted to gross negligence raises an issue of fact.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 (1st Dept 2012), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If the movant makes the necessary showing, the burden shifts to the opposing party "to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Madeline D'Anthony Enters., Inc.*, 101 AD3d at 607, quoting *Alvarez*, 68 NY2d at 324.

1. New York Banking Law § 676 (First Cause of Action)

New York Banking Law § 676 provides, in pertinent part, as follows:

“Any withdrawal of moneys from any savings account or time deposit account maintained in any banking organization, branch of a foreign banking corporation, national bank, federal savings and loan association or federal credit union located in this state which is made by means of an unauthorized signature is wholly inoperative as to the person whose name is signed No such banking organization . . . shall interpose the defense, in an action for recovery by a depositor of money paid upon an unauthorized signature, that it has exercised due care and diligence in ascertaining the identity of the person to whom it has paid such money. . . .

“Any waiver of the provisions of this section or any contrary agreement, by-law, rule or regulation of any banking organization . . . located in this state shall be void as against public policy and wholly unenforceable.”

The plain language of this section places the burden of any loss from an unauthorized transfer on the bank rather than the customer and voids any contractual provisions to the contrary.

American Lodge Assn. v East N.Y. Sav. Bank, 100 AD2d 281, 285-286 (2d Dept 1984) (“[t]he Legislature has determined that it is the bank that bears the burden of loss where payment is made on a forged signature”). Therefore, the Terms and Conditions’ exculpatory provision does not operate to limit HSBC’s liability under Banking Law § 676.

However, the section applies to unauthorized “withdrawal of moneys from any *savings account* or *time deposit account*” only. Banking Law § 676 (emphasis added). Here, the Account’s “Consolidated Statement[s],” dated September 30, 2008 and October 31, 2008, show that the Account was composed of a variety of accounts, falling into two categories: “Banking and Cash Management,” which included “Checking,” “Managed Call Deposit” and “Time Deposits,” and “Investments,” which consisted of a portfolio of securities. Schultz aff, ¶ 4, exhibit A; DiPaolo affirmation, exhibit G. Therefore, to the extent the unauthorized transfers were from accounts other than the time deposits account, such transfers are not within the scope of Banking Law § 676. *Cf Tevdorachvili v Chase Manhattan Bank*, 103 F Supp 2d 632, 640 (ED NY 2000) (dismissing Banking Law § 676 claim where the plaintiff alleged unauthorized wire transfers from a checking account, “[b]ecause on its face § 676 has no bearing whatever on defenses available to banking institutions in cases involving checking accounts”). Accordingly, the first cause of action is dismissed to the extent it seeks recovery of funds other than the funds from plaintiffs’ time deposit account.

2. Breach of Contract (Second Cause of Action)

A cause of action for breach of contract requires a showing of “the existence of a contract, the plaintiff[s’] performance thereunder, the defendant[s’] breach thereof, and resulting damages.” *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). “As a general rule, parties are free to enter into contracts that absolve a party from its own negligence or that limit liability to a nominal sum.” *Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 682-683 (2012) (internal citations omitted). Likewise, parties may elect to waive trial by jury. *Uribe v Merchants Bank of N.Y.*, 227 AD2d 141, 141 (1st Dept 1996). However, contractual exculpatory and limitation of liability provisions are not enforceable where there are

“indication[s] of . . . gross negligence or unconscionability.” *Rivkin v Brackman*, 167 AD2d 239, 241 (1st Dept 1990); *see also Abacus Fed. Sav. Bank*, 18 NY3d at 683.

“Ordinarily the question of gross negligence is a matter to be determined by the trier of fact.” *Lubell v Samson Moving & Stor.*, 307 AD2d 215, 216 (1st Dept 2003), citing *Food Pageant v Consolidated Edison Co.*, 54 NY2d 167, 172-173 (1981). “[W]hen used in this context, ‘gross negligence’ differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing.” *Lubell*, 307 AD2d at 216, quoting *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 (1993); *see also Abacus Fed. Sav. Bank*, 18 NY3d at 683.

