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| Oppedisano v D' Agosttno |
| 2017 NY Slip Op 32882(U) |
| September 22, 2017 |
| Supreme Court, Queens County |
| Docket Number: 3277/16 |
| Judge: Jr., Rudolph E. Greco |
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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.
Justice

IAS Part 32

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MAURIZIO OPPEDISANO, DISARO TRUCKING INC.
FLUSHING AIRPORT HOLDINGS, AND OTHER JOHN
AND JANE DOE PLAINTIFFS,

Index No. 3277/16

Motion Date: 4/20/17

Motion Seq. No. 2

Plaintiffs,

-against-

HEATHER D'AGOSTINO, ANTHONY D'AGOSTINO,
MARIE BORQUE, JP MORGAN CHASE BANK, FIRST
CENTRAL SAVINGS BANK AND OTHER JOHN AND
JANE DOE DEFENDANTS,

FILED
OCT 02 2017
COUNTY CLERK
QUEENS COUNTY

Defendants.
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The following papers numbered 1 to 34 read on this motion by J.P. Morgan Chase Bank, N. A. ("Chase"), to dismiss the complaint pursuant to CPLR 3211 [a][7], for failure to state a cause of action; CPLR [a][1], based upon documentary evidence; and CPLR 3211[a][5], on the ground that the action was untimely commenced; and cross motion by plaintiffs to amend the complaint.

| | Papers <u>Numbered</u> |
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Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs in this, inter alia, fraud and misrepresentation action, seek damages based upon defendants alleged complicity in a series of unauthorized transactions from plaintiffs' bank accounts and "repeated acts of identity theft in order to access and utilize plaintiffs' bank accounts and merchant credit cards. . ." The original complaint alleges causes of action for (1) fraud and misrepresentation; (2) repayment of loans; (3) unjust enrichment; (4) quantum meruit; (5) fraudulent

inducement; (6) punitive damages; (7) intentional misrepresentation and fraud; (8) conversion; (9) civil RICO liability and (10) negligence.

Chase moves to dismiss the complaint on grounds noted above. Plaintiffs oppose the motion, and cross move for leave to amend the complaint. The cross motion is opposed by Chase.

Facts

The original complaint, filed on or about March 18, 2016, alleges that “defendants” engaged in a series of illicit criminal activities, including inter alia, unauthorized transfers and debits from plaintiffs’ unidentified bank accounts, check fraud, failure to notify plaintiffs of suspicious banking activity and negligent and intentional acts and deceptive practices”. Without specifying which defendant committed which wrongs, the original complaint alleged the ten causes of action against all defendants, as listed above.

The proposed amended complaint alleges the following: Heather D’Agostino (“Heather”), was employed by Oppedisano and Disano from approximately 2008 to 2015, as a bookkeeper/office worker, and that her husband Anthony D’Agostino (“Anthony”), was an employee of Chase; and that from 2009 to 2013, the D’Agostinos executed a series of illegal and unauthorized transactions from the Oppedisano and Disano bank Accounts held at Chase. These alleged unauthorized transactions included: (i) unauthorized online transfers made by Heather from the Disano Accounts to an account belonging to Flushing Airport, which she then, aided and abetted by Anthony, siphoned for the D’Agostinos’ own use; (ii) unauthorized book transfers from the Disano Account ending in 7234 directly to “transfer debit a/c Heather C. D’Agostino Maspeth NY; (iii) unauthorized online transfers made by Heather, aided by Anthony, from the Disano Account ending in 7234 directly to an account held by Flushing Airport, which Heather then, aided and abetted by Anthony, siphoned for the D’Agostino’s own use; (iv) unauthorized checks written by Heather or to another payee from whose account she would then siphon funds; and (v) unauthorized payments from the Disano Account ending in 7234 to Amex and Verizon (all collectively referred to herein as the “Alleged Unauthorized Transactions”). Plaintiffs contend that the Alleged Unauthorized Transactions, which occurred from January 2009 to February 2013, total \$211,097.54.

The proposed amended complaint and the original complaint allege that in or about 2008, Heather borrowed \$10,000 from plaintiffs Maurizio Oppedisano and Disano Trucking, Inc., promising to repay the loan in full within three months. In the middle of 2008, Heather informed Oppedisano that she would not be able to repay the above-mentioned loan as agreed. She thereupon entered into a verbal agreement with Oppedisano to perform various clerical and miscellaneous office services for Disano Trucking, Inc., including bookkeeping on an as-needed basis, ranging from part-time to full-time, until the loan was repaid in full.

From 2008 until 2015, plaintiffs made a series of additional loans to Heather and Anthony, including but not limited to a loan of \$8,000 in or about 2008 and a loan of \$11,000 in or about 2015. Thereafter, from 2009 to 2013, Heather and Anthony “engaged in a series of illicit criminal activity,” which included unauthorized transactions from “plaintiffs’ bank accounts,” and “repeated

acts of identity theft in order to access and utilize plaintiffs' bank accounts and merchant credit cards including but not limited to Alma Bank, First Central Savings Bank, Chase Bank, Visa and American Express." Plaintiffs also allege that "defendants were negligent in protecting plaintiffs' personal financial information and . . . failed to notify plaintiffs [sic] of suspicious banking activity."

