Valle v Popular Community Bank
2016 NY Slip Op 30291(U)
February 18, 2016
Supreme Court, New York County
Docket Number: 653936/2012
Judge: Anil C. Singh

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

Motion Sequence No. 005

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

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.

By decision and order, dated August 4, 2014, this court largely granted BPNA's motion to dismiss (2014 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 then sought leave to amend, pursuant to CPLR 3025 (b), and on September 10, 2014 filed a proposed second amended complaint (PSAC), asserting causes of action for breach of the implied covenant of good faith and fair dealing and violations of General Business Law § 349. By decision and order, dated July 22, 2015, this court granted leave to amend (2015 Decision) to the extent plaintiffs sought 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, and otherwise denied the motion.

BPNA now moves, pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the Second Amended Complaint (SAC), which asserts causes of action for breach of the implied covenant of

good faith and fair dealing and violations of GBL § 349 (first and second causes of action, respectively). By stipulation, dated December 28, 2015, plaintiffs voluntarily discontinued, with prejudice, the SAC's first cause of action for breach of the implied covenant of good faith and fair dealing, leaving only a claim under GBL§ 349. *See* NYSCEF document number 316.

The underlying facts of this case were stated in detail in the 2014 and 2015 Decisions. The court, therefore, presumes the parties' familiarity with the facts, which are not stated here. Unless indicated otherwise, defined terms in the Decisions shall have the same meaning when used herein.

BPNA contends that plaintiffs' GBL § 349 claim must be dismissed because: high-to-low reordering is not a deceptive business practice; plaintiffs' factual allegations do not support their contention that reordering made it difficult or impossible for them to track their account balance; and plaintiffs fail to plead facts supporting the feasibility of real-time overdraft notices. BPNA also contends that the claim is partially time-barred, because it is based on newly pleaded allegations that do not related back to the original complaint or the FAC. Lastly, it argues that the SAC does not state a GBL § 349 claim prior to December 31, 2010. Plaintiffs counter that BPNA challenged the sufficiency of the PSAC when plaintiffs sought leave to amend. They argue that if BPNA disagreed with the 2015 Decision, it should have moved to reargue and may not now seek to relitigate those issues. Plaintiffs also contend that BPNA's fact-based challenge is speculative and premature. Lastly, they argue that the SAC merely amplifies the original pleadings and, as such, is not time-barred.

"[O]n a motion to dismiss the complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172,

174 (1st Dept 2004). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). "However, factual allegations that do not state a viable cause of action [or] that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (internal citation omitted). Where the defendant seeks to dismiss the complaint based upon documentary evidence, "the documentary evidence [must] utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (internal citation omitted). "In moving to dismiss a cause of action pursuant to CPLR 3211(a) (5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired." *Matteawan On Main, Inc. v City of Beacon*, 109 AD3d 590, 590 (2d Dept 2013).

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). 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." *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 (1995). "[T]he three-year period of limitations for statutory causes of action under CPLR 214 (2) applies to . . . General Business Law § 349 claims." *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 (2001)

Under the relation-back doctrine, new claims in an amended complaint are deemed to relate back to the original complaint, for statute of limitations purposes, so long as the original

pleading "[gave] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." CPLR 203 (f); *see also Koch v Acker, Merrall & Condit Co.*, 114 AD3d 596, 597 (1st Dept 2014) (finding that new claims related back to the original complaint, because "the original complaint gave defendant notice of the transactions or series of transactions to be proved pursuant to the amended complaint"). Where the new allegations are mere "amplifications" of the original allegations, they relate back to the original pleading. *Pendleton v City of New York*, 44 AD3d 733, 737 (2d Dept 2007). "However, where the original allegations did not provide the defendants notice of the need to defend against the allegations of the amended complaint, the [relation-back] doctrine is unavailable." *Id.* at 736.

As a preliminary matter, plaintiffs do not provide any authority supporting their contention that a defendant who opposes a plaintiff's motion for leave to amend may not later move to dismiss the amended complaint for failure to state a claim. While leave to amend will be denied if the amendment "plainly lacks merit" (*Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]), "[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt." *Lucido v Mancuso*, 49 AD3d 220, 227 (2d Dept 2008) (internal quotation marks and citations omitted). In other words, opposing a motion for leave to amend is not tantamount to a motion to dismiss, and the fact that the court grants a motion for leave to amend does not, a fortiori, result in the facial sufficiency of the pleading. In addition, as neither the 2014 nor the 2015 Decision resolved the legal issues presented on the instant motion, BPNA's motion is not barred by the law of the case doctrine. *See Stroock & Stroock & Lavan v Beltramini,* 157 AD2d 590, 591 (1st Dept 1990).

