Collins Bros. Moving Corp. v Pierleoni
2015 NY Slip Op 32782(U)
February 18, 2015
Supreme Court, Westchester County
Docket Number: 55001/14
Judge: Linda S. Jamieson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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COLLINS BROTHERS MOVING CORPORATION, COLLINS BROTHERS INDUSTRIES, INC., COLLINS BROTHERS WORLDWIDE, LLC, COLLINS BROTHERS NATIONAL CORP., FRANK E. WEBERS, Individually and FRANK E. WEBERS, as Chief Executive Officer,

Plaintiffs,

-against-

Index No. 55001/14

DECISION AND ORDER

GREGG S. PIERLEONI, ANCHIN BLOCK & ANCHIN, LLP, PHILLIP M. ROSS, CPA, CHRISTOPHER KELLY, CPA, DANIEL STIEGLITZ, CPA, VERA KRUPNICK, CPA, RIZ ANN F. DIVA, CPA, BRIDGET KRALICK, CPA, AMY BERGER, CPA, DAVID ALBRECHT, CPA, J.P. MORGAN CHASE, N.A., CAPITAL ONE BANK, NA, AMERICAN EXPRESS COMPANY, JOANNE PIERLEONI, CHRISTOPHER PIERLEONI, DEBRA PIERLEONI and MEGAN PIERLEONI,

Defendants.

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The following papers numbered 1 to 26 were read on these motions:

Paper	Number
Notice of Motion, Affirmation and Exhibit	1
Affidavit in Support	2
Memorandum of Law in Support	3
Memorandum of Law and Exhibits in Opposition	4
Reply Memorandum of Law	5
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There are four motions before the Court in this case arising out of defendant Gregg Pierleoni's ("Gregg") criminal actions during some of the time that he worked for plaintiff Collins Brothers Moving Corporation ("Moving") as their Chief Financial Officer. Gregg worked for Moving for over 25 years. According

to plaintiffs, Gregg was responsible for all accounting functions, with both check signing authority, and the responsibility to perform bank reconciliations. Gregg was terminated in April 2013. Within a short time thereafter, plaintiffs discovered that Gregg had embezzled over $5.8 million. Gregg pleaded guilty to this embezzlement in the Southern District of New York in June 2014. In April 2014, plaintiffs commenced this action against a host of defendants: banks and a credit card company, Gregg and his family members and accountants for the companies.

The first motion is filed by defendant American Express Centurion Bank (sued herein as American Express Company) ("American Express"). American Express' motion seeks to dismiss the complaint as against American Express, and costs. The next motion is filed by defendants Anchin Block & Anchin, LLP ("Anchin"), Phillip M. Ross, CPA, Christopher Kelly, CPA, Daniel Stieglitz, CPA, Vera Krupnick, CPA, Riz Ann F. Diva, CPA, Bridget Kralik, CPA, Amy Berger, CPA, and David Albrecht, CPA (collectively, the "Accounting Defendants").[1] This motion seeks (1) to stay the claims against the Accounting Defendants and compel mediation and arbitration of the claims; (2) to sever the claims against the Accounting Defendants; and (3) to bar

[1]The individuals are accountants who worked for Anchin at the time of the events in question.

plaintiffs from alleging any claims in arbitration based on any events that occurred prior to April 3, 2011 as time-barred.

The third motion, filed by JP Morgan Chase, NA ("Chase"), seeks to dismiss the complaint as to Chase. The final motion is filed by Gregg's children, Christopher, Debra and Megan Pierleoni (the "Pierleoni defendants"). It seeks (1) to dismiss the action as against them on several grounds, including lack of jurisdiction and statute of limitations; (2) to dismiss the cross claims asserted by defendant Capital One Bank, National Association ("Capital One") against the Pierleoni defendants; (3) in the alternative, summary judgment in their favor; and (4) legal fees and sanctions for frivolous claims.

Background

Plaintiff Collins Brothers Industries, Inc. ("Industries") had an account with Chase (previously with Bank of New York, until Chase acquired the accounts in 2006). When Industries was winding down, Gregg was told by plaintiffs to close Industries' account at Chase. It is undisputed that Gregg did not do so, however. Instead, over time, Gregg transferred money from Moving's account into Industries' Chase account. These transfers amounted to a total of $4.8 million. Additionally, it is also undisputed that Gregg transferred money, approximately $919,000, from Moving's accounts into an account at Capital One. According to plaintiffs, in July 2012, they terminated Gregg's

check signing authority, but did not restrict his authority to transfer funds between accounts.