Chase's records reveal that Disano Trucking, Inc. (Disano), maintained two business checking accounts with Chase accounts ending in 7234 and 6064 (the "Disano accounts"), which accounts were closed on or about October 2013 and September 28, 2011, respectively. Similarly, Maurizio Oppedisano previously maintained a personal checking account ending in 5366 ("Oppedisano Account"), which was closed on or about April 25, 2013. Chase's records further reflect that, in connection with opening the Oppedisano Account in 2001 and the Disano Accounts in 2004, Oppedisano executed signature cards acknowledging receipt of the Account Agreements and agreeing to be bound by their terms. In or around March 2007, Chase acquired these accounts from the Bank of New York, now known as "The Bank of New York Mellon." Letters were then sent to plaintiffs advising them that, as of March 23, 2007, plaintiffs accounts would be governed by the applicable customer agreements. The customer agreements were enclosed with the notice. Specifically, the customer agreement sent to Oppedisano stated that:

"This agreement governs personal deposit accounts identified in this Deposit Account Agreement at JPMorgan Chase Bank, N.A. ("the Agreement"). By signing a service application, deposit account signature account, or by otherwise opening or maintaining a check, [or] savings . . . account with us, you accept and agree to be bound by the terms and conditions of this Agreement."

The customer agreement sent to Disano stated that:

"This agreement governs business deposit accounts identified in this Deposit Account Agreement at JPMorgan Chase Bank, N.A. ("the Agreement"). By signing a service application, deposit account signature account, or by otherwise opening or maintaining a checking, [or] savings . . . account with us, you accept and agree to be bound by the terms and conditions of this Agreement."

Furthermore, the Account Agreements stated, in relevant part, that plaintiffs must notify Chase, "in writing within thirty [30] days after 'Chase mail[s] a statement or otherwise make[s] a statement available. . . if . . . [an] item [plaintiffs] did not authorize or that is altered is listed in the statement' ("the Notification Requirements"). The Account Agreements specifically stated that, if plaintiffs fail to comply with the Notification Requirements, Chase is not obligated to reimburse plaintiffs, "for any claimed loss, and [plaintiffs] cannot bring any legal claim against [Chase] in any way related to the item or errors."

Under the Account Agreements, *online transfers* were subject to Federal Reserve Board Regulation E ("Regulation E"), which was codified in the Agreements. Thus, the Account Agreements provided, in accordance with Regulation E, that [Chase] must hear from [plaintiffs] no later than sixty (60) days after [Chase] sent [plaintiffs] the first statement on which the error

appeared.” Finally, the Account Agreements provide that “[plaintiffs] must file any lawsuit or arbitration against [Chase] within two (2) years after the cause of action arises.”

Chase submitted the affidavits of its Executive-Director-Operations Manager, a managing director business operations executive and a market-director, vice president, indicating the following: that monthly account statements for the Oppedisano and Disano accounts were delivered and available to Oppedisano and Disano, respectively, during the time period when the alleged unauthorized transactions occurred, up until the time that the Oppedisano and Disano accounts were closed in 2011 and 2013, respectively; and that at no time did Oppedisano and or Disano notify Chase, in writing, of any unauthorized transaction since the dates they occurred, through the date of the commencement of the instant action on March 18, 2016. Plaintiffs do not dispute that they failed to provide Chase with written notification of any of the Alleged Unauthorized Transactions at issue before the commencement of the instant action.

Discussion

Law Governing Dismissal

Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction,” and “the facts as alleged in the complaint [are presumed] as true” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; see also *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), “factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration” (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citation omitted], *lv denied* 80 NY2d 788 [1992]; see also *Caniglia v Chicago Tribune–N.Y. News Syndicate*, 204 AD2d 233 [1st Dept 1994]).

In order to prevail on a motion to dismiss based upon documentary evidence, the movant must demonstrate that the documentary evidence conclusively refutes the plaintiff’s claims (*AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582 [2005]). Thus, dismissal is warranted where documentary evidence establishes that “the allegations of the complaint fail to state a cause of action” (*L.K. Sta. Group, LLC v. Quantek Media, LLC*, 62 AD3d 487, 491 [1st Dept 2009]; see e.g. *Hallman v. Kantor*, 72 AD3d 895, 896 [2d Dept], *lv denied* 15 NY3d 706 [2010] [granting motion to dismiss where clear language in the retainer agreement “conclusively established a defense to the plaintiff’s claims of malpractice”]).

CPLR 3211 [a][5] provides that “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that. . .the cause of action may not be maintained because of . . . [the] statute of limitations. . .”

