Allied Contr. II Corp. v CTBC Bank Corp. (USA)
2020 NY Slip Op 31419(U)
May 2, 2020
Supreme Court, New York County
Docket Number: 653443/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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ALLIED CONTRACTING II CORP., DECISION AND ORDER

Plaintiff, Index No. 653443/2018

- against -

CTBC BANK CORP. (USA),

Defendant.

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MELISSA A. CRANE, J.:

This action concerns three electronic wire transfers plaintiff Allied Contracting II Corp. alleges it was fraudulently induced to make into an account held at defendant CTBC Bank Corp. (USA). Defendant now moves, pursuant to CPLR 3211 (a) (1) and (7) and CPLR 3016 (b), to dismiss the complaint.

BACKGROUND

The following facts are taken from the complaint and accepted as true for the purposes of this motion. In or about June 2014, an unnamed third party, posing as one of plaintiff's clients, contacted plaintiff and instructed it to wire funds into an account number ending in 1960 (the Account) held in the name of "FSIECO NIG Limited" (the Account Holder) at defendant bank (NY St Elec Filing [NYSCEF] Doc No. 12, affirmation of Peter Janovsky [Janovsky], exhibit 3, ¶¶ 6-7). Plaintiff alleges this third party claimed the funds were meant for the "payment for services rendered and/or goods supplied to Plaintiff by Plaintiff's vendor" (*id.*, ¶ 8). Plaintiff complied with the request, and wired $90,000 to the Account (*id.*, ¶ 9). Upon receiving further instructions, plaintiff wired an additional $10,000 to the Account on July 9, 2014 (*id.*, ¶ 10). The

unnamed third party contacted plaintiff once more, and plaintiff wired $30,000 to the Account on July 15, 2014 (*id.*, ¶ 11). All told, plaintiff electronically transferred $130,000 to the Account.

Plaintiff alleges that in or about September 2014, it learned the wire transfers were part of a fraudulent scheme that third party concocted to steal its money (*id.*, ¶ 12). Plaintiff alleges it immediately contacted defendant "in an attempt to 'call back' and cancel the foregoing wire transfers," that it advised defendant of the fraud, that defendant confirmed it would conduct an investigation, and that defendant would not allow a transfer or withdrawal of the funds until it concluded its investigation (*id.*, ¶¶ 12-15). Plaintiff alleges that defendant initially placed a hold on the Account, but defendant ultimately allowed the Account Holder to withdraw the funds in October or November 2014 (*id.*, ¶¶ 18- 19).

Plaintiff commenced this action by filing a summons with notice on July 9, 2018 (NYSCEF Doc No. 10, Janovsky affirmation, exhibit 1 at 1). The complaint served November 3, 2018 pleads two theories of recovery – aiding and abetting fraud and commercial bad faith – and seeks $130,000 in damages. In lieu of serving an answer, defendant moves to dismiss the complaint.

THE PARTIES' CONTENTIONS

Defendant advances four arguments in support of dismissal. First, defendant contends that claims involving electronic fund transfer transactions, such as those here, are governed by Article 4-A of the Uniform Commercial Code (UCC). Under Article 4-A, claims pertaining to electronic transfers are subject to a three-year statute of limitations, which is consistent with CPLR 214 (2). The complaint alleges the transfers were made in July 2014, but plaintiff did not commence the present action until 2018. Defendant also relies on an affidavit from its COO,

Parham Medhat (Medhat), to which Medhat annexed three wire confirmation reports (NYSCEF Doc No. 7, Medhat aff, ¶ 2). The reports show the amounts and dates of completion for each transfer plaintiff made to the Account as follows: (1) $10,000 from plaintiff's account at Alma Bank on July 10, 2014; (2) $90,000 from an account held by Gerasimoula Economou (Economuo) at Citibank, NA (Citibank) on July 1, 2014; and (3) $30,000 from Economou's account at Citibank on July 15, 2014 (NYSCEF Doc No. 8, Medhat aff, exhibit A at 1, 3-4). Because the transfers were completed four years before plaintiff commenced this action, defendant argues the claims are time-barred.

Second, defendant argues that plaintiff failed to avail itself of the relief outlined in Article 4-A-503 and obtain an injunction to prohibit the release of the funds to the Account Holder. Lastly, defendant posits that plaintiff fails to plead the aiding and abetting fraud and commercial bad faith causes of action with particularity as required under CPLR 3016 (b).