There is no dispute that Chase and Capital One did send regular bank account statements for the various companies to plaintiffs; although plaintiffs dispute having received all of the bank statements, they do concede having received several years' worth of statements. There is also no dispute that Gregg was the only one who reviewed these bank statements. There is further no dispute that plaintiffs gave this broad power to Gregg. Plaintiffs allege that throughout 2006, Chase sent emails regularly about overdrafts to Frank Webers, the principal of plaintiffs, along with Gregg. In December 2006, however, Gregg told one of Chase's employees, Vanessa Dantes, to stop copying Mr. Webers on the overdraft emails. Ms. Dantes complied with Gregg's request. There is no dispute that no one from any of the plaintiff companies ever contacted Chase to see why the emails to Mr. Webers, that had been sent "regularly," had ceased.

Gregg used the transferred money from the Chase and Capital One accounts to pay his and his then-wife's, defendant Joanne Pierleoni ("Joanne"), American Express bills for nearly six years. According to plaintiffs, the purchases included jewelry, handbags, furs, vacations, college tuition, "and other similar non-business related charges." Plaintiffs allege that at times, Gregg paid American Express bills of over $100,000 per month from

these accounts. Plaintiffs state that "American Express accepted in excess of $4,000,000.00 in stolen funds from the Plaintiffs in payment of Gregg and Joanne Pierleoni's credit cards." Plaintiffs allege that the Pierleoni defendants were also the beneficiaries of much of this stolen largesse, from college tuition to cars to family vacations, and other generous gifts.

The relationship between plaintiffs and the Accounting Defendants began in 1992. Over the years, the Accounting Defendants performed various business services for plaintiffs. The parties entered into agreements for the Accounting Defendants to provide services to plaintiffs. Plaintiffs allege that "the services performed each year exceeded the services as outlined in the engagement letters. . . [and that the Accounting Defendants] provided these additional services without the execution of new engagement letters."

The agreements specifically provide, among other things, that (1) **plaintiffs**, not the Accounting Defendants, are responsible for "preventing and detecting fraud;" (2) that a "review is substantially less in scope than an audit;" (3) that the "engagement cannot be relied upon to disclose errors, fraud or illegal acts that may exist;" (4) that disputes arising under the agreement must be submitted to mediation under certain terms; (5) if the mediation is not successful, then the dispute shall be submitted to binding arbitration; and (6) "No action, regardless

of form, arising out of the services under this agreement may be brought by either of us more than three years after the date of the last services for the year in dispute provided under this agreement."

Despite these limitations, plaintiffs allege that the Accounting Defendants reviewed accounts, or failed to obtain relevant account documents, that "would have clearly shown the massive fraud being perpetrated by" Gregg. Plaintiffs further claim that there were "glaring discrepancies" in the accounts that the Accounting Defendants knew about and that, in fact, the Accounting Defendants admitted in a January 2014 meeting that they had learned of Gregg's wrongdoing, and had memorialized it in notes that they had. Counsel for the Accounting Defendants emphatically deny these allegations in the strongest possible terms, stating that although they requested that these false allegations be recanted, plaintiffs declined to do so.

Analysis

The Court addresses each motion in turn. It is, of course, well-settled that "On a motion to dismiss the complaint . . . for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as

alleged fit within any cognizable legal theory." *Gateway I Grp., Inc. v. Park Ave. Physicians, P.C.*, 62 A.D.3d 141, 145, 877 N.Y.S.2d 95, 99 (2d Dept. 2009).

A. **American Express**

The Court begins with American Express' motion. American Express is a credit card company, which asserts that it is a "holder in due course" under the New York Uniform Commercial Code, Section 3-302. This section provides, in relevant part, that "A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." Plaintiffs argue that American Express is not a "holder in due course" because it "knew or should have known that Pierleoni was paying them with embezzled funds." Plaintiffs have no factual support for this supposition, but merely state that "since the Court has to assume the allegations in the Complaint are true, Defendant's **awareness** of the embezzlement disqualifies it from being a holder in due course." (Emphasis added). There is, simply put, no legally cognizable basis for plaintiffs to state that American Express was "aware" of the embezzlement. Pure speculation is not allowed; as the Second Department stated, citing a Court of Appeals case, "holders in due course are to be determined by the simple test of **what they actually knew, not by speculation as to**

what they had reason to know, or what would have aroused the suspicion of a reasonable person in their circumstances." *First Transcapital Corp. v. King Umberto, Inc.*, 214 A.D.2d 699, 701, 625 N.Y.S.2d 294, 295 (2d Dept. 1995) (Emphasis added). Plaintiffs literally have no allegations in the complaint to support their conclusory, speculative allegation that American Express "knew" of the embezzlement.