Here, HSBC has established its prima facie entitlement to judgment as a matter of law by submitting the October 2007 Terms and Conditions, which “authorized [HSBC] to accept, rely and act on any facsimile . . . transmitted [i]nstructions concerning [plaintiffs’] account(s) . . . which the Bank believe[d] . . . to be from [plaintiffs],” without first “need[ing] to inquire or investigate . . . the genuineness or authenticity of such instructions.” *Schultz aff*, exhibit C at 23. The Terms and Conditions further provided that the “the Bank shall in particular *not be under any duty* to make any inquiry or investigation with respect to, or verification of, such facsimile or email-transmitted instructions,” except to confirm the account number and that “the person issuing or purporting to issue such instructions on [plaintiffs’] behalf is shown on the Bank’s records as an authorized person” for the Account. *Id.* at 23-24 (emphasis added). Lastly, the Terms and Conditions stated that HSBC would not be liable for acting on such instructions “except in the case of gross negligence or willful misconduct by the Bank.” *Id.* at 23. HSBC makes a prima facie showing that the facsimile instructions it received complied with the Terms

and Conditions. Each of the facsimile-transmitted wire instructions purported to be from Caruso and contained the Account number. *Id.*, exhibit E; DiPaolo affirmation, exhibit C at 160-162.

Plaintiffs do not dispute that the October 2007 Terms and Conditions was the operative agreement at the time of the alleged unauthorized wires. During their depositions, plaintiffs acknowledged that they executed the Application, which provided that plaintiffs were bound by the Terms and Conditions, and that they regularly received their Account statements, which, according to HSBC, is how it provided plaintiffs with the revised Terms and Conditions. DiPaolo affirmation, exhibit C at 53-54, 66-67, 81 and exhibit D at 14, 17; Schultz aff, ¶¶ 10, 11. Therefore, plaintiffs were bound by the Terms and Conditions, which relieved HSBC of the duty to verify the authenticity of the wire instructions it received from an individual purporting to be Caruso. *See Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 (1998) (“it is well established that when the meaning of [a] . . . contract is plain and clear . . . [it is] entitled to [be] enforced according to its terms” [internal quotation marks and citation omitted]); *see also Dietrich v Chemical Bank*, 115 Misc 2d 713, 715 (Sup Ct, NY County 1981) (holding that the plaintiff was bound by the terms and conditions upon signing the signature card and could “not claim that she did not receive them now, or that she was not aware of their contents”), *affd* 92 AD2d 786 (1st Dept 1983).

In opposition, plaintiffs argue that HSBC agreed to keep the money safe and that it “violated the agreement and committed gross negligence by willfully failing to keep the Account safe from marauding employees, failing to enforce its own security protocol . . . and by failing to prevent employees from making seven unauthorized withdrawals . . . from the Account.” Plaintiffs’ brief at 9. Significantly, plaintiffs fail to identify a single contractual provision violated by HSBC. Instead, plaintiffs argue that HSBC was grossly negligent in that its

employees failed to: (1) compare the forged signature on the wire instructions to Caruso's signature on file with the bank; (2) call Caruso at his telephone number of record, rather than the number on the forged wire instructions, to confirm the instructions, while indicating on internal forms that this was done; (3) ask the standard security questions, dispensing with the security protocol by indicating on internal forms that Caruso was well-known to the HSBC employee when Caruso was not. Plaintiffs also imply that one HSBC employee assigned to plaintiffs' Account, Christian Zimmerman, participated in the scheme.

Plaintiffs' allegations, even if true, fail to raise an issue of fact requiring trial. At best, plaintiffs raise issues of fact only with respect to HSBC's negligence in failing to detect the fraud. *See Calisch Assoc. v Manufacturers Hanover Trust Co.*, 151 AD2d 446, 448 (1st Dept 1989) (finding that "[a]t most, [the plaintiff's] allegations amount[ed] to a claim that defendant bank was negligent" where the plaintiff alleged that "[the bank] acted in bad faith by failing to perceive that a fraud was in progress either because one of its employees was conspiring with [the fraudster] or by not adequately training and supervising its employees regarding proper bank procedures"). The Terms and Conditions exculpated HSBC from mere negligence, providing that, in acting on a facsimile-transmitted instruction, "the Bank shall not be liable . . . except in the case of gross negligence or willful misconduct by the Bank." Schultz aff, exhibit C at 23. "[G]ross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must 'smack[] of intentional wrongdoing,'" and none of plaintiffs' claims do so. *Abacus Fed. Sav. Bank*, 18 NY3d at 683 (internal quotation marks and citations omitted). Accordingly, the second cause of action for breach of contract is dismissed. *See Lubell*, 307 AD2d at 217 (reversing denial of summary judgment on the plaintiff's claim for gross negligence where the "plaintiff's allegations amount[ed], at most, to ordinary negligence,"