Here, plaintiffs allege that BPNA engaged in the following deceptive conduct in violation of GBL § 349: (1) reordering customer withdrawals to create or maximize overdraft charges; (2) providing inaccurate account information in response to plaintiffs' balance inquiries; and (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. According to the SAC, false balance statements, along with BPNA's reordering policy, made it "difficult or impossible for Plaintiffs and Class members to accurately track their account balances" and caused them to overdraw their accounts. SAC, ¶ 67.

Plaintiffs allege that BPNA's high-to-low reordering policy resulted in additional overdraft charges on at least three occasions: September 2-5, 2007, January 1-3, 2012 and April 18, 2012.[1] Plaintiffs also allege that, "for multiple balance inquiries performed by Plaintiffs . . . on or after December 31, 2010" (*id.*, ¶ 68), "[a]lthough [BPNA] ha[d] actual knowledge of outstanding debits and transactions, it informed Plaintiffs that they had a positive balance when, in reality, they ha[d] a negative balance," and that this caused plaintiffs to overdraw their account on at least two occasions: January 3, 2012 and June 2, 2012. *Id.*, ¶ 72.

BPNA contends that, pursuant to the First Department's holding in *Feld v Apple Bank for Sav.* (116 AD3d 549 [1st Dept 2014]), high-to-low reordering does not give rise to a GBL § 349 claim. However, *Feld* is distinguishable because, in that case, it was undisputed that all necessary disclosures had been made. There, "plaintiff was advised in his brochure that defendant had reserved the right to pay overdrafts on his checking account." *Id.* at 552. In

[1] The complaint alleges that reordering of transactions occurred January 1-3 of 2011. However, this appears to be a typographical error. The account statement, submitted in opposition to the instant motion, demonstrates that these transactions occurred in 2012. Tusa affirmation, exhibit D.

addition, "the brochure disclosed defendant's funds-availability policy," which "belie[d] plaintiff's claim that defendant's monthly bank statements were deceptive." *Id.* at 552-553. On the instant motion, BPNA does not provide documentary evidence showing that it made similar disclosures to plaintiffs.

Moreover, rather than holding that high-to-low reordering was not a deceptive business practice as a matter of law, in *Feld*, the First Department held that, "[o]n [that] record, plaintiff ha[d] not sufficiently alleged that defendant ha[d] engaged in a deceptive practice . . . by posting transactions to plaintiff's checking account in the manner authorized by UCC 4-303 (2)." *Id.* at 552. UCC 4-303 (2) provides that "items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank." "Items" are defined as "any instrument for the payment of money . . . *but does not include money*." UCC 4-104 (g) (emphasis added). The official commentary explains that UCC 4-303 (2) does not provide any rule for the ordering of items,

> "because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other difficulties. Further, where the drawer has drawn all the checks, he should have funds available to meet all of them and has no basis for urging one should be paid before another."

UCC 4-303, Comment 6.

Feld dealt with "the alleged re-ordering of [Automated Clearing House] and Electronic Fund Transfer . . . transactions," which UCC § 4-303 (2) "explicitly permits banks to charge . . . to a customer's account 'in any sequence.'" *Feld v Apple Bank for Sav.*, 2013 WL 2457716, *5 n 1, 2013 NY Misc LEXIS 2315, *11 n 1 (Sup Ct, NY County, Mar. 13, 2013, Index No. 651565/2011), *affd* 116 AD3d 549 (1st Dept 2014). In fact, in *Feld*, the trial court distinguished

the cases that "Feld cite[d] in support of his argument that the re-ordering of transactions [was] legally impermissible," because such cases "all involve[d] debit card transactions such as ATM withdrawals or point of sale transactions." *Feld*, 2013 WL 2457716 at *5 n 1, 2013 NY Misc LEXIS 2315 at *11 n 1. Unlike *Feld*, the instant case involves ATM transactions. Therefore, *Feld* is factually distinguishable from the instant case.

