

Newman v HSBC Bank USA, N.A.

2019 NY Slip Op 32398(U)

August 9, 2019

Supreme Court, New York County

Docket Number: 151764/2016

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 151764/2016

MICHAEL NEWMAN and LINDA NEWMAN,

MOTION DATE 04/10/2019

Plaintiffs,

MOTION SEQ. NO. 002

- v -

HSBC BANK USA, N.A.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83

were read on this motion to/for JUDGMENT - SUMMARY

Motion by Defendant HSBC Bank USA, N.A. ("HSBC") pursuant to CPLR 3212 for summary judgment dismissing the amended complaint is granted and the action is dismissed.

BACKGROUND

This action arises out of a banking relationship between HSBC and the Plaintiffs Michael and Linda Newman dating back to 2001. The facts herein are taken from the moving papers, the amended complaint, and the affidavit of Michael Newman.

Between 1980 and 2001, the Newmans were owners of the Card Rack, Inc. In connection with a commercial lease, the Newmans obtained from Republic National Bank (Republic) a \$25,000 letter of credit and a \$300,000 line of credit and deposited approximately \$500,000 worth of stock certificates into an account as collateral for the line of credit and letter of credit.

In 1999, Republic was acquired by HSBC and the collateral account was converted into a brokerage account ending in 0383 (the "Securities Account"). As the Card Rack business wound down, in 2001, the Newmans attempted to cancel the letter of credit unsuccessfully. In 2003, the Newmans made a second attempt to cancel the letter of credit by sending a letter stating that the letter of credit was to be canceled and included the original letter of credit in its mailing. HSBC failed to do so for reasons that are unknown.

In December 2006, the line of credit having been cancelled, HSBC agreed to release the contents of the Securities Account on the condition that the Newmans deposit \$25,000.00 into an HSBC savings account (the "Bank Account") as collateral for the letter of credit. The Newmans complied and deposited the funds into an account ending in 7785, whereupon the contents of the Securities Account were transferred to the Newmans' brokerage account at Charles Schwab Co.

On September 26, 2006, the Newmans made a second attempt to terminate the letter of credit and to obtain the funds in the Bank Account that were being held as collateral for the letter of credit. HSBC failed to comply with this request for unknown reasons, prompting Michael Newman to commence an action against HSBC in December 2011, entitled *The Card Rack Inc. and Michael Newman v HSBC Bank USA and Boston Properties Ltd.*, under index no. 114241/2011, which was ultimately abandoned for failure to serve a complaint.

On March 2, 2016, the Newmans commenced the instant action. The amended complaint asserts causes of action for conversion, breach of contract, unjust enrichment, attorney's fees, and punitive damages arising from the improper restraint of the Securities Account and the Bank Account after discovering that all the funds in the Bank Account were notated as a "pending miscellaneous debit."

On May 10, 2016, and October 26, 2017, HSBC notified the Newmans that there were no restrictions on the Bank Account and that the funds were readily accessible. Michael Newman confirmed during his deposition that he has since obtained access to the funds, has made substantial withdrawals, and that he continues to use the Bank Account.

HSBC now moves for summary judgment dismissing the amended complaint. HSBC argues that the Newmans' causes of action are time barred by the statute of limitations and that the causes of action are moot because (1) the Securities Account has been closed as of 2006 and (2) the funds in the Bank Account were released to the Newmans in May 2016. The Court heard oral argument on April 10, 2019.

DISCUSSION

"Summary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law, thereby avoiding needless litigation cost and delay" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). The party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* [citation omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.* [citation omitted]).

With respect to the Securities Account, HSBC contends the latest date that the causes of action could have accrued was in 2006 when HSBC released the contents of the Securities Account to the Newmans. With respect to the Bank Account, the Newmans' causes of action accrued in 2006, when the Newmans demanded the release of the funds in the Bank Account and HSBC failed to act. The Newmans did not file the instant action until 2016, over 10 years later. As a result, the three-year statute of limitations for conversion and the six-year statute of limitations for breach of contract and unjust enrichment have long since expired.

This Court agrees and finds that the Newmans' causes of action for conversion, breach of contract, and unjust enrichment are time-barred under the relevant statutes of limitations.

Under New York law, a cause of action for conversion is subject to a three-year statute of limitations (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]). Furthermore, “[b]reach of contract actions are subject generally to a six-year statute of limitations” (*Chase Scientific Research. v NIA Group*, 96 NY2d 20, 25 [2001] [citation omitted]). New York law, does not identify a “statute of limitations period within which to bring a claim for unjust enrichment, but where, as here, the unjust enrichment and breach of contract claims are based upon the same facts and pleaded in the alternative, a six-year statute of limitations applies” (*Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [2013] [citation omitted]).

Thus, to the extent any of the Newmans' claims arise from the Securities Account and the Bank Account, those claims accrued in 2006 upon HSBC's first failure to comply with the Newmans' demands to release its contents and cancel the letter of credit. While it is undisputed that HSBC did not release the contents of the Bank Account until the Newmans filed the instant action in 2016, by then the causes of action were over 10 years old and already barred by the statute of limitations.

