

Valle v Popular Community Bank

2015 NY Slip Op 31368(U)

July 22, 2015

Supreme Court, New York County

Docket Number: 653936/2012

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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JOSEFINA VALLE and WILFREDO VALLE, individually
and on behalf of all others similarly situated,

Plaintiffs,

- against -

Index No. 653936/2012

POPULAR COMMUNITY BANK
f/k/a BANCO POPULAR NORTH AMERICA
a/k/a BANCO POPULAR NORTH AMERICA,

Motion Sequence No. 003

Defendant.

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SINGH, J:

Plaintiffs Josefina Valle and Wilfredo Valle bring this purported class action individually and on behalf of all others similarly situated against Popular Community Bank, also known as Banco Popular North America (BPNA), challenging the bank’s overdraft policies in effect from 2006 to the present.

By decision and order, dated August 4, 2014, this court largely granted BPNA’s motion to dismiss (Decision) the first amended complaint (FAC), dismissing all but one, narrow claim for breach of the implied covenant of good faith and fair dealing. Plaintiffs now seek leave to amend, pursuant to CPLR 3025 (b), and submit a proposed second amended complaint (PSAC), asserting causes of action for breach of the implied covenant of good faith and fair dealing and violation of General Business Law § 349.

The underlying facts of this case were stated in detail in the Decision. The court, therefore, presumes the parties’ familiarity with the facts, which are not stated here. Unless indicated otherwise, defined terms in the Decision shall have the same meaning when used herein.

The parties dispute whether: (1) plaintiffs may premise their breach of the implied covenant of good faith and fair dealing claim on the 2004 Agreement, the 2007 Agreement, the 2008 Agreement and the 2010 Agreement (collectively, Post-2000 Agreements); and (2) the PSAC corrects the various pleading defects that resulted in the dismissal of the FAC's GBL § 349 claim.

Generally, leave to amend should be freely granted in the absence of prejudice or surprise. *Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420, 420 (1st Dept 2014). "The type of prejudice necessary to warrant denial of the motion requires some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position." *Id.* (internal quotation marks and citation omitted). Mere delay in bringing the motion or the cost of additional discovery is insufficient for denial of the motion. *Id.* "[P]laintiff[s] need not establish the merit of [their] proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 (1st Dept 2010) (internal citations omitted).

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). "Absent the existence of a contract, a claim alleging breach of the implied covenant of good faith and fair dealing is legally unavailing." *Keefe v New York Law School*, 71 AD3d 569, 570 (1st Dept 2010); *see also One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 13-14 (1st Dept 2011) ("[t]he claim for breach of the covenant of good faith and fair dealing [was] not viable because defendant did not deprive plaintiff of the benefits of any contract to which plaintiff was a party"). "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer,

consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms.” *Kowalchuk v Stroup*, 61 AD3d 118, 121 (1st Dept 2009) (internal citations omitted).

To state a claim for deceptive business practices under GBL § 349, plaintiffs must allege that: (1) conduct was consumer-oriented; (2) the act was misleading in a material way; and (3) plaintiffs suffered injury. *Stutman v Chemical Bank*, 95 NY2d 24, 29 (2000). To show consumer-oriented conduct, plaintiffs “must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties . . . would not fall within the ambit of the statute.” *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 (1995). The “objective [test for] deceptive acts and practices [is] whether representations or omissions [are] . . . likely to mislead a reasonable consumer acting reasonably under the circumstances.” *Id.* at 26. “[O]mission-based claims under Section 349 are appropriate where the business alone possesses material information that is relevant to the consumer and fails to provide this information.” *Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13, 16-17 (1st Dept 2012) (internal quotation marks and citations omitted).

Here, plaintiffs allege that BPNA engaged in the following deceptive and bad faith conduct, in violation of its duty of good faith and fair dealing and GBL § 349: (1) failing to obtain customer approval prior to making overdraft loans, in violation of state and federal regulations; (2) re-ordering customer withdrawals to create or maximize overdraft charges; (3) failing to disclose, prior to the completion of a transaction, that an ATM withdrawal or debit card transaction would cause the account to be overdrawn; and (4) providing inaccurate account information in response to plaintiffs’ balance inquiries.