While it is unfortunate that American Express took plaintiffs' embezzled money from Gregg, the fact is that American Express did pay the charges that Gregg and Joanne made to non-party merchants. American Express should not have to bear the burden of Gregg's dishonesty. As the Court of Appeals has explained, "Article 3 . . . shifts the risk of loss to the drawer in situations where the drawer is the party best able to prevent the loss." *Getty Petroleum Corp. v. Am. Exp. Travel Related Servs. Co.*, 90 N.Y.2d 322, 327 (1997). The Court went on to explain that as an employer, plaintiff "was in the best position to prevent the losses by its bookkeeping practices, by supervising its employees, by enforcing its rules and by examining records relating to a fraud that had been in progress for a considerable time. Under UCC 3-405(1)(b), the loss brought about by Lewis's misconduct should therefore fall to her employer, not the depositary." *Id.* at 328.

A factual situation similar to the one before this Court arose in the case of *Italia Imports, Inc. v. Weisberg & Lesk*, 210 A.D.2d 23, 24, 618 N.Y.S.2d 805, 806 (1st Dept. 1994). In that case, "American Express took plaintiffs' checks, which had been misdirected by a faithless employee to make payments on her daughter's private credit card." The plaintiffs in that case, as here, sued American Express. The First Department granted American Express' motion dismissing it from the action, holding that "Plaintiffs offer no evidence that American Express had actual notice, and their argument that American Express had constructive notice on the basis of speculation as to what they had reason to know, or what would have aroused the suspicion of a reasonable person in their circumstances is meritless." *Id.* The same result should apply here, where there is "no evidence that American Express had actual notice." *See also Heilbronn v. Fine Line, Inc.*, 165 A.D.2d 866, 866, 560 N.Y.S.2d 336, 337 (2d Dept. 1990) ("defendant failed to allege sufficient facts showing that the plaintiff bank . . . had actual notice . . . ."); *Admaster, Inc. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 183 A.D.2d 477, 478, 583 N.Y.S.2d 408, 409 (1st Dept. 1992) ("Pursuant to UCC § 3-304(7), 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. This is a subjective test requiring actual

knowledge of a defense or facts."); *Royal Arcanum Hosp. Ass'n of Kings Cnty., Inc. v. Herrnkind*, 113 A.D.3d 672, 673, 978 N.Y.S.2d 355, 357 (2d Dept. 2014) ("The Bank established, prima facie, that it exercised due care and diligence under the circumstances, and that the circumstances surrounding the subject transactions were not such as would arouse the suspicion of its employees.").

As a holder in due course, American Express took the checks "free of virtually all claims and defenses." *Hartford Acc. & Indem. Co. v. Am. Exp. Co.*, 74 N.Y.2d 153, 159 (1989). The Court thus need not reach the other arguments raised by either of the parties.

Given the lack of any allegation that American Express knew of the embezzlement, the Court finds that American Express should be dismissed from the action. *See Transglobal Mktg. Corp. v. Derfner & Mahler, LLP*, 246 A.D.2d 482, 483, 667 N.Y.S.2d 751, 751 (1st Dept. 1998) (denying leave to replead and dismissing for failure to allege actual knowledge). The Court denies American Express' request for costs.

B. **The Accounting Defendants**

The Accounting Defendants argue that all of plaintiffs' claims concerning them arise from the services that they performed for plaintiffs pursuant to the various engagement agreements. There is no dispute that these agreements contain mediation and arbitration provisions, as outlined above at page

6-7. They seek to have the claims against them severed, stayed and directed to mediation and arbitration (as well as to have them time-limited).

Plaintiffs (and Joanne), not surprisingly, oppose the motion, arguing that the various cross-claims against the Accounting Defendants alleged by many of the defendants are "inextricably intertwined" with those claims that are subject to arbitration. If the claims are "inextricably intertwined," then they should be heard in the same forum. *See Young v. Jaffe*, 282 A.D.2d 450, 450, 723 N.Y.S.2d 90, 91 (2d Dept. 2001) (claims against architect and builder concerning defects in the design and construction of a building were "inextricably intertwined" such that claims against both should be heard together).