because “there [was] no indication that defendant's negligence, if any, ‘differ[ed] in kind’ from acts of ordinary negligence”); *see also Retty Fin. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341, 341 (1st Dept 2002) (affirming dismissal of breach of contract and negligence claims where the defendant’s liability was limited by contract to acts of “gross negligence or willful misconduct” and “allegations of the complaint fail[ed] to set forth actions by defendant evincing ‘a reckless disregard for the rights of [plaintiff] or ‘smack[ing]’ of intentional wrongdoing”), quoting *Colnaghi, U.S.A.*, 81 NY2d at 823-824.

Likewise, HSBC has made a prima facie showing that plaintiffs waived their right to trial by jury. Pursuant to paragraph 38 of the Terms and Conditions, “[plaintiffs] and the Bank agree[d] to waive trial by jury.” Schultz aff, exhibit C at 28. In opposition, plaintiffs argue that “the clause is adhesory and hence unconscionable.” Plaintiffs’ brief at 17. However, “unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 (1988) (internal quotation marks and citations omitted). Here, plaintiffs fail to raise a factual issue concerning either element, as their papers contain nothing beyond the legal standard for unconscionability. *See* plaintiffs’ brief at 17. In any event, there is no indication that Caruso “lacked experience or expertise” necessary to open the Account. *Gillman*, 73 NY2d at 11. In fact, plaintiffs depict him as a sophisticated investor “adept at increasing the worth of funds in the Account.” Plaintiffs’ brief at 13. Moreover, there is no indication that plaintiffs lacked meaningful choice when they opened the Account. *See Ranieri v Bell Atl. Mobile*, 304 AD2d 353, 354 (1st Dept 2003) (“[i]nequality of bargaining power alone does not invalidate a contract as one of adhesion when

the purchase can be made elsewhere”). Therefore, plaintiffs’ demand for a trial by jury is stricken.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing (Third Cause of Action)

HSBC contends that the claim for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of the breach of contract claim. Plaintiffs do not oppose this portion of HSBC’s motion.

Every contract contains an implied covenant of good faith and fair dealing. *Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 (1st Dept 2010). Here, however, the claim for breach of the implied covenant of good faith and fair dealing is based on the same facts and seeks the same damages as the breach of contract claim. *See* complaint, ¶¶ 31-35 and 36-37. Therefore, the third cause of action is dismissed as duplicative of the breach of contract claim. *Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 434 (1st Dept 2013); *see also Logan Advisors, LLC v Patriarch Partners, LLC, LLC*, 63 AD3d 440, 443 (1st Dept 2009).

A. Plaintiffs’ Cross Motion for Leave to Amend the Complaint

Plaintiffs seek leave to amend the complaint to add a fourth cause of action for gross negligence and to include consequential and punitive damages in their prayer for relief. Plaintiffs contend that HSBC’s gross negligence entitles them to punitive damages and that, because HSBC knew that Caruso used the Account to invest for retirement, it should be held liable for the appreciation of the securities that were liquidated to effectuate the unauthorized wire transfers. HSBC counters that the cross motion should be denied because plaintiffs do not offer an excuse for their delay in seeking leave to amend the complaint. It also argues that the facts do not support gross negligence and that the claim is duplicative of the breach of contract

cause of action. In addition, HSBC contends that, pursuant to the Terms and Conditions, plaintiffs' damages are limited to the credit balance of the Account.

Pursuant to CPLR 3025 (b) “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court.” “A motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit.” *Bishop v Maurer*, 83 AD3d 483, 485 (1st Dept 2011) (internal quotation marks and citations omitted). “[W]here, as here, there is an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion.” *Kassis v Teachers Ins. & Annuity Assn.*, 258 AD2d 271, 272 (1st Dept 1999) (internal quotation marks and citation omitted). If the proposed amendment will prejudice the defendant, the application for leave to amend is properly denied. *Id.*

Here, plaintiffs offer no explanation for their delay in seeking leave to amend the complaint after filing the note of issue, but “plaintiffs' proposed amendment would [not] prejudice[HSBC] by materially altering plaintiffs' theory of recovery.” *Id.*

However, as discussed above, plaintiffs' allegations of HSBC's “reckless failure to ensure enforcement of security protocols” (proposed amended complaint, ¶ 43) and “fail[ure] to properly supervise its employees to insure their adherence to HSBC safeguards” (*id.*, ¶ 45), even if true, “[a]t most . . . amount to a claim that defendant bank was negligent.” *Calisch Assoc.*, 151 AD2d at 448; *see also Abacus Fed. Sav. Bank*, 18 NY3d at 683 (“[g]ross negligence . . . must ‘smack[] of intentional wrongdoing’ [internal quotation marks and citation omitted]).