Applicable Contract and Law

Briefly, before enactment of the Uniform Commercial Code and its predecessor statutes, common law governed the relationship between a bank and its depositors. A depositor was under a duty to exercise reasonable care to examine returned checks and verify statements in order to detect forgeries (*Frank v Chemical National Bank of New York*, 84 NY 209 [1881]; see *Critten v Chemical National Bank*, 171 NY 219 [1902]; *Morgan v. U.S. Mtge. & Trust Co.*, 208 NY 218 [1913]. If the

depositor neglected his duty and failed to notify the bank of forgeries within a reasonable time, any loss that ensued as a result of such negligence was borne by the depositor, provided that the bank was free from contributory negligence (*Screenland Magazine, Inc. v National City Bank of N.Y.*, 181 Misc. 454 [S.Ct. NY Cnty 1943]; *Thomson v New York Trust Co.*, 266 AD 384 [1st Dept 1943]; *Gutfreund v East Riv. Nat. Bank*, 251 NY 58 [1929]).

The depositor's common law duty has been codified by the Uniform Commercial Code as follows:

[A] customer must exercise reasonable care and promptness to examine the statement and the items to discover his unauthorized signature ... and must notify the bank promptly after discovery thereof. U.C.C. Section 4-406(1).

In accord with its broad purpose of facilitating commercial relationships and curtailing litigation, the Code has modified the common law rule in a number of ways. First, the Code adopted bright line distinctions which minimize the need for testimonial proof and exhaustive fact-finding. Where a customer has not fulfilled his duty to the bank, the customer can be precluded, under certain circumstances, from asserting an unauthorized signature or alteration provided that the bank used ordinary care. UCC 4-406(2)-(3). Moreover, a customer who fails to report an unauthorized signature or alteration within one year is statutorily precluded from asserting such claim notwithstanding the bank's negligence. UCC 4-406(4).

These provisions are not exclusive. Given the Code's effort to harmonize the law with its view of commercial reality, and in accord with traditional common law notions of freedom of contract, the Code permits parties to a contract of deposit to agree between themselves as to their duties, and the legal consequences to flow from breach, provided that the agreement does not disclaim the bank's responsibility for its own lack of good faith or failure to exercise ordinary care. U.C.C. 4-103(1), 1-102(3). Thus, the contract of deposit may include conditions precedent or the equivalent of a shortened statute of limitations (See *New York Credit Mens' Adjustment Bureau, Inc. v Manufacturers Hanover Trust Co.*, 41 AD2d 912 [1st Dept 1973]), as long as they are not unconscionable or manifestly unreasonable, or the product of overreaching. See Official Comment to UCC 4-103. Neither provision constitutes an unlawful disclaimer of the bank's liability. The subparagraphs do not absolve the bank of its duty to use good faith and ordinary care. Moreover, unlike a classic covenant not to sue, the deposit agreement does not absolutely bar the depositor from suit and does not excuse liability *in futuro* (See *gen. Colton v. New York Hospital*, 98 Misc.2d 957 [S.Ct. NY Cnty 1979]). A condition precedent does limit an aggrieved party's claim because it requires that party to first perform a specified act prior to commencing an action. Long known to the common law, conditions precedent are consistent with the goals of the U.C.C. and general public policy. They encourage investigation and preservation of evidence, and may even obviate the need for litigation, by promoting early settlement and preventing repetition of offending conduct. See Chase, *Civil Litigation in New York*, pgs. 317-318.

Similarly, a contractual shortening of a statute of limitation also limits a plaintiff's right of action because it requires him to act more quickly than the law would have otherwise permitted.

Generally intended to prevent stale claims which are difficult to defend, a shortened period encourages vigilance by both parties to a deposit contract, thus making continued fraud or wrongdoing less likely. As long as it is reasonable, and otherwise conforms with the requisites of contract law, such a shortened period of limitation is legally valid (CPLR 201; *Wayne Drilling & Blasting Inc. v Felix Industries Inc.*, 129 AD2d 633 [2d Dept.1987]; see McLaughlin, Commentary to McKinney's CPLR C201:2.

Conditions precedent and shortened periods of limitation similar to those at issue here have been routinely accepted in the banking relationship, usually without extensive analysis (see *New York Credit Men's Adjustment Bureau v Manufacturers Hanover Trust Co.*, 41 AD2d 912, *supra*; *Cohen v Manufacturers Hanover Trust Co.*, 144 NYS2d 366 [S. Ct. NY Cnty 1955]). "Such provisions are not only compatible with statute and case law; they are in accord with public policy by limiting disputes in a society where millions of bank transactions occur every day" (*Gluck v JPMorgan Chase Bank*, 12 AD3d 305, 306 [1st Dept 2004]).