BPNA concedes that UCC 4-303 (2) does not govern ATM transactions (BPNA's brief at 9), but contends that an applicable New York banking regulation, 3 NYCRR 32.4, gives banks discretion to process transaction in whatever order they choose, so long as they disclose it. In relevant part, 3 NYCRR 32.4 provides that:

> "with regard to consumer deposit accounts, a banking institution shall disclose in writing to its depositors the order in which it pays *items* drawn against a depositor's account. By way of illustration, and without limitation, such disclosure may inform the depositor that the banking institution pays the largest *items* first, the smallest *item* first, or by the number of the *item* or in the order received."

3 NYCRR 32.4 (emphasis added). Like UCC 4-303 (2), 3 NYCRR 32.4 deals with the banks' ability to reorder "items." *Id.* The official comment to 4-104 (g) explains, "[t]he word 'item' [was] chosen because it is '*banking language*'. . . ." UCC 4-104, Comment 4 (emphasis added). BPNA does not provide any authority suggests that the UCC's use of the term is narrower than that of 3 NYCRR 32.4. Therefore, BPNA has not established that reordering of ATM transactions is sanctioned by New York banking regulations.

BPNA next challenges plaintiffs' ability to state a GBL § 349 claim based on the SAC's specific allegations of reordering. BPNA argues that the September 2-5, 2007 transactions took place more than five years before the original complaint was filed and that, as such, a GBL § 349 claim is time-barred as to these transactions. It also argues that, with respect plaintiffs' withdrawals on January 1-3, 2012, plaintiffs incurred the same number of overdraft charges as

they would have had the transactions been processed chronologically. As such, BPNA contends, plaintiffs may not premise their GBL § 349 claim on the practice of reordering transaction across multiple days. With respect to the April 18, 2012 transactions, BPNA does not dispute that reordering caused plaintiffs to incur three, instead of two, overdraft charges. BPNA's brief at 12. Instead, it contends that this was not deceptive because plaintiffs knowingly overdrew their account twice. Therefore, BPNA reasons, plaintiffs cannot now argue that they overdrew their account due to BPNA's reordering practice. It also contends that a single additional overdraft charge is not sufficient to support plaintiffs' theory that reordering made it difficult or impossible for them to track their account balance. According to BPNA, "documentary evidence establishes that Plaintiffs' penchant for overdrawing their account had nothing to do with confusion from BPNA's reordering policy." *Id.*, at 17.

BPNA correctly argues that the September 2-5, 2007 transactions cannot support plaintiffs' deceptive business practices claim. They occurred more than three years before October 14, 2012, the commencement of the instant action. *See* NYSCEF document number 1. Therefore, they are time-barred. *Gaidon*, 96 NY2d at 210.

However, with respect the January 1-3, 2012 transactions, BPNA overlooks some of plaintiffs' allegations. BPNA focuses on the description of these transactions as contained in paragraph 60 of the SAC, which states that:

> "[o]n January 1, 2011 (a Saturday), Plaintiffs began the day with a positive account balance of $807.69. Plaintiffs' account shows three ATM withdrawals on January 1, 2011 for $201.75, at 8:23 a.m., for $201.75, at 8:25 a.m., and $101.75, at 8:27 a.m. Plaintiffs' account statement shows two ATM withdrawal on January 3, 2011 for $302.00, at 10:46 a.m., and $42.00, at 10:52 a.m. According to Plaintiffs' account statement, Popular re-ordered these withdrawals—across multiple days—and cleared them all on January 3, 2011, from highest-to-lowest amounts. That practice resulted in two Overdraft Charges imposed on Plaintiffs'

> account on January 4, 2011. Popular manipulated, increased and manufactured the number of Overdraft Charges imposed on January 4, 2011 by reason of its re-ordering policies. By re-ordering Plaintiffs' withdrawals from highest-to-lowest amounts, Popular created at least one Overdraft Charge that would not have existed had it cleared the debits chronologically or from lowest-to-highest amounts."