Plaintiffs argue that to allow some of the claims to proceed in arbitration will yield an "incongruous result," or, as Joanne frames it in her opposition papers, the Accounting Defendants "should not be allowed to escape litigation for their intentional torts by way of seeking enforcement of an arbitration clause in an engagement agreement." The Court disagrees. Allowing the claims against the Accounting Defendants to be heard in mediation and binding arbitration does not constitute "escaping litigation;" rather, it just changes the forum and style of the litigation.

The Accounting Defendants assert that plaintiffs' claims against them are not "inextricably intertwined" with the claims involving the other defendants. The Court agrees. *See Fewer v. GFI Grp. Inc.*, 59 A.D.3d 271, 271, 873 N.Y.S.2d 580, 581 (1st Dept. 2009) ("Although certain of the parties in the Fewer Action and the Employer Arbitration are closely related, the issues and claims that underlay the two matters are not inextricably interwoven such that the arbitration determination could resolve the issues in the Fewer Action."). The claims against the other defendants arise from different alleged wrongdoing, albeit all stemming from Gregg's embezzlement. For example, plaintiffs' claims involving the Pierleoni defendants relate to their receipt, whether knowingly or not, of the benefits of the embezzled funds. Plaintiffs' claims against Chase and Capital One pertain to alleged misconduct by their employees. In contrast, plaintiffs' claims against the Accounting Defendants relate to their alleged failure to detect Gregg's fraud. The facts involving the various allegations against defendants, "although related, are separate and not inextricably intertwined." *ACF Indus. Holding Corp. v. Wachovia Capital Markets LLC*, 22 A.D.3d 426, 427, 803 N.Y.S.2d 53, 54 (1st Dept. 2005).

Plaintiffs and Joanne also argue that because of the counterclaims against the Accounting Defendants for common law

indemnification and contribution, the Court cannot dismiss the claims against the Accounting Defendants. However, as the Second Department has explained, "the law is that the claim for indemnity [and contribution] does not arise until the prime obligation has been established. Stated otherwise, a party seeking indemnity must be held liable to the plaintiff before he can recover over from a third party." *Martinez v. Fiore*, 90 A.D.2d 483, 483, 454 N.Y.S.2d 475, 475 (2d Dept. 1982). Because these claims are, at best premature, they cannot be found to be "inextricably intertwined" with the action.[2]

Next, Joanne and plaintiffs further argue that the allegations in the complaint, which allege errors, fraud and illegal acts, fall outside of the engagement agreements, and the arbitration provisions do not apply. According to them, this is the "logical conclusion" because the agreements between plaintiffs and the Accounting Defendants state that the Accounting Defendants "could not have been relied upon to disclose errors, fraud or illegal acts." The Court disagrees

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[2]As an aside, it does not appear that the counterclaims against the Accounting Defendants for indemnification have any merit. This is because in order for the Accounting Defendants to be liable for common law indemnification, the cross-claiming defendants would have to be found liable to plaintiffs but would have to be themselves entirely blameless. *See Cathedral Court Assocs., L.P. v. Cathedral Properties Corp.*, 116 A.D.3d 649, 650, 983 N.Y.S.2d 277, 279 (2d Dept.) *lv. to app. den.*, 24 N.Y.3d 941, 994 N.Y.S.2d 40 (2014) ("The appellants failed to state a cause of action for common-law indemnification, which involves loss-shifting from a party compelled to pay damages by law, to the actual wrongdoer.").

that this is the "logical conclusion." The agreements specifically state that "disputes arising under this agreement (including, but not limited to scope, nature and quality of services to be performed by us. . .)" shall be submitted to mediation and thereafter arbitration. Plaintiffs' claims certainly relate to the "scope, nature and quality" of the Accounting Defendants' work and are thus encompassed by this extremely broad provision. "Plaintiffs' claims, as alleged in the amended complaint, all arise from or relate to their contracts with the defendants and, therefore, are within the scope of the broad arbitration provisions contained within those contracts." *Jamaica Hosp. Med. Ctr., Inc. v. Oxford Health Plans (N.Y.), Inc.*, 58 A.D.3d 686, 687, 871 N.Y.S.2d 665, 666 (2d Dept. 2009) (allegations of fraud only invalidate arbitration agreement when the fraud pertains to the agreement itself).

Plaintiffs also argue that it would be unfair to allow the Accounting Defendants to proceed to arbitration because an arbitrator may not award punitive damages. While it may perhaps be unfair, plaintiffs agreed to a broad arbitration provision in their agreements. If they had wanted to carve out an exception for claims involving punitive damages, they could have done so.