Plaintiff, in opposition, contends that UCC Article 4-A does not preempt its common-law claims because the claims do not pertain to the mechanics of performing electronic funds transfers. As a result, plaintiff may maintain its common-law claims, which, incidentally, are not time-barred because both aiding and abetting fraud and commercial bad faith claims enjoy a six-year limitations period. Plaintiff also submits that it has pled its claims with the requisite particularity.

DISCUSSION

Dismissal under CPLR 3211 (a) (1) is warranted "where the documentary evidence utterly refutes 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]). "A paper will qualify

as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v Sic Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]).

A motion brought under CPLR 3211 (a) (7) addresses the sufficiency of a pleading (*see Arister-Farer v State of New York*, 29 NY3d 501, 509 [2017]). The court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," the motion will be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). But, "allegations consisting of bare legal conclusions … are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc*., 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted]). Additionally, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]).

"Electronic funds transfers, commonly known as wire transfers, are governed by article 4-A of the Uniform Commercial Code" (*Golden Door V & I, Inc. v TD Bank*, 123 AD3d 976, 977 [2d Dept 2014]). "Establishing finality in electronic fund wire transactions was considered a

singularly important policy goal" of the article (*Banque Worms v BankAmerica Intl.*, 77 NY2d 362, 372 [1991] [citation omitted]). Thus, "article 4-A was drafted with the intention that it set forth 'a body of unique principles of law that would address every aspect of the electronic funds transfer process and define the rights and liabilities of all parties involved in such transfers'" (*Golden Door V & I, Inc.*, 123 AD3d at 977, quoting *Banque Worms*, 77 NY2d at 371; *accord Receivers of Sabena S.A. v Deutsche Bank A.G.*, 142 AD3d 242, 252-253 [1st Dept 2016] [stating that Article 4A was intended to provide the exclusive means for determining the rights, duties and liabilities regarding electronic fund transfers]; *see generally* UCC § 4-A-102, Comment). "'[R]esort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article'" (*Grain Traders, Inc. v Citibank, N.A.*, 160 F3d 97, 100 [2d Cir 1998], quoting UCC § 4-A-102, Comment]). Consequently, parties should look to Article 4-A to resolve a dispute over an electronic fund transfer (*see Sheerbonnet, Ltd. v American Express Bank, Ltd.*, 951 F Supp 403, 407 [SD NY, 1995]).

That said, common-law causes of action "are not preempted by Article 4-A to the extent the provisions are not inconsistent with Article 4-A or they fall within one of the areas where a variance is permitted" (*Fischer & Mandell LLP v Citibank, N.A.*, 632 F3d 793, 797 [2d Cir 2011]; *Bank of Haw. Intl. Corp. v Marco Trading Corp.*, 261 AD2d 333, 333 [1st Dept 1999] [stating that "[t]he Uniform Commercial Code does not displace common-law causes of action unless a particular Code provision expressly so provides"]; *Sheerbonnet, Ltd.*, 951 F Supp at 409-410 [finding that Article 4-A does not automatically bar common-law or equitable claims provided those claims "compliment the important policy considerations of the Article and are not

inconsistent with any of its specific provisions"]). Because Article 4-A controls how electronic funds transfers are conducted, "[c]aims that … are not about the mechanics of how a funds transfer was conducted may fall outside of this regime" (*Ma v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F3d 84, 89 [2d Cir 2010]). "For Article 4A purposes, the critical inquiry is whether its provisions protect against the type of underlying injury or misconduct alleged in a claim" (*id*. at 89-90).

Contrary to plaintiff's contention, the gravamen of the complaint concerns the mechanics of an electronic fund transfer and the parties' rights and obligations with respect to those transfers. Consequently, the allegations fall squarely within Article 4-A.

A "payment order" is "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary" (UCC § 4-A-103 [1] [a]). A "sender" is "the person giving the instruction to the receiving bank" (UCC § 4-103 [1] [e]). A "receiving bank" is "the bank to which the sender's instruction is addressed" (UCC § 4-103 [1] [d]). A "beneficiary's bank" is "the bank identified in a payment order in which an account of the beneficiary is to be credited" (UCC § 4-103 [1] [c]), and a "beneficiary" is the "person to be paid by the beneficiary's bank" (UCC § 4-103 [1] [b]). In this action, plaintiff is the sender, Alma Bank and Citibank are the receiving banks, the Account Holder is the beneficiary, and defendant is the beneficiary's bank.