Plaintiffs premise their breach of the implied covenant of good faith and fair dealing claim on various provisions of the Post-2000 Agreements and argue that BPNA acted in bad faith with respect to those provisions. Specifically, the PSAC alleges that, in response to the amended Regulation E, the 2010 Agreement and a brochure sent to BPNA customers stated that overdrafts would not be paid unless customers affirmatively consented to overdraft protection, but that BPNA continued to pay plaintiffs' overdrafts, and to charge the related fees, without ever obtaining their consent. PSAC, ¶¶ 98-112. Plaintiffs allege that BPNA abused the discretion it retained over the order in which it processed transactions, pursuant to the Post-2000 Agreements, to re-order withdrawals, made in a single day or over multiple days, from the highest amounts to the lowest amounts for the sole purpose of maximizing overdraft fees. *Id.*, ¶¶ 51-64. According to plaintiffs, the Post-2000 Agreements stated that ATM cards would allow customers to obtain account balance information, but that BPNA overstated balances, when it knew of pending transactions, and did not alert customers that a debit would result in an overdraft. *Id.*, ¶¶ 75-85, 96-97. Plaintiffs contend that, because the Decision held that plaintiffs stated a claim for breach of the implied covenant of good faith and fair dealing based on the 2008 Agreement, despite plaintiffs' acknowledgement that they never received any of the Post-2000 Agreements, they may now rely on all of the Post-2000 Agreements to state the claim in the PSAC.

Plaintiffs misconstrue the Decision. The court did not hold that the 2008 Agreement was the operative agreement during its effective period. Rather, the court allowed plaintiffs the favorable inference that it *may* have been the operative agreement based on the following circumstances: (1) plaintiffs' reliance on the 2000 Agreement and the 2008 Agreement for their claims, without identifying the operative agreement (Decision at 21); (2) BPNA's failure to raise

the issue in its moving papers as grounds for dismissal and, instead, “impermissibly rais[ing] the argument for the first time in a footnote of its reply brief” (*id.* at 22); (3) the parties were not disputing that some version of the agreement was in effect (*id.* at 23); and (4) BPNA’s contention that plaintiffs were bound by any disclosed changes to the agreement and that such notice could be given by various means, “including mailings, online postings, and branch postings.” *Id.* at 22. Without making any determination, the court merely allowed for the possibility that the 2000 and 2008 Agreements may have been the operative agreements at some point during the parties’ relationship and assessed the FAC’s allegations based on that possibility. *Id.* at 23.

Here, the PSAC merely alleges that the Post-2000 Agreements were the operative agreements to the extent that they did not require prior notice or consent. *See* PSAC, ¶¶ 51, 54, 57, 60. However, plaintiffs do not provide, nor could the court locate, any legal authority for finding a contractual relationship where one party is not informed of, and does not consent to, the terms. As it is undisputed that plaintiffs did not receive notice of, or agree to, the terms of the Post-2000 Agreements (*see* FAC, ¶ 37; Lupkin affirmation, exhibit C at 2; BPNA’s brief at 10), plaintiffs cannot demonstrate that these agreements were ever the operative agreements. *Kowalchuk*, 61 AD3d at 121. Therefore, plaintiffs cannot state a viable claim for breach of the implied covenant of good faith and fair dealing based on the Post-2000 Agreements. *Keefe*, 71 AD3d at 570.

The court notes plaintiff’s estoppel argument and finds it without merit. Plaintiffs contend that, having previously argued that BPNA could adopt new rules and regulation that would be binding on plaintiffs, BPNA may not now argue that the Post-2000 Agreements were never the operative agreements. At no point has BPNA argued that it could unilaterally change

the terms of the parties' agreement, without notice to plaintiffs. To the contrary, on its motion to dismiss, BPNA argued that "[p]laintiffs agreed when executing the signature card that subsequent *disclosures* become binding terms of their contract." Decision at 22 (emphasis added).

For the foregoing reasons, to the extent that the motion for leave to amend relates to the breach of the implied covenant of good faith and fair dealing claim, the motion is denied.

The PSAC also seeks to assert a claim for violations of GBL § 349. To the extent the claim is based on BPNA's alleged violations of NY Banking Regulations and Regulation E, the court previously dismissed the claim, finding that: (1) the documentary evidence established that BPNA provided all disclosures required by NY Banking Regulations (*id.* at 29); and (2) with respect to violation of Regulation E, the FAC failed to allege consumer-oriented conduct, "fram[ing] the issue as a private dispute, based upon BPNA's failure to provide the required disclosure to Plaintiffs only" (*id.* at 31) and failed to allege injury, "confus[ing] the deceptive conduct with the injury." *Id.* at 32. On the instant motion, plaintiffs admit that BPNA made the required disclosures (plaintiff's brief at 8), but contend that the PSAC now contains specific allegations concerning how such disclosures were misleading, consumer-oriented and injurious.