For all of these reasons, the Court grants the Accounting Defendants' motion to the extent of staying all claims against them; ordering plaintiffs to proceed to mediation and arbitration

as set forth in the parties' agreements; and severing the claims against the Accounting Defendants.

Finally, the Accounting Defendants argue that plaintiffs' claims are limited to any actions occurring after April 3, 2011. This date is three years prior to commencement of the action, because there is a three year statute of limitations set forth in the parties' agreements. It is well-settled that "Parties to a contract may agree to limit the period of time within which an action must be commenced to a shorter period than that provided by the applicable Statute of Limitations." *Inc. Vill. of Saltaire v. Zagata*, 280 A.D.2d 547, 547, 720 N.Y.S.2d 200, 200 (2d Dept. 2001).

Plaintiffs assert that the Court should ignore this contractual limitation, because there was "a mutual understanding" that the parties had an "ongoing and continuous relationship" such that the statute of limitations did not begin to run until plaintiffs terminated Anchin in October 2013. The Court disagrees. The agreements specifically state that each is the "complete and exclusive statement of the agreement between us, superseding all proposals oral or written [sic] and all other communications between us." This is a merger clause, designed to indicate that the written agreement is the **sole** agreement between the parties. *Jarecki v. Shung Moo Louie*, 95 N.Y.2d 665, 669 (2001). There is, thus, no "mutual understanding" that can exist

apart from the parties' agreements. *Irving O. Farber, PLLC v. Kamalian*, 16 A.D.3d 506, 506, 791 N.Y.S.2d 609, 610 (2d Dept. 2005). *See also VFS Fin. v. Ins. Servs. Corp.*, 111 A.D.3d 505, 506, 974 N.Y.S.2d 444, 446 (1st Dept. 2013). The Court finds, as a matter of law, that the limitations period contained in the agreements is enforceable. Thus, any claims against the Accounting Defendants arising before April 2011 are barred from being heard in the mediation or arbitration.

C. **Chase**

Chase seeks to dismiss all of the nine causes of action against it. These claims fall into several general categories: negligence; fraud (fraudulent concealment, aiding and abetting fraud and commercial bad faith); violation of Gen. Bus. Law § 349; and conversion. Plaintiffs completely ignore Chase's motion to dismiss the conversion claim. That is likely because it is meritless. It is dismissed from the action.

The Court first looks at the General Business Law § 349 claim. As the Court of Appeals has held, this section "declares unlawful deceptive acts or practices in the conduct of any business. 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 N.Y.3d 616, 883 N.Y.S.2d 772 (2009). Here, there was clearly no "consumer-oriented conduct" that was directed to the broader public at large; indeed, the only people allegedly injured by Gregg's scheme are parties to this lawsuit.

As the Court of Appeals has further explained, "Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). *See also Yellow Book Sales and Distribution Co., Inc. v. Hillside Van Lines, Inc.*, 98 A.D.3d 663, 950 N.Y.S.2d 151 (2d Dept. 2012). This is precisely the situation here. Accordingly, all Section 349 claims against Chase must be dismissed, as a matter of law.

Next, the Court looks at the three types of fraud claims that plaintiffs allege against Chase:. fraudulent concealment, aiding and abetting fraud and commercial bad faith. While these three claims differ in their elements, one thing that they all have in common is that they all require that there be a duty, or fiduciary relationship, between a plaintiff and a defendant. The Second Department has stated that "Although a cause of action alleging fraud may be predicated on acts of concealment, the plaintiffs must allege, inter alia, that the defendant had **a duty to disclose** the disputed information." *Spencer v. Green*, 42

A.D.3d 521, 522, 842 N.Y.S.2d 445, 446 (2d Dept. 2007) (emphasis added).

Plaintiffs have not plead any duty, or fiduciary relationship, here. That is because "the relationship between a bank and its customer is not a fiduciary one, but rather one of creditor and debtor." *Curtis-Shanley v. Bank of Am.*, 109 A.D.3d 634, 635, 970 N.Y.S.2d 830, 832 (2d Dept. 2013). *See also Fab Indus., Inc. v. BNY Fin. Corp.*, 252 A.D.2d 367, 367, 675 N.Y.S.2d 77, 78 (1st Dept. 1998) (there "is no fiduciary duty arising out of the contractual arm's length debtor and creditor legal relationship."). "The lack of any fiduciary relationship is [] fatal" to plaintiffs' fraud claims." *Woods v. 126 Riverside Drive Corp.*, 64 A.D.3d 422, 423, 882 N.Y.S.2d 106, 108 (1st Dept. 2009). Although the lack of a duty dooms plaintiffs' fraud claims, the Court examines each one in turn.

