

**Itkowitz v Signature Bank**

2016 NY Slip Op 30060(U)

January 12, 2016

Supreme Court, New York County

Docket Number: 152709/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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JAY B. ITKOWITZ,

Plaintiff,

Index No.152709/2015

-against-

**DECISION/ORDER**

SIGNATURE BANK,

Defendant.

-----X

**HON. CYNTHIA KERN, J.S.C.**

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss:** \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1
Affidavits in Opposition.....	_____ 2
Replying Affidavits.....	_____ 3
Exhibits.....	_____ 4

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Plaintiff Jay Itkowitz has brought the present action against defendant Signature Bank (“Signature”) based on his claim that defendant charged improper fees to plaintiff’s bank account. Defendant has brought the present motion to dismiss plaintiff’s complaint on the ground that plaintiff has not plead his claims with sufficient particularity, plaintiff’s claims are contradicted by documentary evidence, plaintiff’s claims are time barred and the complaint fails to state a claim for which relief can be granted.

The facts, as alleged in the complaint, are as follows. On April 16, 2010, plaintiff opened a checking account in the name of Jay B. Itkowitz, Esq. d/b/a Itkowitz & Harwood at Signature by completing a Business Profile and Account Application (the “I&H Account”). At the time plaintiff opened the I&H Account, he received Signature’s Business Bank Account Agreements and Disclosures (the “Account Agreement”). Subsequent to plaintiff opening the I&H Account, he opened several other accounts at Signature.

On April 21, 2010, plaintiff executed a remote check capture agreement with defendant (the "Remote Check Capture Agreement"). Schedule A to the Remote Check Capture Agreement, entitled Payment Services, provides in pertinent part, as follows:

### 1 Service

Pursuant to the terms of the Agreement and this Schedule A, Signature, through Agent, agrees to provide [Plaintiff] with the Service. The Service, as set forth in the Agreement and this Schedule A, is comprised of Agent's products, software services, and support systems ("System") which will enable [Plaintiff] to scan checks and any payment coupons received from [Plaintiff's] customers through use of a scanner provided to [Plaintiff] by Agent or its agent ("Scanner") so that those checks can be converted into either (i) an ARC ("Accounts Receivable Conversion") and processed as an ACH pre-authorized debit ("Conversion Option") or (ii) a digital image that can be either electronically presented to the FRBNY or to any other bank for collection or used to create an IRD ("Image Replacement Document") and presented to the FRBNY or to any other bank for collection as a Substitute Check, as that term is defined under the FRB's Regulation CC and the Check Clearing for the 21st Century Act ("Check 21") ("Digital Imaging Option")...

### 2 Fees & Charges

For the Service, [Plaintiff] shall pay to Signature the fees and charges set forth in Schedule B ... Signature will debit [Plaintiff's] account set forth on Schedule C (Account) each month in the amount of these fees and charges. If the Account does not have sufficient funds to pay such amounts, the Signature may debit any other account that Client maintains with Signature...

### 3 Client Authorization

[Plaintiff] authorizes Signature and Agent to credit [Plaintiff's] account at Signature designated on Schedule C ("Account") for all checks scanned and submitted pursuant to this Agreement and to debit the Account to pay for all fees and charges for the Service and for any scanned checks that are returned or not paid in accordance with FRB, NACHA and clearinghouse rules.

Between August, 2010 and September, 2014, Signature often paid checks drawn on the I&H Account that created an overdraft balance in the I&H Account. In addition, Signature often paid checks drawn on the other personal and business accounts plaintiff maintained at Signature, creating an overdraft balance in those accounts.

In September, 2014, Signature advised plaintiff that Signature would no longer pay checks that created an overdraft in any of the accounts plaintiff and his various businesses maintained at Signature. In September, 2014, plaintiff met with Signature at which time Signature requested that Itkowitz, PLLC enter into a Term Note to pay the amount of the overdraft that plaintiff and his various businesses maintained at Signature. On December 22, 2014, Itkowitz, PLLC entered into a Term Note in the amount of \$272,847.78 with Signature (the "Term Note"), whereby plaintiff repaid the overdrafts.