Condition precedent

Applying the above-noted principles to the facts at hand, plaintiffs in the first instance waived their right to bring this action against the defendant Chase by failing to timely notify Chase of the unauthorized withdrawals after the account statements itemizing these transactions were made available to them, as required by the deposit account agreements (see *Catalano v Mar. Midland Bank*, 303 AD2d 617, 618 [2d Dept 2003]; *Marino, Ltd. v Bank of N.Y.*, 250 AD2d 485 [1st Dept 1998]; *Radon Constr. Corp. v Colwell*, 248 AD2d 366 [2d Dept 1998]; *Qassemzadeh v IBM Poughkeepsie Empls. Fed. Credit Union*, 167 AD2d 378 [2d Dept 1990]; *Retail Shoe Health Commn. v Manufacturers Hanover Trust Co.*, 160 AD2d 47 [1st Dept 1990]). It is well settled that parties may impose conditions precedent, and such provisions have been routinely enforced in New York (see *Clemente Bros. Contracting Corp. v Hafler-Milazzo*, 100 AD3d 677 [2d Dept 2012]).

The law in New York is well settled that contractual provisions, such as the ones contained in the Deposit Agreement, providing for an abbreviated notification period as a condition precedent to liability, are enforceable (see e.g., *Royal Arcanum Hosp. Assoc. of Kings Cty, Inc. v Herrnkind*, 35 Misc3d 1205(A) [Sup. Ct. Kings. Cty. Mar. 28, 2012], *aff'd*, 113 A.D.3d 672 [2d Dept 2014] (noting the contractual obligation of the customer to timely report unauthorized transactions following the transmittal of the monthly statement); *Bloch v. Bank of America Corp.*, 2011 WL 4542719 [SDNY Sept. 30, 2011], *aff'd*, 479 Fed Appx 399 [2d Cir 2012] (enforcing a nearly identical 60 day notice provision contained within a separate Bank of America Deposit Agreement stating, in part: "If you do not notify us in writing of suspected problems or unauthorized transactions within 60 days after we send your statement or items, or otherwise make them available, you agree that you cannot make a claim against us relating to the unreported problems or unauthorized transactions..."); *Gluck v JP Morgan Chase Bank*, 12 AD3d 305, 306 [1st Dept 2004] (upholding 60 day written notice requirement in bank's deposit account agreement); *Josephs v Bank of New York*, 302 AD2d 318, 318 [1st Dept 2003] (upholding trial court's dismissal of plaintiffs claims as barred by 30 day notice provision in bank's checking account rules); *Catalano v. Marine Midland Bank*, 303 AD2d 617, 618 [2d Dept 2003] (finding plaintiffs waived their right to bring an action against the bank by failing

to notify the bank of the unauthorized withdrawals within 14 days after the account statements itemizing the suspect transactions were made available to them, as required by the deposit account agreement); *Retail Shoe Health Commission v. Manufacturers Hanover Trust Company*, 160AD2d 47 [1st Dept 1990](holding that a six month written notice requirement and an 18 month lawsuit commencement provision contained in the bank's customer agreement were enforceable conditions precedent to suit).

Indeed, notification requirements as short as 14 days have been upheld as valid conditions precedent to suit so long as the provisions do not disclaim the bank's liability nor absolve the bank of its duty to use good faith and ordinary care (*Catalano*, 303 AD2d at 617) (summary judgment affirmed for defendant bank as plaintiffs waived their right to bring action against the bank by failing to notify the bank of the unauthorized withdrawals within 14 days after the account statements itemizing these transactions were made available to them, as required by the deposit account agreement); *Parent Teacher Ass'n v. Public School 72*, 138 Misc 2d 289 [NY City Civ. Ct. Bronx County 1988] (depositor failed to give written notice of irregularities to the bank within 14 days after delivery of bank statements as required by the deposit agreement); *cf.*, *Royal Arcanum Hosp. Assoc. of Kings Cty., Inc. v Herrnkind*, 2012 N.Y. Misc. Lexis 1459 (Sup. Ct. Kings Cty. March 28, 2012), *aff'd*, 113 AD3d 672 [2d Dept 2014] (“[a] bank cannot be held responsible for losses caused by a customer's failure to timely examine statement with respect to ATM withdrawals (citing *Kramer v Chase Manhattan Bank*, 235 AD2d 371 [1st Dept 1997]). As observed by the Court of Appeals in *Woods v MONY Legacy Life Ins. Co.*, 84 NY2d 280, [1994], because the depositor is in “the better position to discover an alteration of the check or forgery of his or her own signature, the absolute time limit places the burden on the depositor to examine the statement and items with reasonable promptness.” [T]here is little excuse for a customer not detecting an alteration of his own check or a forgery of his own signature (quoting NY UCC 4-406 Comment 5).

Finally, these contractual provisions are enforced without any regard to whether or not the bank was negligent (*Parent Teacher Ass'n, Pub. School 72 v Manufacturers Hanover Tr. Co.*, 138 Misc 2d 289 [Civ Ct 1988] (finding it was irrelevant whether the bank was negligent or breached the parties' agreement where the depositor failed to comply with a condition precedent which was an element of the depositor's cause of action).