SAC, ¶ 60. When factoring in the $2 "Non-Popular ATM Fee" charged for each transaction, plaintiffs would have incurred the same number of overdraft charges, even if the transactions had been processes chronologically.[2] *Id.*, ¶ 70. However, BPNA's reordering practice is not the sole basis for plaintiffs' GBL § 349 claim. Plaintiffs also allege that false balance statements, along with BPNA's reordering policy, made it "difficult or impossible" for them to track their account balance and caused them to overdraw their account. *Id.*, ¶ 67. To that end, the SAC alleges that, as of January 3, 2012, BPNA had not processed any of plaintiffs' January 1, 2012 ATM withdrawals, but had processed a deposit, and represented to plaintiffs that their account had a positive balance of $807.69. *Id.*, ¶ 70. Plaintiffs allege that, based on this representation, they withdrew additional funds that overdrew their account. *Id.* Therefore, the SAC sufficiently alleges that BPNA's reordering practice, particularly across multiple days, combined with its practice of providing false balance information, made it difficult or impossible for plaintiffs to track their account balance.

With respect to the April 18, 2012 transactions, the SAC states that plaintiffs started the day with a balance of $16.69. *Id.*, ¶ 61. They made three withdrawals: "1) $11.75, at 1:43 p.m.;

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[2] High-to-low posting of all transactions on January 3, 2012: 807.69 – (302+2) = 503.69; 503.69 – (201.75+2+201.75+2) = 96.16; 96.19 – (101.75 +2) = -7.56; -7.56 – (42 +2) = -51.56.

Chronological posting of all transactions: 807.69 – (201.75+2+201.75+2) = 400.19; 400.19 – (101.75+2) = 296.44; 296.44 – (302 +2) = -7.56; -7.56 – (42.00+2) = -51.56.

2) $11.75, at 1:44 p.m.; and 3) $61.75, at 1:45 p.m." *Id.* According to plaintiffs, BPNA reordered and cleared these withdrawals from highest-to-lowest amounts, creating one more overdraft charge than would have resulted had BPNA cleared the debits chronologically. *Id.* As such, the SAC acknowledges that BPNA's reordering policy was not responsible for two of the three resulting overdraft charges. However, these allegations do not render plaintiffs' claim, that BPNA's reordering policy was deceptive and caused them injury, "inherently incredible." *Skillgames, LLC*, 1 AD3d at 250. Similarly, BPNA's documentary evidence, demonstrating the frequency with which plaintiffs overdrew their account, does not "utterly refute[] plaintiff's factual allegations." *Goshen*, 98 NY2d at 326; *see* Nieland affirmation, exhibit 8 (containing plaintiffs' account statements from September 30, 2011 through August 31, 2012). Ultimately, whether or not plaintiffs overdrew their account, due to BPNA's allegedly deceptive practices, raises an issues of fact not properly decided by the court on the instant motion to dismiss. *See EBC I, Inc.*, 5 NY3d at 19; *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]).

BPNA also argues that the claim should be dismissed to extent it is based on BPNA's failure to provide real-time notice of a potential overdraft, because plaintiffs fail to allege that such notice is feasible. Here, the SAC alleges that financial institutions have instantaneous knowledge of ATM transactions that will overdraw a customer's account and the ability to decline such debit card transactions or notify customers that an overdraft will result. SAC, ¶ 73. Whether BPNA actually possesses such capability, particularly when dealing with non-

proprietary ATMs, raises an issue of fact not determinable on the instant motion to dismiss. *See EBC I, Inc.*, 5 NY3d at 19; *Forrest*, 3 NY3d at 315.

Lastly, BPNA contends that the SAC contains a number of new allegations and legal theories not contained in the previous pleadings, including that: BPNA provided false balance information; high-to-low reordering is inherently deceptive; false balance information, combined with BPNA's reordering practice, made it difficult of impossible for plaintiffs to track their account balance; and the duty to provide customers with real-time notice of a potential overdraft stems from BPNA's allegedly deceptive practices, which make it difficult for customers to track their account balances. BPNA argues that such allegations do not relate back to the original complaint or the FAC and are, therefore, partially time-barred.