First, as Justice Scheinkman's comprehensive summary of the law regarding fraudulent concealment explains,

> in addition to [alleging] the elements for fraud, a party must allege a duty to disclose material information which must be based upon a special relationship between the parties *i.e.*, that the other party had a duty to disclose the disputed information. This requirement may be met either by the party alleging that there existed a fiduciary relationship between the parties or that there was some other reason that the party had a duty to disclose the fact either because the defendant had special or superior knowledge not available to the other party or because the defendant has communicated a half truth or made a misleading partial disclosure.

MBIA Ins. Corp. v. Royal Bank of Canada, 28 Misc. 3d 1225(A), 958 N.Y.S.2d 62 (Sup. Ct. West. Co. 2010) (citations and quotations omitted). Here, Chase had no "superior knowledge, not readily available to the other," nor did Chase know "that the other is acting on the basis of mistaken knowledge." There is thus no duty to plaintiffs. *Id.* "Where a party has the means of discovering, by the exercise of ordinary intelligence," exactly what is transpiring with its business, "it must make use of those means or it cannot be heard to complain" that it lacked information. *Woods*, 64 A.D.3d at 423, 882 N.Y.S.2d at 108.

Plaintiffs argue that Chase did have a duty to report overdrafts, and that there was a deceptive act - the withholding of the information about the overdrafts. Putting aside the fact that disclosure of the overdrafts would not necessarily have exposed Gregg's embezzlement scheme (since Mr. Webers **did** receive emails about overdrafts in 2006, when the embezzlement had already begun, and never was moved to investigate),[3] the withholding of the information about the overdrafts could not be said to be a "deceptive act."

Nor was the information about the embezzlement exclusively within Chase's control. Mr. Webers, or any of the other officers of plaintiffs, could have, at any time, accessed the companies'

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[3]Plaintiffs' argument would require the Court to find - which it does not - that it is patently obvious to anyone that if there are overdrafts, there must be embezzlement.

Chase accounts, either electronically, or by physically obtaining any of the bank records. The information about the overdrafts was certainly "not exclusively within the knowledge" of Chase; and if it was, the only reason for that is because **plaintiffs** allowed Gregg to have such a measure of control that he was able to (legally) limit access to information to himself. *Rojas v. Paine*, 101 A.D.3d 843, 846, 956 N.Y.S.2d 81, 84 (2d Dept. 2012). This Court concludes that there was no fraudulent concealment, and dismisses those claims.

Similarly, plaintiffs have not adequately plead a claim of aiding and abetting a fraud against Chase. As the Second Department has explained,

> A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, **actual knowledge, and substantial assistance**. Aiding and abetting fraud is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud combined with conclusory allegations that the aider and abettor had actual knowledge of such fraud.

Goel v. Ramachandran, 111 A.D.3d 783, 792, 975 N.Y.S.2d 428, 438 (2d Dept. 2013) (emphasis added). Putting aside the fact that there is no evidence that anyone - even Ms. Dante, the Chase employee who acceded to Gregg's requests to send the overdraft notices only to him - had actual knowledge of Gregg's embezzlement, there is certainly no allegation that anyone at Chase "substantially assisted" Gregg in his criminal actions.

The fact that Ms. Dante complied with Gregg's request not to copy Mr. Webers on the emails does not mean that Chase "substantially assisted" Gregg in his crimes. Plaintiffs' entire reliance on the emails is far too weak a connection to maintain a cause of action for aiding and abetting fraud.

As for the claims for commercial bad faith, the seminal case, cited by both parties, is *Prudential-Bache Sec., Inc. v. Citibank, N.A.*, 73 N.Y.2d 263, 276 (1989). The facts of *Prudential-Bache* are very different from those in this matter. In *Prudential-Bache*, the Court of Appeals stated that "What plaintiff has pleaded is not merely a lapse of wary vigilance, or even suspicious circumstances which might well have induced a prudent banker to investigate." Not only did the bank in *Prudential-Bache* have two corrupt employees (who took bribes from the embezzler), but the Court also found that there were multiple other bank employees who knew that something was amiss. As the Court stated in *Prudential-Bache*, the embezzler often cashed "several checks on a single day," ranging upwards from $9,000 to over $50,000, "leaving the branch with large quantities of currency or cashiers' checks." There were also dozens of checks for which "no currency transaction reports were prepared," as was required under banking regulations.