Furthermore, the continuing wrong doctrine is not applicable to preserve the Newmans' claims by extending the relevant statutes of limitation. “The continuous wrong doctrine is an exception to the general rule that the statute of limitations runs from the time of the breach though no damage occurs until later” (*Henry v Bank of Am.*, 147 AD3d 599, 601–2 [1st Dept 2017] [internal quotation marks and citation omitted]). “The doctrine is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act” (*id.* [internal quotation marks and citation omitted]). If the continuing wrong doctrine applies, it “will save all claims for recovery of damages but only to the extent of wrongs committed within the applicable statute of limitations” (*id.* [internal quotation marks and citation omitted]).

The application of the doctrine must “be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct” distinguishing “between a single wrong that has continuing effects and a series of independent, distinct wrongs” (*id.* [internal quotation marks and citation omitted]). Furthermore, a tort cause of action accrues when the wrongful act injures the plaintiff and does not change as a result of continuing consequential damages (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1032 [2013] [The court did not apply the continuing wrong doctrine even though the plaintiffs alleged ongoing injury to their property, finding that the wrongful acts were committed over 20 years ago during the construction of a sewer]).

In the instant action, the Newmans' cause of action for conversion and breach of contract accrued, and the applicable statutes of limitations began to run, when HSBC first failed to comply with the Newman's demands in 2006 and that “accrual date does not change as a result of continuing consequential damages” (*New York Seven-Up Bottling Co. v Dow Chem. Co.*, 96 AD2d 1051, 1052 [2d Dept 1983], *affd* 61 NY2d 828 [1984]). Furthermore, a cause of action for breach of contract accrues at the time of breach, even if no damage occurs until later (*Ely-*

Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 402 [1993]). That the Newmans were subject to continuing effects of HSBC's wrongful act in 2006, does not equate to a continuing series of wrongs by HSBC that would render the continuing wrong doctrine applicable and toll the statute of limitations.

With respect to the issue of the pending miscellaneous debit that was placed on the funds in the Bank Account, there is no evidence that the funds were ever debited from the Bank Account and the Newmans do not allege that the funds were ever removed from the Bank Account. Even presuming that the funds were restricted by the pending miscellaneous debit notation, the Newmans fail to identify any damages arising from the alleged restriction on the funds to sustain their causes of action beyond except for potential lost profits on unidentified stock investments which are not compensable (*Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986] ["the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes"]) [internal quotation marks and citations omitted]).

Plaintiffs in their papers ask that the Court look to the so-called "Rules for Deposit" submitted by HSBC and find that, at minimum, Plaintiffs are entitled to damages described therein. The Rules of Deposit provide that the account holder agrees that "[i]f [HSBC's] conduct results in an inappropriate delay of transfer or withdrawal, [HSBC's] liability as liquidated damages and not as a penalty[] shall be an amount equal to the interest, at the Federal Funds rate, payable on the amount of the funds which were directed by you to be transferred in the Payment Order for the period [of] the delay." Nevertheless, this argument fails, as it is conceded by plaintiff Michael Newman in his affidavit that he "never agreed to Defendant's Rules of Deposit [], as I originally contracted with Republic National Bank." (Aff ¶ 26.)

As such, the Newmans have failed to raise a triable issue of fact to defeat HSBC's entitlement to summary judgment based on the statute of limitations (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] ["to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact"]).

Consequently, the first cause of action for conversion, the second cause of action for breach of contract, and the third cause of action for unjust enrichment are dismissed as time-barred. The fourth cause of action for attorney's fees is dismissed as well as the Newmans fail to identify an agreement or statute for the basis of such an award (*Eida v Bd. of Mgrs. of 135 Condo.*, 166 AD3d 561, 562 [1st Dept 2018]). The fifth cause of action for punitive damages is dismissed because the Newmans fail to present any evidence of willful misconduct that would provide a basis for granting punitive damages (*U.S. Tr. Corp. v Newbridge Partners, LLC*, 278 AD2d 172, 172 [1st Dept 2000] ["Punitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton"]) and because punitive damages is not a separate cause of action (*Gregor v. Rossi*, 120 A.D.3d 447, 449, 992 N.Y.S.2d 17, 20 [2014]). Based on the foregoing, this court does not need to determine if the causes of action would otherwise be moot.

As a result of the dismissal of the Complaint, the portion of HSBC's motion seeking to strike the jury demand is dismissed as academic (*Zisholtz v Bank of N.Y.*, 171 AD2d 745, 746 [2d 1991]).

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendant HSBC Bank USA, N.A. ("HSBC") pursuant to CPLR 3212 for summary judgment dismissing the amended complaint is granted and the action is dismissed; and it is further

ORDERED that, within 10 days of the NYSCEF filing date of the decision and order on this motion, movant shall upload a copy of the April 10, 2019 oral argument transcript to NYSCEF; and it is further

ORDERED that, within 10 days of the NYSCEF filing date of the decision and order on this motion, movant shall serve a copy of this order with notice of entry on Plaintiffs and on the clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

8/9/2019
DATE

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE


~~HONORABLE ROBERT D. KALISH, J.S.C.~~