The PSAC alleges that, through the 2010 Agreement and an informational brochure, BPNA informed customers that they had to affirmatively consent to continue to receive overdraft protection and that BPNA's internal policy documents confirmed that this was the bank's policy. PSAC, ¶¶ 99-110. The PSAC then alleges that plaintiffs never opted-in, but continued to receive overdraft protection (*id.*, ¶¶ 103, 112, 114-120), and concludes that BPNA's statements regarding the opt-in policy were, therefore, false. *Id.*, ¶¶ 106, 107. It also alleges that, in addition to pecuniary harm, plaintiffs suffered annoyance, frustration, anger and anxiety. *Id.*, ¶ 152. These

allegations do not demonstrate that BPNA engaged in deceptive, consumer-oriented conduct, but merely that BPNA failed to obtain plaintiffs' consent. Therefore, just as the FAC, the PSAC "frames the issue as a private dispute." Decision at 31, citing *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321 (1995) (finding that the plaintiff failed to state a GBL § 349 claim where the action was "essentially a 'private' contract dispute . . . unique to these parties"). The PSAC's conclusory allegation regarding BPNA's dealings with other customers, stating that the bank assessed "Class members with Overdraft Charges despite the fact that they had not opted in to [BPNA's] overdraft program" (PSAC, ¶ 112), also fails to state consumer-oriented conduct. *Golub v Tanenbaum-Harbor Co. Inc.*, 88 AD3d 622, 623 (1st Dept 2011). Therefore, to the extent plaintiffs assert a claim for violation of GBL § 349 based on BPNA's alleged non-compliance with state and federal banking regulations, plaintiffs' motion for leave to amend is denied.

The PSAC makes the following allegations with respect to the remaining grounds for its violations of GBL § 349 claim: (1) BPNA's re-ordering practice, which entailed the clearing of withdrawals, made in a single day or over multiple days, from the highest amounts to the lowest amounts, manufactured overdraft charges that plaintiffs would not have otherwise incurred; (2) BPNA provided inaccurate account balances on at least two occasions, which caused plaintiffs to overdraw their account and incur fees; and (3) all overdraft fees "would have been avoided had [BPNA] notified plaintiffs prior to the completion of their ATM transaction that the withdrawal would overdraw their account." PSAC, ¶ 20. The PSAC alleges that, as a result of the false account balance information and "[BPNA's] re-ordering policy, it was difficult or impossible for Plaintiffs and Class members to accurately track their account balances." *Id.*, ¶ 74.

The court addressed some of these allegations in the Decision. In considering the challenge to BPNA's re-ordering of transactions, the court found that, having specifically alleged that they never saw the Post-2000 Agreements, plaintiffs could not show how the allegedly misleading Overdraft and Ordering Policies contained in those agreements caused their injury.¹ Decision at 32. The court also held that "[p]laintiffs fail[ed] to allege deceptive conduct" with respect to BPNA's failure to notify plaintiffs that their account contained insufficient funds, because "[p]laintiffs had other readily available means of ascertaining their account balance." *Id.* at 34, citing *State of N.Y. Workers' Compensation Bd. v 26-28 Maple Ave., Inc.*, 80 AD3d 1135, 1137 (3d Dept 2011).

The PSAC corrects the shortcomings which the court identified in the Decision. First, it is no longer relevant that plaintiffs never saw, or were parties to, the Post-2000 Agreements. The claim is not premised on whether the statements in those agreements were likely to mislead a reasonable consumer acting reasonably. Instead, the PSAC bases the claim on the allegedly deceptive practice of posting transactions from high-to-low, particularly over the course of several days (PSAC, ¶¶ 46-50), the inability of plaintiffs to track their expenditures to avoid fees and BPNA's failure to provide accurate and timely information to enable plaintiffs to do so. *Id.*, ¶¶ 74, 97. These allegations, which are supported by account statements that illustrate these practices (Tusa affirmation, exhibits 4 and 5), are sufficient to "show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp.*, 74 AD3d

¹ The court also held that "to the extent that [plaintiffs relied] on the 2000 Agreement as the operative agreement, it [did] not give rise to a GBL § 349 claim," because "[t]he high-to-low ordering practice was expressly disclosed and BPNA did not retain any discretion in the ordering of overdraft items." Decision at 33. On the instant motion, the parties do not offer any insight into which version of the agreement was the operative agreement or whether this version fully disclosed BPNA's re-ordering policy.

at 500; see *Levin v HSBC Bank USA, N.A.*, 2012 WL 7964121, *17, 2012 NY Misc LEXIS 6062, *36 (Sup Ct, NY County, June 26, 2012, Index No. 650562/2011) (denying motion to dismiss claim for deceptive business practices under GBL §349 because “[a] reasonable consumer would expect to be able to accurately track his own expenditures to avoid overdraft charges” and “[p]laintiffs allege[d that] this [was] nearly impossible given [the bank’s] overdraft and posting policies”).