Statute of limitations

Next, even assuming *arguendo*, that plaintiffs' claims are not barred by the Account Agreements, plaintiffs' claims concerning any electronic transfers (which appear to account for the bulk of the alleged unauthorized transactions), are time-barred under the applicable one-year statute of limitations provided in the Electronic Fund Transfer Act (“EFTA”). The EFTA “provides a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund and remittance transfer systems” (15 U.S.C. §1693[b]; *Ognibene v Citibank, N.A.*, 112 Misc2d 219 [Civ. Ct. N.Y. Cnty. 1981]). Under the EFTA, a bank is required to provide a consumer with monthly statements notifying the consumer of the date, amount and payee of all electronic transfers. (15 U.S.C. §1693[c]). A consumer must notify the bank of any unauthorized electronic funds transfer within 60 days of receipt of a monthly statement (see 15 U.S.C. §1693g [a]). After

providing the bank with adequate notice, “the [bank] shall investigate the alleged error, determine whether an error has occurred, and report or mail the results of such investigation and determination to the consumer within ten business days” *Id.*

The EFTA limits customer reimbursements where, as here, such losses “would not have occurred but for the failure of the consumer to report within sixty days of transmittal of the statement . . . of any unauthorized electronic fund transfer” (15 U.S.C. §1693a [a]). Chase’s Agreements codify these requirements. The documentary evidence establishes that Chase provided plaintiffs with monthly statements that reflected the dates, amounts and payees of each of the alleged unauthorized electronic transfers. The undisputed record indicates that plaintiffs’ failed to notify Chase of the same at any point prior to the commencement of the instant action. Under the EFTA, any action concerning unauthorized electronic fund transfers must be commenced “within one year from the date of the occurrence of the violation” (15 U.S.C. §1693m[g]). Here, plaintiffs did not commence the instant action until over six years after the first alleged unauthorized transaction occurred and over three years after the last unauthorized transaction occurred. Accordingly, under the one-year statute of limitations in the EFTA, the complaint was not timely filed and is dismissed.

Plaintiffs seek to assert the doctrine of equitable estoppel to preclude Chase from asserting the statute of limitations defense. The doctrine of equitable estoppel will preclude a defendant from asserting the statute of limitations as a defense “ ‘where it is the defendant’s affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding’ ” (*N. Coast Outfitters, Ltd. v Darling*, 134 AD3d 998, 999 [2d Dept 2015], quoting *Zumpano v Quinn*, 6 NY3d 666, 673 [2006]). A plaintiff seeking to invoke the doctrine of equitable estoppel must “establish that subsequent and specific actions by defendants somehow kept [the plaintiff] from timely bringing suit” (*Zumpano v Quinn*, 6 NY3d at 674). “Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant” (*Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552–553 [2006]). Here, plaintiffs do not allege that Chase’s conduct lulled them into inactivity, or that they were “induced by fraud, misrepresentation or deception to refrain from commencing a timely action” (*John v State Farm Mut. Auto. Ins. Co.*, 116 AD3d 1010, 1012 [2d Dept 2014], citing *Minichello v Northern Assur. Co. of Am.*, 304 AD2d at 732 [internal quotation marks omitted]; see *Garcia v Peterson*, 32 AD3d 992, 993 [2d Dept 2006]; *Brown v Royal Ins. Co. of Am.*, 210 AD2d 279 [2d Dept 1994]). In short, the doctrine of equitable estoppel is inapplicable to bar the statute of limitations defense here, as the plaintiffs did not allege any separate and subsequent act of wrongdoing that prevented them from timely bringing suit (see *Zumpano v Quinn*, 6 N.Y.3d 666, 673–675 [2006]; *Brooklyn Historic Ry. Ass’n v City of New York*, 126 AD3d 837, 839 [2d Dept 2015]).

Cross Motion

The cross motion for leave to amend the complaint is denied.

Pursuant to CPLR 3025(b), “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” As a general proposition, leave to amend pleadings “should be freely

granted” (*RBP of 400 W42 St., Inc. v. 400 W. 42nd St. Realty Assoc.*, 27 AD3d 250, 250 [1st Dept 2006]), although the court retains the sound discretion over whether to permit the amendment (*see Pellegrino v New York City Tr. Auth.*, 177 AD2d 554, 557 [2d Dept 1991]). When the court is presented with a motion to amend the pleadings, “in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted” (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]).

One of the well-settled bases on which to deny a motion to amend is where, as here, the proposed causes of action would be time-barred - either wholly or in part (*see Gonik v Israel Discount Bank*, 80 AD3d 437 [1st Dept 2011] (affirming the Supreme Court's denial of the motion to amend the complaint to add proposed causes of action barred by the statute of limitations); *Stevens v Winthrop S. Nassau Univ. Health Sys., Inc.*, 89 AD3d 835 [2d Dept 2011] (affirming the Supreme Court's denial of a motion to amend the complaint where the action against the proposed additional defendants was barred by the statute of limitations).