In plaintiff's first cause of action, he seeks a declaratory judgment as to whether certain terms of the Account Agreement are enforceable. He alleges that he is entitled to a declaratory judgment as to whether the provisions in the Account Agreement titled limitation of bank's liability, limitation of time to sue, jury trial waiver and the paragraph titled burden of proof and duty to mitigate are enforceable as against plaintiff. More specifically, he alleges that the provisions in the Account Agreement which provide that his right to relief is limited to breach of contract and that he may not pursue punitive damages is unenforceable; that the one year statute of limitations is unenforceable; that the waiver of the jury trial is unenforceable and that the provision requiring plaintiff to mitigate damages are all unenforceable as invalid exculpatory provisions. In plaintiff's second cause of action, he asserts that defendant breached the Account Agreement by charging plaintiff's I&H Account for certain fees and charges incurred as a result of activity in his other accounts.

Defendant has brought a motion to dismiss plaintiff's complaint on a number of different grounds. Initially, defendant argues that plaintiff's second cause of action for breach of contract must be dismissed because it fails to give the requisite notice to defendant under CPLR 3013 of the factual basis for the claim. It argues that there is not sufficient notice because plaintiff's

complaint does not allege which provision of the Account Agreement was breached and the exact amount of damages. CPLR section 3013 provides that statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense. In the present case, the court finds that plaintiff's second cause of action for breach of contract provides defendant with the requisite notice required under CPLR 3013. Plaintiff has clearly stated the basis for his breach of contract claim which is that defendant breached the Account Agreement by charging plaintiff's I&H Account for certain fees and charges incurred as a result of activity in his other accounts, without his authority. Plaintiff cannot point to a specific provision that defendant breached because his allegation is that nothing in the Account Agreement allowed defendant to charge plaintiff's I&H account for fees and charges generated by checks drawn by plaintiff on plaintiff's other accounts. Moreover, the court finds that plaintiff has sufficiently alleged the damages he has incurred as a result of the breach at the present time and that he is entitled to obtain discovery to more particularly state what these damages are.

Defendant's argument that the breach of contract cause of action must be dismissed because it is contradicted by the plain language of the Remote Check Capture Agreement is without merit. It is undisputed that the Remote Check Capture Agreement authorized defendant to debit any of plaintiff's accounts for all "fees and charges for the Service and for any scanned checks that were returned or not paid..." However, defendant has failed to provide any documentary evidence which establishes that the Remote Check Capture Agreement applies to the fees that are the subject of plaintiff's complaint. On its face, the Remote Check Capture Agreement provides that the defendant agrees to provide plaintiff with a service which will

enable the plaintiff to scan checks and any payment coupons received from plaintiff's customers to a scanner provided to plaintiff by the defendant. Thus, the language in the Remote Check Capture Agreement which permits defendant to debit any of plaintiff's accounts for any scanned checks that were returned or not paid only applies to checks that were scanned by the plaintiff which were ultimately returned or not paid. However, it is not applicable to checks written by plaintiff for which there were insufficient funds. Since the complaint on its face is not limited to only fees for scanned checks that were returned or not paid, the documentary evidence submitted by defendant consisting of the Remote Check Capture Agreement is insufficient to establish that plaintiff does not have a viable claim.

The court will next address defendant's argument that plaintiff's breach of contract claim is time-barred in whole or in part. It is undisputed that the account agreement between the parties provides that plaintiff must commence any legal action or proceeding against defendant with respect to "any Account or this Agreement within one year of the date of the occurrence of the event that is the subject matter of the action or proceeding but in no event beyond the time period set forth in any law or agreement applicable to such event." The Court of Appeals has specifically held that an agreement between the parties that modifies the statute of limitations by specifying a shorter but still reasonable time within which to commence an action is enforceable as long as it is in writing. *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551 (1979).