In contrast, plaintiffs here have alleged, at worst, a "lapse of wary vigilance." *Id.* However, according to

Prudential-Bache, "such assertions of bank negligence by a drawer would be **insufficient** to state a cause of action against a depositary bank." *Id.* (Emphasis added). Plaintiffs simply have no detailed allegations of obvious fraud here - there are no enormous far-too-frequent currency transactions, no corrupt employees and no failure to follow banking regulations. Accordingly, the Court finds that plaintiffs have failed to allege the necessary facts required for a claim for commercial bad faith, and those claims are also dismissed.

Turning to the claims for negligence, the Court first notes that there is a contractual relationship between plaintiffs and Chase. Plaintiffs argue that they never received certain account agreements from Chase, which agreements place all blame for any overdrafts, the responsibility for determining the propriety (or impropriety) of any checks written or electronic fund transfers and the like squarely on **plaintiffs**. These agreements disclaim all liability for mistakes, require plaintiffs to indemnify Chase, and state that the depositor must police its own accounts and personnel. These written contracts expressly state that there can be no claims for negligence against Chase.

However, whether or not plaintiffs have a written agreement, they nonetheless have an implied contractual relationship. The Second Department has explained that the "underlying relationship between a bank and its depositor is the contractual one of debtor

and creditor." *Kersner v. First Fed. Sav. & Loan Ass'n of Rochester*, 264 A.D.2d 711, 712-13, 695 N.Y.S.2d 369, 370-71 (2d Dept. 1999). Because this is a contractual relationship, there can be no claims for negligence. *See Countrywide Home Loans, Inc. v. United Gen. Title Ins. Co.*, 109 A.D.3d 953, 954, 972 N.Y.S.2d 296, 298 (2d Dept. 2013); *Regini v. Bd. of Managers of Loft Space Condo.*, 107 A.D.3d 496, 497, 968 N.Y.S.2d 18, 19 (1st Dept. 2013) (dismissing negligence claim because there was no relationship aside from contractual relationship).

The case of *Calisch Associates, Inc. v. Manufacturers Hanover Trust Co.*, 151 A.D.2d 446, 448, 542 N.Y.S.2d 644, 646 (1st Dept. 1989) is instructional. In that case, as here, a faithless employee engaged in an embezzlement scheme that went undetected by her employer. According to the Court, 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 Rounick or by not adequately training and supervising its employees regarding proper bank procedures." Based on that description, the Court dismissed the negligence claim, holding that "At most, these allegations amount to a claim that defendant bank was negligent in not being sufficiently vigilant and/or not providing satisfactory instruction to its staff." Similarly here, plaintiffs' allegations amount to claims that Chase was negligent in not

being sufficiently vigilant in not detecting Gregg's embezzlement scheme. Such negligence claims cannot lie when the parties' relationship is purely contractual.

Even if the Court were to allow the negligence claims the Court would have to dismiss them because there is no evidence that Chase failed to follow any procedures or had any information that plaintiffs did not have, or could not have obtained, if they had tried. The fact remains that it was plaintiffs, and plaintiffs alone, who allowed Gregg to be the only one reviewing the bank statements. "When a customer requests that a bank mail the statements either to himself or to another person, and the bank complies, the statements are considered "made available to the customer" for the purposes of the UCC . . . and the bank is entitled to the protections afforded by UCC 4-406(4) even if the statements are thereafter intercepted by a dishonest employee." *Robinson Motor Xpress, Inc. v. HSBC Bank, USA*, 37 A.D.3d 117, 119, 826 N.Y.S.2d 350, 354 (2d Dept. 2006). Since the Uniform Commercial Code prevents claims such as the negligence claims alleged by plaintiffs, *see Royal Bank of Canada v. Weiss*, 172 A.D.2d 167, 168, 567 N.Y.S.2d 707, 708 (1st Dept. 1991) ("the UCC makes no provision for a cause of action by the customer against the bank for wrongful payment unless the customer has succeeded

in having payment enjoined."), the Court must dismiss all of the negligence claims against Chase.[4]

D. **The Pierleoni Defendants**

At the outset, the Court addresses the jurisdictional claims that the Pierleoni defendants raise. Plaintiffs concede that they cannot locate proof of service on Christopher Pierleoni, who alleges that he was never served. No affidavit of service was ever filed with the Court, as is required by CPLR § 306-b. Plaintiffs have not indicated any good cause for this failure, or that the interests of justice require the Court to extend the time for service. Accordingly, Christopher Pierleoni is dismissed from the action without prejudice . *Mandel v. Waltco Truck Equip. Co.*, 243 A.D.2d 542, 544, 663 N.Y.S.2d 106, 108 (2d Dept. 1997).