Moreover, plaintiffs do not demonstrate that HSBC had a duty to plaintiffs “independent of the

contract formed when the account was opened” and, therefore, “fail[] to demonstrate that [they have] a tort claim independent of a contract claim.” *Hartsko Fin. Servs., LLC v JPMorgan Chase Bank, N.A.*, 125 AD3d 448, 448 (1st Dept 2015) (affirming denial of motion for leave to amend the complaint); *see also Stella Flour & Feed Corp. v National City Bank of N.Y.*, 285 App Div 182, 183-184 (1st Dept 1954) (holding that, given the “old and well-settled rule of high contractual responsibility . . . imposed on banks in paying money chargeable against their depositors' accounts,” courts should not impose additional responsibility in tort, because while “[t]he theory of tort liability may be discovered to overrun into breaches of contract in a very limited area . . . , the payment charged to a depositor's account by a bank on forged or altered drafts certainly does not come within that area”), *affd* 308 NY 1023 (1955). Therefore, to the extent that plaintiffs seek to add a claim for gross negligence, “the proposed amendment is palpably insufficient to state a cause of action” and plaintiffs’ cross motion is denied. *Bishop*, 83 AD3d at 485.

In addition, pursuant to the Terms and Conditions, plaintiffs may not seek consequential or punitive damages. Paragraph 6 provided that “[HSBC’s] sole liability and obligation with respect to any account or any agreement between [plaintiffs and HSBC] shall be to pay [plaintiffs] (a) any credit balance in such account” *Schultz* *aff*, exhibit C at 8. Moreover, pursuant to paragraph 38, “[plaintiffs] agree[d] also to waive . . . any claim for consequential, punitive or special damages.” *Id.* at 28. As discussed above, “there is simply no indication of . . . gross negligence or unconscionability as required to avoid operation of the . . . limitation of liability clauses.” *Rivkin*, 167 AD2d at 241; *see also Raymond v JPMorgan Chase Bank, N.A.*, 2010 WL 515787, 2010 NY Misc LEXIS 1491, * 37 (Sup Ct, Nassau County, Feb. 2, 2010, Index No. 012068/2007) (finding that “[i]ndirect, special or consequential damages [were]

barred by the parties' Account Agreement" where "there [was] no evidence of intentional wrongdoing to otherwise defeat the Account Agreement"), citing *Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438-439 (1994). Therefore, plaintiffs are bound by the Terms and Conditions limiting their damages to the credit balance of the Account.

Plaintiffs' claim for punitive damages is barred for the additional reason that they allege only a private wrong. *Mom's Bagels of N.Y. v Sid Greenebaum Inc.*, 164 AD2d 820, 823 (1st Dept 1990) ("punitive damages are not available for a private wrong").

For the foregoing reasons, plaintiffs' cross motion for leave to amend the complaint is denied.

Accordingly, it is hereby

ORDERED that the motion of defendant HSBC Bank USA, N.A for summary judgment (motion sequence number 002) is granted to the extent of:

- (1) dismissing those portions of the first cause of action that seek recovery of funds other than funds from plaintiffs' time deposit account;
- (2) dismissing the second and third causes of action; and
- (3) striking plaintiffs' demand for trial by jury contained in the note of issue; and

the motion is otherwise denied; and it is further

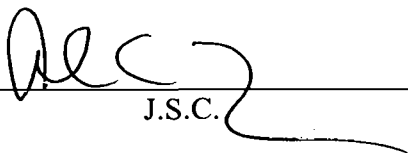
ORDERED that the cross motion of plaintiffs Carlos Angel Caruso and Teresa Isabel Livetti for leave to amend the complaint is denied; and it is further

ORDERED that the action shall continue; and it is further

ORDERED that counsel are directed to appear for a pre-trial conference in Room 218 60 Centre Street, on June 2, 20 15, at 2:30 ~~AM~~ PM.

Dated: April 29, 2015

ENTER:


_____ J.S.C.