SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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HOWARD LEVITZ,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 63691/2017

NEW YORK COMMUNITY BANCORP, INC.
D/B/A NEW YORK COMMERCIAL BANK,

Defendants.

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COLANGELO, J.

The following papers were read on Plaintiff's motion for an Order pursuant to CPLR §3212 granting summary judgment:

	NYSCEF
Notice of Motion-Affidavit-Affirmation-Exhibits A-N	24-40
Opposition-Affirmation-Affidavit-Exhibits A-K	
Memorandum of Law	46-59
Reply Affirmation-Affidavit-Exhibits a, x	60-63

Upon the foregoing papers it is ORDERED that the motion is disposed as follows:

This is an action by Plaintiff Howard Levtiz ("Plaintiff") to recover monetary damages as a result of Defendant New York Community Bancorp, Inc. d/b/a New York Commercial Bank's allegedly unauthorized wire transfer of $84,700.00 form the Plaintiff's escrow account. A copy of the Summons and Verified Complaint, Defendant's Verified Answer and Counterclaim and Plaintiff's Reply to the Counterclaim, *inter alia*, are attached as Exhibits to the instant motion. (Pl. Exhs. I, J, & K, respectively). Plaintiff's Affidavit in Support ("Levitz Aff.") and the Affirmation of Glen Curtis, Esq. ("Curtis Aff.") are submitted in support of the instant motion.

Plaintiff is an 84 year old attorney duly licensed to practice law in the State of New York. His operating and escrow accounts were maintained at Allied Irish Bank, which was taken over by Atlantic Bank and then by Defendant. His accounts were transferred and continue to be held under the name of Defendant. (Levitz Aff., ¶¶3,4). As he began to wind down his law practice in New York City and operate out of his home in Westchester County, his banking business was conducted at the Yonkers Branch located at 2320 Central Avenue (the "Branch")(*Id.* ¶5). On June 5, 2015, Plaintiff opened the subject Escrow Account at the Yonkers Branch. A Funds Transfer Agreement and Authorization to Act upon Instructions Transmitted by Telephone, Facsimile or Electronic Mail Communication ("the Agreement") was executed by Plaintiff and a Branch representative on that date. (*Id.* ¶7).

The Handling Procedure outlined in paragraph 5 (a) of the Agreement provided for the following to occur before a wire transfer was made from Plaintiff's account: "(a) Each Facsimile Communication or Email Communication shall be sent to the Business Account Representative at the Bank Branch primarily responsible for servicing the Business and shall be manually signed and contain sufficient information to effect the instructions . . .(b) Upon receipt of a Facsimile Communication or Email Communication containing a signature, the Bank will compare the signature of the Authorized Person with the exemplar of such signature contained in Exhibit A (emphasis in original) on file with the Bank. Then, if the Bank, in its sole discretion, determines that the Authorized Person's signature compares favorably with the signature on record, the Bank will place a Telephone Call-Back to the same Authorized Person who initiated the Facsimile or Email Communication . . . in order to confirm that the Facsimile Communication or Email Communication was sent by Business."

According to Plaintiff, on July 28, 2016 at 9:00AM, Defendant and specifically branch manager Victoria Conti received a fraudulent email (i.e. one not sent by Plaintiff) requesting a wire transfer from Plaintiff's purported account ending in 0445. (Pl. Exh. B). The account maintained at Defendant's branch ended in 4445. (Levitz Aff., ¶13). A further fraudulent email was sent to Ms. Conti on July 28th , purportedly but not actually by Plaintiff which requested that "[o]nce you complete the transfer would you please email me a copy of the wire information so I can forward up with the client." Branch manager Conti replied to the email as follows, "Just send the instructions and I will follow . . ." (Pl. Exh. C). Plaintiff contends that Ms. Conti should have been alerted that the transfer was fraudulent. (Levitz Aff., ¶14,15). Plaintiff maintains that he received a telephone call from Bank representative Carleen Glenn who indicated that his account was overdrawn "because of the wire." Neither Ms. Glenn nor anyone on Defendant's behalf contacted Plaintiff to confirm the amount of the wire, the recipient bank or the date or origination. (*Id.* ¶18). The unauthorized wire transfer appeared on Plaintiff's bank statement dated July 29, 2016. (*Id.* ¶23; Pl. Exh. G).

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

"[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded

reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

It is well established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341 (1974); *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

If and only if the "moving party carries this initial burden of making a prima facie showing of entitlement to judgment as a matter of law, does the burden shift to the opposing party to come forward with evidence showing an issue of fact." *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986).

However, "[S]ummary judgment is a drastic remedy that 'should not be granted where there is any doubt as to the existence of a triable issue' (*Russell v A. Barton Hepburn Hosp.*, 154 A.D.2d 796, 797 [3rd Dept. 1989] *quoting Moskowitz v Garlock*, 23 A.D.2d 943, 944 [3rd Dept. 1965]). "In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court." *Russell v A. Barton Hepburn Hosp.*, 154 A.D.2d 796, 797 (3rd Dept. 1989). "While summary judgment is available in some cases, its dire effects preclude its use except in 'unusually clear' instances." *Barber v. Cornell University Co-op. Extension of Orange County,* 37 Misc.3d 1217(A) (Sup. Ct, Orange County 2012; *see also Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County, 1941). "A remedy which precludes a litigant from

presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a day in court.'" *Barber v. Cornell University Co-op. Extension of Orange County, quoting Danger v. Zea*, 45 Misc. 2d. 93, 94, (Sup. Ct., Albany County, 1965), *aff'd* 26 A.D.2d 729 (3rd Dept.1966). "Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or 'fairly debatable,' summary judgment must be denied." *Bayesian v. H.F. Horn*, 21 A.D.2d 714 (1st Dept. 1964); *See also, Sillman v Twentieth Century-Fox Film Corporation*, 3 N.Y.2d 395, 404 (1957).

Applying the foregoing principles to the instant motion, Plaintiff's motion for summary judgment is granted. Defendants have failed in opposition to come forward with any evidence to establish that the Handling Procedures set forth in the Agreement were followed to prevent the unauthorized and fraudulent wire transfer that occurred in this case. The Court finds that none of the eighteen Affirmative Defenses set forth in Defendant's Verified Answer have merit; Defendant's Counterclaim for attorneys fees is dismissed as no basis exists for the relief requested.

Accordingly, Plaintiff may enter judgment against the Defendant in the amount of $84,700.00 plus interest from July 28, 2016 as well as costs and disbursements of the action. Plaintiff's request for attorneys fees is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 14, 2019
White Plains, New York

HONORABLE JOHN P. COLANGELO, J.S.C.