As to the motion to dismiss for lack of jurisdiction over the other two Pierleoni defendants, the Court denies this request as premature. The parties allege sharply different versions of these defendants' contacts with New York. Absent discovery, the Court cannot make a determination on the jurisdictional claims, and thus denies them without prejudice. *See Expert Sewer & Drain, LLC v. New England Mun. Equip. Co.*, 106 A.D.3d 775, 776,

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[4]The Court finds that since, as plaintiffs concede, there is no private right of action for a violation of the USA Patriot Act, there is also no cause of action for negligence arising out of an alleged violation of so-called "industry standards."

964 N.Y.S.2d 597, 598 (2d Dept. 2013) (in "a motion to dismiss pursuant to CPLR 3211(a)(8) . . . [t]he jurisdictional issue is likely to be complex. Discovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits.").

Next, the Court will address the conversion claims alleged against the remaining two Pierleoni defendants. It is well-settled that "Conversion is the unauthorized exercise of dominion over or interference with a specific identifiable piece of property in defiance of the owner's rights." *Petty v. Barnes*, 70 A.D.3d 661, 662, 894 N.Y.S.2d 85, 87 (2d Dept. 2010). While it occurs most often with tangible items of chattel, "Money may be the subject of a cause of action for conversion" where "it can be identified and segregated as a chattel can be, *i.e.*, where there is a specific, identifiable fund." *Heckl v. Walsh*, 122 A.D.3d 1252, 996 N.Y.S.2d 413, 416 (4th Dept. 2014) (where guardian embezzled approximately $4 million, conversion claim had to be dismissed because money was not specifically identifiable). Here, the embezzled funds that were used to buy things for the Pieleoni defendants cannot be specifically identifiable. Plaintiffs do not allege that a specific purchase was paid with embezzled funds, as opposed to earned income. Accordingly, the conversion claims are dismissed.

Both plaintiffs and Capital One allege unjust enrichment claims against the Pierleoni defendants. "The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). To succeed on an unjust enrichment claim, "A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Id.* The Court of Appeals has further explained that unjust enrichment "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012). Indeed, that is exactly what has been alleged here. This claim, unlike the claim for conversion, does not require a chattel (or that money be chattel-like). Based on the facts alleged, the Court denies the Pierleoni defendants' request to dismiss the unjust enrichment claims. The Court also denies the request to dismiss the claims arising under Article 10 of the Debtor and Creditor Law. While

the claims alleged are fairly general, plaintiffs do allege that Gregg made transfers to the Pierleoni defendants without consideration, and with the intent to defeat plaintiffs' rights as creditors. This is adequate to survive the motion to dismiss. *See generally Union Nat. Bank v. Russo*, 64 A.D.2d 759, 760, 406 N.Y.S.2d 930, 932 (2d Dept. 1978).

Capital One also alleges claims against the Pierleoni defendants for indemnification and/or contribution, which the Pierleoni defendants seek to dismiss as lacking "any basis in fact or law" because they allege that they had no "knowledge of Defendant's bank account being unlawfully used by Defendant FATHER." A review of the complaint shows that plaintiffs have adequately plead these claims.[5] Whether the claims have merit, however, requires discovery. Given the very early stage of this litigation, the Court denies the request to dismiss these claims.

The Court also denies the Pierleoni defendants' request to convert the motion to one for summary judgment. As stated, there

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[5] "With respect to the cause of action for contribution, where two or more persons are subject to liability for the same harm, equitable apportionment of liability may be claimed among them, and it is not necessary that each of the persons be charged with the commission of a tort." *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 786, 468 N.Y.S.2d 894, 895 (2d Dept. 1983). Similarly, indemnification "involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer, . . . to prevent an unjust enrichment or an unfair result. *Westchester Cnty. v. Welton Becket Associates*, 102 A.D.2d 34, 46-47, 478 N.Y.S.2d 305, 314 (2d Dept. 1984), *aff'd*, 66 N.Y.2d 642 (1985).

has not yet been any discovery. Given the disparities in the allegations made by the various parties, the Court finds that this case cries out for thorough discovery. The parties are of course free to make motions for summary judgment once that has been concluded. The Court also denies the request for sanctions.

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
February 18, 2015

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Justice of the Supreme Court

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