Furthermore, a motion for leave to amend in response to a dispositive motion is “futile” and should be denied where, as here, “the defects [in the complaint] are [not] cured by the proposed ... amended complaint” (*Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643, 643 [1st Dept 2013], and/or the proposed amendment “suffers from the same fatal deficiency as the original claims” (“*J. Doe No. 1*” v *CBS Broadcasting Inc.*, 24 AD3d 215, 216 [1st Dept 2005]; *see also CARI, LLC v 415 Greenwich Fee Owner, LLC*, 91 AD3d 583, 583 [1st Dept 2012]; *Pearl Cash, LLC v EMD Produce Corp.*, 2013 WL 3389349 (“[i]f the proposed amended complaint contains the same defects as the original complaint, leave should be denied as futile”)).

Fraud and misrepresentation

Plaintiffs’ claims for fraud and misrepresentation are not remedied by the additional allegations in plaintiffs’ proposed amended complaint. As an initial matter, plaintiffs’ claims are untimely under New York law, separate and apart from the Account Agreement, with regard to any alleged unauthorized transactions that occurred prior to March 18, 2010. Actions based on fraud must be commenced within “the greater of six years from the date the cause of action accrued or two years from the time that plaintiff discovered the fraud, or could with reasonable diligence have discovered it” (CPLR 213[8]). Plaintiffs initiated this action on March 18, 2016. Therefore, any transactions that occurred prior to March 18, 2010 are time-barred under the CPLR.

Furthermore, plaintiffs’ conclusory allegations are insufficient to establish a viable cause of action. To properly plead a common-law fraud claim, a plaintiff must allege a misrepresentation of a material fact, falsity of the misrepresentation, scienter, plaintiff’s reasonable reliance on the alleged misrepresentation, and injury resulting from the reliance (*Small v Lorillard Tobacco Co.*, 94 NY2d 43 [1999]; *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373 [1st Dept 2003]). The absence of any of these elements is fatal to a recovery on a claim for fraud (*Shea v Hambros PLC*, 244 A.D.2d 39 [1st Dept 1998]).

In particular, “CPLR 3016(b) requires that a complaint for fraud articulate the misconduct complained of, in sufficient detail to clearly inform each defendant of what their respective roles were in the incidents complained of” (*Williams v Sidley Austin Brown & Wood, L.L.P.*, 15 Misc.3d 1125[A] [Sup Ct, N.Y. County 2007] [citing *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 A.D.2d at 377; see also *Sherman v Eisenberg*, 267 A.D.2d 29 [1st Dept 1999], *lv dismissed* 94 N.Y.2d 899 [2000]). Hence, “[e]ach of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016(b)” (*Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278 [2d Dept 2001]). Accordingly, dismissal of a claim for fraud is warranted where the requisite elements are not pleaded with sufficient particularity (*Rabouin v Metropolitan Life Ins. Co.*, 307 AD2d 843 [1st Dept 2003]; *Zaref v Berk & Michaels, P.C.*, 192 AD2d 346 [1st Dept 1993]).

Here, plaintiffs have identified no material misstatements on which they reasonably relied. Instead, plaintiffs simply allege, in conclusory fashion, that Chase “misrepresented to [plaintiffs] that it was acting in good faith and in conformity with good banking practices in its management and handling of the [Accounts]”, and in “omitting to disclose that its employee, [Anthony], was engaged in fraudulent acts and embezzlement, which fact [Chase] knew or should have known in the exercise of even the slightest care.” However, plaintiffs fail to identify any specific misstatements on which they reasonably relied, who made them, or when the statements were allegedly made. This lack of specificity warrants dismissal of the fraud claim (see *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278 [2d Dept 2001] [dismissing fraud claim where the “complaint does not contain any allegations setting forth the alleged material misrepresentations”]; *Mountain Lion Baseball v Gaiman*, 263 AD2d 636, 638 [3d Dept 1999] [finding that “plaintiff’s complaint, which fails to set forth the substance of, the dates upon which or the persons to whom the alleged misrepresentations purportedly were made, falls far short of satisfying the pleading requirement imposed by CPLR 3016(b)”]; *Chrysler Credit Corp. v Dioguardi Jeep Eagle*, 192 A.D.2d 1066, 1068 [4th Dept 1993] [finding claim “based upon fraud ... insufficient on its face because defendants have failed to set forth in detail the alleged fraudulent representations”]).

The complaint also does not adequately allege that Chase made a knowingly false representation as to a material fact with the intention of inducing plaintiffs to rely on that representation (see CPLR 3016 [b]; *Brualdi v IBERIA, Lineas Aereas de España, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; cf. *Nationscredit Fin. Servs. Corp. v Turcios*, 55 AD3d 806, 807-808 [2d Dept 2008]).