"A payment order is issued when it is sent to the receiving bank" (UCC § 4-103 [3]). A payment order is deemed "accepted" by a beneficiary's bank when (1) the bank pays the beneficiary or notifies the beneficiary of receipt of the order, (2) the bank receives payment in full of the sender's order, or (3) the sender's order is fully covered by the withdrawable credit

balance in the sender's account (UCC § 4-209 [2]). "[I]f a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order" (UCC § 4-A-404 [1]), and the funds become the property of the beneficiary (*see Bayerische Hypo-Und Vereinsbank AG v HSBC Bank USA, N.A.*, 144 AD3d 501, 502 [1st Dept 2016] [stating that funds become the beneficiary's property when a payment order is accepted]; *United States v BCCI Holdings (Lux.), S.A.*, 980 F Supp 21, 27 [DDC, 1997] [stating that "title to funds in a wire transfer passes upon acceptance of a payment order"]). Once a beneficiary's bank credits the beneficiary's account, the bank's obligation to pay occurs when "(i) the beneficiary is notified of the right to withdraw the credit … or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank" (UCC § 4-A-405 [1]).

Plaintiff has not alleged the payment orders were unauthorized at the time it initiated the transfers (*see Blum v Citibank, NA*, 162 AD3d 631, 631-632 [2d Dept 2018] [dismissing plaintiff's negligence claim against the defendant bank because the plaintiff had authorized the wire transfer requests even though he "was allegedly induced to take that action by various fraudulent representations made by that third party"]; *see also Wellton Intl. Express v Bank of China (Hong Kong)*, 2020 WL 1659889, *3, 2020 US Dist LEXIS 59224, *7-8 [SD, NY Apr. 3, 2020, No. 19-CV-6834 (JPO)]). Nevertheless, plaintiff alleges that defendant "substantially assisted in the fraud by allowing the holder of the Account to withdraw and/or transfer the funds wired by Plaintiff to the Account, despite having knowledge of the fraud" (NYSCEF Doc No. 12, ¶ 24). Plaintiff, though, ignores the provision, noted above, that states once a beneficiary's bank accepts a payment order, the bank is obligated to pay the beneficiary (*see* UCC § 4-A-404 [1]; *see also Bank of N.Y. v Norilsk Nickel*, 14 AD3d 140, 145 [1st Dept 2004], *appeal dismissed*

4 NY3d 843 [2005], *lv dismissed* 4 NY3d 846 [2005] [stating that title to transferred funds passes when a beneficiary's bank accepts "payment orders by executing them"]). Thus, the Account Holder was entitled to withdraw the funds unless plaintiff took action as provided for in the statute, discussed *infra*.

Plaintiff complains that defendant was aware of the fraudulent scheme but "failed to take any action to cause such conduct to cease" (NYSCEF Doc No. 12, ¶ 29). UCC § 4-A-503 states, in pertinent part, that "a court may restrain … (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds." As such, the statute provides a mechanism by which plaintiff could have avoided the injury alleged herein. The complaint, though, does not state whether plaintiff sought injunctive relief barring defendant from releasing the funds to the Account Holder (*see Abramowitz v Bank of Am.*, 41 Misc 3d 127[A], 2013 NY Slip Op 51660[U], *1 [App Term, 1st Dept 2013] [concluding the plaintiff, who sought to recoup funds it had been induced by fraud to transfer to a third party, had no cause of action against the defendant bank, in part, because the "plaintiff failed to procure a restraining order or other appropriate process as required by the Banking Law"]).

Likewise, UCC § 4-A-211 outlines procedures for amending or cancelling a payment order. Importantly, subsection (3) states, in relevant part:

> "After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.
>
> (a) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

> (b) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order … (ii) that orders payment to a beneficiary not entitled to receive payment from the originator …."