Both of the previously-filed pleadings alleged that BPNA engaged in high-to-low reordering and that the practice was inherently deceptive, as its sole purpose was to maximize overdraft charges. *See* complaint, ¶¶ 44-49; FAC, ¶¶ 52-57. In addition, both the original complaint and the FAC specifically alleged that BPNA had violated GBL § 349 by reordering customers' withdrawals to create or maximize overdraft charges. Complaint, ¶ 108 (c); FAC, ¶ 141 (c). Likewise, both pleadings provided specific examples of overdrafts that were imposed because BPNA, among other things, "did not disclose prior to completion of this ATM withdrawal that Plaintiffs' deposit account would become overdrawn, nor provide an opportunity to cancel or modify the ATM withdrawal." Complaint, ¶¶ 64-70; FAC, ¶¶ 74-78, 83-102. Moreover, both pleadings specifically alleged that BPNA's failure to give notice of a potential overdraft gave rise to plaintiffs' GBL § 349 claim. Complaint, ¶ 108 (b); FAC, ¶ 141 (b). While neither pleading explicitly stated that plaintiffs were unable to track their account balance due to BPNA's reordering practice or that this gave rise to a duty to disclose a potential overdraft, such

allegations merely amplify and expand the original allegations. *See Pendleton*, 44 AD3d at 737 (finding that allegations in the amended complaint, "that the plaintiff's rights were violated by numerous specific policies or customs of the municipal defendants, . . . [were] amplifications of the original allegation that the municipal defendants failed to properly train police"). Therefore, to the extent the SAC's GBL § 349 claim is premised on BPNA's reordering practice and its failure to give prior notice of overdrafts, "the original complaint gave defendant notice of the transactions or series of transactions to be proved pursuant to the [SAC], and the new claims are deemed to relate back to the original complaint, for purposes of the statute of limitations." *Koch*, 114 AD3d at 597; *see also Jennings-Purnell v Jennings*, 107 AD3d 513, 514 (1st Dept 2013) (stating that proposed pleading's claim of notarial misconduct related back to prior pleading, which "did not mention notarial misconduct," because "it clearly gave notice to defendant of the transaction and occurrence in which the notarial misconduct took place").

However, the SAC's allegations regarding inaccurate balance information are entirely novel. *See* SAC ¶¶ 63-67. Nothing in either the complaint or the FAC alleged that BPNA provided plaintiffs with inaccurate account balance information. The only mention of inaccurate account balances arose in a quote from *In re Checking Account Overdraft Litig.* (694 F Supp 2d 1302 [SD FL 2010]), which plaintiffs included in both pleadings. The quoted language discussed the practice of high-to-low reordering and stated, in relevant part, that "[i]n certain cases, customers [were] informed that they ha[d] a positive balance when, in reality, they ha[d] a negative balance, despite the Bank's actual knowledge of outstanding debits and transactions." Complaint, ¶ 46 and FAC, ¶ 54, quoting *In re Checking Account Overdraft Litig.*, 694 F Supp 2d at 1309. However, neither pleading notified BPNA of plaintiffs' allegation that BPNA provided false balance information. As such, the relation-back doctrine does not apply to the SAC's false

balance allegations. *See Infurna v City of New York*, 270 AD2d 24, 24 (1st Dept 2000) (finding the proposed causes of action were "time-barred and not saved by the relation back exception" where "[p]laintiff's original allegations of negligence in the maintenance or use of bed guard rails did not give notice of the present allegations that defendant's employees attacked the decedent"); *see also US Bank N.A. v Gestetner*, 103 AD3d 962, 965 (3d Dept 2013) (finding that, while the allegations of the previous complaint, which sough foreclosure of mortgage, gave rise to the new claims for equitable mortgage and unjust enrichment, "nothing in the original complaint gave notice of the conduct that plaintiff now alleges constituted a fraudulent scheme"). Therefore, the portion of the GBL § 349 claim relating to false balance information is dismissed as time-barred to the extent it relates to overdraft fees incurred more than three years before September 10, 2014, the filing of the PSAC.

In addition, plaintiffs fail to state a GBL § 349 claim to the extent it is premised on BPNA providing plaintiffs with false balance information prior to December 31, 2010. According to the SAC, BPNA began providing false balance information "on or after December 31, 2010." SAC, ¶ 68. As plaintiffs do not allege that this practice caused them injury prior to that date, the GBL § 349 claim is dismissed to that extent for failure to state a claim. *See Stutman*, 95 NY2d at 29.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent of dismissing those portions of the second cause of action of the second amended complaint that seek recovery for overdraft charges resulting from false account balance information, incurred more than three years before September 10, 2014, and the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the second amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a ~~[preliminary]~~ [status] conference in Room 218, 60 Centre Street, on March 1st, 2016, at 2:30 ~~a.m.~~/p.m.

Dated: 2/13/16

ENTER:

J.S.C.