Aiding and Abetting Fraud

The proposed amended complaint also fails to plead, with the requisite specificity, the elements of the cause of action alleging aiding and abetting fraud as asserted against Chase, including the element of “actual knowledge, and substantial assistance” by Chase in the underlying alleged fraudulent scheme by the other defendants (*Kanterakis v Kanterakis*, 125 AD3d 814, 815–16 [2d Dept 2015]; *Goel v Ramachandran*, 111 AD3d 783, 792 [2d Dept 2013]; see CPLR 3016 [b]; *CDR Creances S.A.S. v First Hotels & Resorts Invs., Inc.*, 101 AD3d 485, 486–487 [2d Dept 2012]). In order to allege a valid claim for aiding and abetting fraud, a plaintiff may not simply assert “allegations which would be sufficient to state a cause of action 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 AD3d 783, *supra*). Instead, “[i]n order to state a legally viable claim for aiding and abetting fraud, plaintiffs must allege, with sufficient particularity, facts demonstrating that defendant had knowledge of the fraudulent nature of the representations and rendered substantial assistance to the principal actor” (*Goldson v Walker*, 65 AD3d 1084, 1085 [2d Dept 2009] (the complaint adequately set forth that he had actual knowledge of the fraud and that he provided substantial assistance to the commission of the fraud, which are essential elements of a cause of action to recover damages for aiding and abetting fraud)). Here, plaintiffs failed to assert specific facts that establish that Chase had actual knowledge of Heather or Anthony’s fraud, or how Chase “substantially assisted” the alleged fraud. Plaintiffs merely allege that Anthony was an employee of Chase, married to Heather, and “aided and abetted” his wife in various fraudulent acts. Plaintiffs provide no details as to how Anthony assisted in the fraud or Chase’s actual knowledge of Heather or Anthony’s misconduct.

Conspiracy to commit fraud

Plaintiffs’ claim for conspiracy to commit fraud is not viable because the State of New York does not recognize an independent cause of action in tort for conspiracy” (*Waggoner v Caruso*, 68 AD3d 1, 6 [1st Dept 2009], *aff’d* 14 NY3d 874 [2010]; *see e.g. Roche v Claverack Coop. Ins. Co.*, 59 AD3d 914, 918 [3d Dept 2009] [“As New York does not recognize an independent cause of action for civil conspiracy to commit a tort, that claim was properly dismissed”]).

Breach of fiduciary duty

Under New York law, a claim for breach of fiduciary duty consists of “the existence of a fiduciary relationship [between plaintiff and defendant], misconduct by defendant and damages that were directly caused by defendant’s misconduct” (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). It is well established that “the underlying relationship between a bank and its depositor is a contractual one of debtor and creditor” (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Chem. Bank*, 57 NY2d 439, 444 [1982]; *Tonelli v Chase Manhattan Bank, N.A.*, 41 NY2d 667, 670 [1977]). Moreover, “[a] debtor-creditor relationship, standing alone, does not create a fiduciary duty of the latter to the former” (*Fallon v Wall St. Clearing Co.*, 182 AD2d 245 [1st Dept 1992]; *see also Greenberg, Tager & Herbst, LP v HSBC Bank USA*, 73 AD3d 571, 572 [1st Dept 2010] (affirming dismissal of “claim against [a] bank for negligent misrepresentation absent a fiduciary relationship, which does not exist between a bank and its customer”). Here, Chase was not in fiduciary relationship with plaintiffs. Plaintiffs merely allege that there was a fiduciary relationship between them and Chase “as depositors and account holders,” which does not create a fiduciary duty. Accordingly the branch of the cross motion which is for leave to amend the complaint to assert a cause of action for breach of a fiduciary duty is denied.

Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiffs’ proposed amended complaint also fails to allege a viable cause of action for breach of the implied covenant of good faith and fair dealing. Within every contract is an implied covenant of good faith and fair dealing (*see Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62 [1976]). This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the

benefits under their agreement (*see Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 [1st Dept 1996]). For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*see Dvoskin v Prinz*, 205 AD2d 661, 662 [2d Dept 1994]). At bar, even the most liberal reading of the amended complaint, shows that plaintiffs fail to sufficiently state a cause of action alleging breach of an implied covenant of good faith and fair dealing (*see, Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513 [2d Dept 1999]; *Components Direct v European Am. Bank & Trust Co.*, 175 AD2d 227 [2d Dept 1991]). Plaintiffs do not allege facts supporting a claim that Chase sought to withhold the benefits of the Account Agreements from plaintiffs or prevented their performance under the Agreements.

Punitive Damages

Plaintiffs have asserted a claim for punitive damages contending that Chase has put the plaintiffs and other members of the public at an unreasonable risk of harm. However, plaintiffs have asserted no facts to justify an award of punitive damages. Their claimed losses are based solely on their own failure to review their account statements. Both the EFTA and the NY UCC place the onus on the customers to review the statements and to promptly report. As the Court of Appeals instructs, punitive damages “are prohibited unless the harmful conduct is intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence” (*McDougald v Garber*, 73 N.Y.2d 246, 254 [1989]). A private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*Rocanova v Equit. Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 [1994]).