BPNA argues that plaintiffs’ failure to allege that BPNA possessed the ability to provide notice of insufficient funds is fatal to their claim. In addition, BPNA contends that plaintiffs should not be permitted to add allegations concerning inaccurate account balance information because: (1) the allegations are based on monthly statements, which, BPNA argues, do not provide real-time records of the information provided to plaintiffs at the ATM; (2) the two alleged misstatements of plaintiffs’ account balance information do not constitute consumer-oriented conduct; and (3) plaintiffs do not offer an explanation for the delay in asserting this theory of liability, which prejudices BPNA by requiring additional discovery. Lastly, BPNA argues that plaintiffs fail to allege how any of the practices injured them, since they do not allege that they would have chosen not to proceed with a transaction if they had known it would result in an overdraft.

While BPNA contends that a reasonable consumer acting reasonably could not expect BPNA to warn him of a potential overdraft if such an alert was not feasible, the feasibility of such an alert is not presently before the court and plaintiffs sufficiently allege that BPNA “alone possesse[d] material information that [was] relevant to [its customers] and fail[ed] to provide this information.” *Gomez-Jimenez*, 103 AD3d at 16-17 (internal quotation marks and citations

omitted); *see* PSAC ¶¶ 74, 81-85. Therefore, plaintiffs sufficiently plead an omissions-based GBL § 349 claim.

BPNA's argument that the monthly account statements are not reflective of plaintiffs' real-time experience at the ATM is contradicted by plaintiffs' submission of the November 2012 account statement and two ATM receipts, which contain identical transaction-specific information, including the time-stamp, the withdrawal amount and the remaining balance. Tusa affirmation, exhibits 6-8. In any event, plaintiffs are not required to prove the merits of their claim at this juncture. *MBIA Ins. Corp.*, 74 AD3d at 500. In addition, while plaintiffs point only to two misstatements of their balance information, this is sufficient to state consumer-oriented conduct, as the allegations make it plain that the misstatements were the result of BPNA's processing policies, rather than some error on the part of BPNA that was particular to plaintiffs. *See Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 25; PSAC, ¶ 81 (alleging that BPNA "had actual knowledge of outstanding transactions and debits that ha[d] already created a negative balance in a customer's account," but overstated the account balance to show a positive balance). While BPNA argues that it would be prejudiced, plaintiffs' delay in asserting this theory of liability and the cost of additional discovery are insufficient to show prejudice that would warrant denial of the motion. *Tri-Tec Design, Inc.*, 123 AD3d at 420.

Finally, plaintiffs do allege that, but for the complained of practices, they would not have overdrawn their account and incurred overdraft fees. PSAC, ¶¶ 20, 74, 97. While BPNA finds the allegation dubious in light of the frequency with which plaintiffs have overdraw their account over the years, allegations concerning what plaintiffs, hypothetically, would or would not have done raise factual issues not determinable on the instant motion. *See MBIA Ins. Corp.*, 74 AD3d at 500; *see also Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004) ("[c]redibility

determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge” [internal quotation marks and citation omitted]).

For the foregoing reasons, to the extent plaintiffs seek leave to amend the FAC to add a claim for violations of GBL § 349 based on BPNA’s re-ordering of transactions, misstatement of balance information and failure to notify customers that a transaction would result in an overdraft, the motion is granted.

Accordingly, it is hereby

ORDERED that the plaintiffs' motion for leave to amend the first amended complaint is granted to the extent that it seeks to add a cause of action for violations of General Business Law § 349 based on BPNA’s re-ordering of transactions, misstatement of balance information and failure to notify customers that a transaction would result in an overdraft, and the motion is otherwise denied; and it is further

ORDERED that the plaintiffs are directed to serve a second amended complaint consistent with this decision upon all parties within 20 days of service of a copy of this decision and order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 218, 60 Centre Street, on September 8, 2015, 2015, at 2:30 PM.

Date: July 22, 2015
New York, New York



Anil C. Singh