Although the statute does not expressly refer to fraud, particularly instructive is case no. 1 in the official comment accompanying this section. Case no. 1 discussed the cancellation of a fraudulently issued payment order that had been accepted by a beneficiary's bank. Importantly, the Comment states that "[u]nder subsection (c) (2) … Originator's Bank can cancel the order if Beneficiary's Bank consents. It doesn't make any difference whether the payment order that Originator's Bank accepted was or was not enforceable against the customer under Section 4A–202 (b) … [because] [w]hether or not verified, the payment order was not authorized by the customer" (UCC § 4-A-211, Comment 4). Thus, to effectuate a valid cancellation of a payment order that has been accepted by a beneficiary's bank, both the receiving bank and the beneficiary's bank had to agree to the cancellation (*see Bayerische Hypo-Und Vereinsbank AG v HSBC Bank USA, N.A.*, 2015 NY Slip Op 31270[U], *11 [Sup Ct, NY County 2015], *affd as mod* 144 AD3d 501 [1st Dept 2016]). The complaint does not allege that plaintiff followed this procedure to "'call back' and cancel the foregoing wire transfers" by contacting Alma Bank or Citibank to seek their consent. Similarly, the complaint does not allege that defendant agreed to cancel the payment order and return the funds.

Article 4, therefore, outlines the parties' obligations and liabilities with regard to the three wire transfers at issue (*see Abramowitz*, 41 Misc 3d 127[A], 2013 NY Slip Op 51660[U], *1 [rejecting the plaintiff's attempt to impose liability for his loss on the beneficiary's bank where

the plaintiff did not discover the alleged fraud perpetrated by a nonparty until after the bank had accepted the transfer]; *Aleo Intl. v Citibank*, 160 Misc 2d 950, 952 [Sup Ct, NY County 1994] [dismissing the plaintiff's claim that the receiving bank had failed to carry out the plaintiff's attempt to cancel a payment order because the beneficiary's bank had already accepted the payment order]). Hence, Article 4-A applies to plaintiff's claims.

Plaintiff cites *Regions Bank v Provident Bank, Inc.* (345 F3d 1267 [11th Cir 2003]) for the proposition that its claims are not displaced by Article 4-A. That action, though, is distinguishable. The dispute in *Regions* arose out of a series of fraudulent actions by a nonparty mortgage lender. The plaintiff had executed a contract with the lender whereby it had agreed to advance funds to the lender, who would use the monies to fund home loans, in exchange for the original notes as collateral (*id.* at 1270-1271). At the lender's request, the plaintiff transferred funds for two separate home loans to an escrow account held by an attorney (*id.* at 1271). The lender informed the attorney the funds had been transferred in error, and instructed the attorney to wire the funds to the lender's account at the defendant bank (*id.*). The lender then used the funds to satisfy its debt owed to the defendant (*id.* at 1272). When the defendant refused to return the plaintiff's funds, the plaintiff sued for conversion and unjust enrichment, among other claims (*id.* at 1279). The Court explained:

> "Article 4A is silent with regard to claims based on the theory that the beneficiary bank accepted funds when it knew or should have known that the funds were fraudulently obtained. Therefore, a provision of state law that requires a receiving or beneficiary bank to disgorge funds that it knew or should have known were obtained illegally when it accepted a wire transfer is not inconsistent with the goals or provisions of Article 4A"

(*id*. at 1275). The Court further noted that "[i]nterpreting Article 4A in a manner that would allow a beneficiary bank to accept funds when it knows or should know that they were fraudulently obtained, would allow banks to use Article 4A as a shield for fraudulent activity" (*id.* at 1276).

The Court, though, concluded the plaintiff could not recover. Importantly, an Ohio statute permitted the recovery of damages in a civil action for injury to person or property caused by a criminal act (*id.*, citing Ohio Rev Code Ann § 2307.60). To accomplish this, the plaintiff "was required to demonstrate that Provident knew or had reasonable cause to believe that it was receiving fraudulently obtained funds *before* it received the wire transfers and acquired title to the funds" (*id.* at 1277 [emphasis in original]). The plaintiff, though, contacted the defendant about the lender's fraud after the defendant had already accepted the payment orders. The Court concluded that the plaintiff could not meet this burden, and therefore could not succeed on its claim for disgorgement (*id.*).

In this action, plaintiff has not cited an equivalent New York statute on which defendant could be held liable. Its allegations primarily concern defendant's treatment of three payment orders, and its claimed damages stem from the acceptance of those wire transfers (NYSCEF Doc No. 12, ¶ 13). Significantly, as in *Regions*, defendant accepted the payment orders before plaintiff contacted it about the alleged fraud.