To determine whether the statute of limitations provision contained in the Account Agreement is enforceable, the court must address the claim raised in plaintiff's first cause of action for a declaratory judgment that certain provisions in the Account Agreement, including the statute of limitations clause, are unenforceable exculpatory provisions. Plaintiff argues that

the provisions are unenforceable exculpatory provisions based on the conduct of defendant in fraudulently charging plaintiff's I&H account for overdraft fees generated in other accounts, failing to provide plaintiff with any documentation as to how those charges were computed and the defendant's employee admitting to having engaged in criminal conduct by receiving commissions on overdrafts in violation of New York Banking Law. The First Department has held that the "common business practice of limiting liability by restricting or barring recovery by means of an exculpatory provision, "although disfavored by the law and closely scrutinized by the courts... is accorded judicial recognition where it does not offend public policy ." *Banc of Am Sec., LLC v. Solow Bldg Co. ii, LLC*, 47 A.D.3d 239, 244 (1<sup>st</sup> Dept 2007). However, "that policy does not extend to acts that are either 'willful or grossly negligent.'" *Id.* Thus,

Enforcement of such a provision is precluded when "the misconduct for which it would grant immunity smacks of intentional wrongdoing" (Kalisch-Jarcho, 58 N.Y.2d at 385; see also *Sommer v Federal Signal Corp.*, 79 N.Y.2d 540, 554, 593 N.E.2d 1365, 583 N.Y.S.2d 957 [1992] [gross negligence]), where it is willful (see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v 7 Wise Metals Group, LLC*, 19 A.D.3d 273, 274, 798 N.Y.S.2d 14 [2005] [fraudulent inducement]), "as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens reckless indifference to the rights of others" (Kalisch-Jarcho, 58 N.Y.2d at 385).

In the present case, even if the court accepts as true plaintiff's allegations that defendant fraudulently charged plaintiff's I&H account for overdraft fees generated in other accounts, failed to provide plaintiff with any documentation as to how those charges were computed and that defendant's employee admitted to engaging in criminal conduct by receiving commissions on overdrafts in violation of New York Banking Law, these allegations are insufficient to establish willful and/or grossly negligent behavior on the part of defendant with respect to the alleged exculpatory provisions which would render the exculpatory provisions at issue unenforceable. Therefore, the court finds that the provisions in the Account Agreement which

are challenged by plaintiff in the first cause of action, including the one year statute of limitations, are enforceable. As a result, plaintiff's breach of contract claim based on defendant's breach of the Account Agreement is subject to a one year statute of limitations, thus barring all claims for fees charged prior to June 22, 2014, the date which is one year prior to commencement of the instant action.

Defendants also move to dismiss that portion of plaintiff's breach of contract claim which seeks to recover punitive damages on the ground that the underlying allegations involve a private wrong. The law is well established that punitive damages are not available for a mere breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights. *See Garrity v. Lyle Stuart, Inc.*, 40 N.Y. 2d 354 (1976). Punitive damages may be available for a breach of contract if the conduct was aimed at the public generally and the breach "involves a fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations.'" *Rocanova v. Equitable Life Assure Socy. Of U.S.*, 83 N.Y.2d 603 (1994).

In the present case, plaintiff is not entitled to recover punitive damages based on the provision in the Account Agreement which provides that the defendant will not be liable for punitive damages. Even in the absence of such provision, however, the allegations in plaintiff's complaint are insufficient to justify an award of punitive damages, as the conduct alleged is not aimed at the public generally.

Based on the foregoing, the motion to dismiss the first cause of action is granted to the extent that the court has found that the provisions in the Account Agreement, including the statute of limitations, are enforceable and the motion to dismiss the second cause of action is

granted to the extent that all claims for fees charged prior to June 22, 2014 are dismissed as time barred. The foregoing constitutes the decision and order of the court.

Dated: 11/2/16

Enter: CK

**CYNTHIA S. KERI.**  
J.S.C. J.S.C.