Civil RICO

To state a cause of action for damages based on a civil Racketeer Influenced and Corrupt Organizations Act (“RICO”), violation, a plaintiff must plead (1) the defendant’s violation of 18 USC § 1962 *et seq.*, (2) an injury to the plaintiff’s business or property, and (3) that the defendant’s violation of the statute caused the plaintiff’s injury (*see Commercial Cleaning Servs., L.L.C. v Colin Serv. Sys., Inc.*, 271 F3d 374, 380 [2001]; *First Nationwide Bank v Gelt Funding Corp.*, 27 F3d 763, 767 [1994], *cert denied* 513 US 1079 [1995]; *Dempster v Liotti*, 86 AD3d 169, 177–78 [2d Dept 2011]). The ninth cause of action alleging a RICO violation is dismissed because the factual allegations in support thereof were not pleaded with the requisite particularity (*see Grafstein v Schwartz*, 78 AD3d 772, 773 [2d Dept 2010]; *Joyce v JJF Assoc., LLC*, 8 AD3d 190 [1st Dept 2004]; *CFJ Assoc. of N.Y. v Hanson Indus.*, 274 AD2d 892, 896 [3d Dept 2000]; *United Knitwear Co. v North Sea Ins. Co.*, 203 AD2d 358 [2d Dept 1994]; *Ritchie v Carvel Corp.*, 180 AD2d 786 [2d Dept 1992]).

Gross Negligence

Plaintiffs’ factual allegations also do not support a claim for gross negligence. Gross negligence “differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing” (*Colnaghi U.S.A., Ltd. v Jewelers Prot. Servs., Ltd.*, 81 NY2d 821, 823-24 [1993]). In the absence of such

allegations, gross negligence claims should be dismissed (*see e.g., Rotterdam Ventures, Inc. v Ernst & Young LLP*, 300 AD2d 963, 965 [3d Dept 2002] (affirming the dismissal of plaintiff's claim pursuant to CPLR 3211); *Apple Bank for Savs. v PricewaterhouseCoopers LLP*, 70 AD3d 438, 438 [1st Dep't 2010] (reversing Supreme Court and finding that defendant's conduct could not arise to gross negligence, as it did not "smack[] of intentional wrongdoing") (*quoting Colnaghi*, 81 N.Y.2d at 824) (alteration in original)).

In the proposed amended complaint, plaintiffs assert that Chase's "failure to recognize and halt the conduct of its employee, Anthony D'Agostino, from using his position at Chase, to facilitate, disguise and conceal the embezzlement by Heather D'Agostino, constituted reckless disregard of and indifference to the rights of plaintiffs, a failure to exercise even slight care or the actual knowledge of Chase." This contention, unsupported by any factual allegations of conduct evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing, is insufficient to state a cause of action alleging gross negligence (*see Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]; *Mancuso v Rubin*, 52 AD3d 580, 583 [2d Dept 2008]; *Gluck v JPMorgan Chase Bank*, 12 AD3d 305, 306 [1st Dept 2004]; *Sutton Park Dev. Corp. v Guerin & Guerin Agency*, 297 AD2d 430, 431 [2d Dept 2002]; *cf. Calisch Assoc. v Manufacturers Hanover Trust Co.*, 151 AD2d 446 [1st Dept 1989]; *Lubell v Samson Moving & Stor.*, 307 AD2d 215, 216-217 [2d Dept 2003]).

In *Rotterdam Ventures, Inc.*, the court dismissed plaintiff's claim for gross negligence premised on the defendant's failure to detect "red flags" related to four transactions, thereby (according to plaintiffs) violating GAAS and misrepresenting the financial viability of the company (300 AD2d 963, 965 [3d Dept 2002]). The court dismissed the claim because "plaintiffs [did] not allege any facts suggesting that defendant was aware of the alleged problems associated with the foregoing transactions" and "the mere conclusory assertion of recklessness and intent . . . , appended to the identical set of facts as are alleged in the negligence claim," do not state a claim for gross negligence (*Id.*) Similarly here, Plaintiffs' conclusory assertion that Chase "recklessly" permitted the embezzlement to occur, unsupported by any factual allegations of conduct evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing, is insufficient to state a cause of action alleging gross negligence (*see Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]; *Mancuso v Rubin*, 52 AD3d 580, 583 [2d Dept 2008]). Thus, Plaintiffs' cause of action for gross negligence is dismissed.

Conclusion

The motion to dismiss the complaint is granted.

The cross motion to amend the complaint is denied.

Dated:

Sept. 22, 2017


Rudolph E. Greco, Jr., J.S.C.