Claims brought under Article 4-A are subject to a three-year statute of limitations (*see Banca Commerciale Italiana, New York Branch v Northern Trust Intl. Banking Corp.*, 160 F3d 90, 95 [2d Cir 1998], citing CPLR 214 [2]), unless stated elsewhere in the article (*see Regatos v North Fork Bank*, 257 F Supp 2d 632, 644 [SD, NY 2003], *affd* 431 F3d 394 [2005] [discussing

UCC § 4-A-505 as a statute of repose]). As applied here, the documentary evidence demonstrates that defendant accepted the three wire transfers in July 2014, and that plaintiff commenced this action on July 9, 2018 (NYSCEF Doc No. 10 at 1). Thus, plaintiff's claims are time-barred.

Assuming that Article 4-A does not govern these claims, the complaint fails to plead causes of action for aiding and abetting fraud and for commercial bad faith.

To state a cause of action for aiding and abetting fraud, the complaint must allege "the existence of the underlying fraud, actual knowledge, and substantial assistance" (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). A common-law fraud claim requires a plaintiff to plead "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-579 [2018] [internal quotation marks and citation omitted]). In accordance with CPLR 3016 (b), a claim for aiding and abetting fraud must be pled with particularity (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Latimore v Fuller*, 127 AD3d 521, 522 [1st Dept 2015]).

Here, the complaint fails to plead adequately a claim for aiding and abetting fraud. First, the allegedly fraudulent acts took place in June and July 2014, when plaintiff claims it was induced to initiate the wire transfers. The complaint, though, does not allege that defendant had actual knowledge that the unnamed third party had engaged in a fraudulent act at the time the wire transfers were made (*see Alarmex Holdings, LLC v JP Morgan Chase Bank, N.A.*, 147 AD3d 451, 452 [1st Dept 2017]). Indeed, plaintiff admits it only alerted defendant to the alleged

fraud in September 2014, two months after the acts had occurred (NYSCEF Doc No. 12, ¶¶ 13-15).

Nor does the complaint adequately plead the element of substantial assistance. "Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated" (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009] [internal quotation marks and citations omitted]). "[T]he mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Markowits v Friedman*, 144 AD3d 993, 996 [2d Dept 2016] [internal quotation marks and citations omitted]). Plaintiff complains that defendant "knew or should have known that the Account was being utilized … for fraudulent and/or illegal purposes," but allowed the Account Holder to withdraw the subject funds anyway (NYSCEF Doc No. 12, ¶¶ 17 and 19). "As a general rule, '[b]anks do not owe non-customers a duty to protect them from the intentional torts of their customers'" (*Winkler v Battery Trading, Inc.*, 89 AD3d 1016, 1018 [2d Dept 2011], quoting *Lerner v Fleet Bank, N.A.*, 459 F3d 273, 286 [2d Cir 2006]), and the complaint does not allege that plaintiff and defendant had a confidential or fiduciary relationship from which the existence of a fiduciary duty may be inferred (*see Balanced Return Fund Ltd. v Royal Bank of Can.*, 138 AD3d 542, 542 [1st Dept 2016]; *Stanfield Offshore Leveraged Assets, Ltd.*, 64 AD3d at 476). More importantly, as is the case here, "[a] bank's allowing its customer to transfer money from its account is a routine business service"

and does not constitute substantial assistance (*McBride v KPMG Intl*., 135 AD3d 576, 579 [1st Dept 2016]).

As to plaintiff's second cause of action, "[a] cause of action for commercial bad faith against a bank requires allegations of a scheme or acts of wrongdoing, together with allegations of the bank's actual knowledge of the scheme or wrongdoing that amounts to bad faith or allegations of complicity by bank principals in alleged confederation with the wrongdoers" (*Peck v Chase Manhattan Bank*, 190 AD2d 547, 548-549 [1st Dept 1993]). Stated differently, the bank must have "acted dishonestly by becoming a participant in a fraudulent scheme" (*LPP Mortg., Ltd. v Card Corp*., 17 AD3d 103, 104 [1st Dept 2005], *rearg denied* 2005 NY App Div Lexis 6975 [1st Dept 2005], *lv denied* 6 NY3d 702 [2005]). The claim is "subject to heightened pleading requirements" (*Griffon V, LLC v 11 East 36th LLC*, 2012 NY Slip Op 33272[U], *15 [Sup Ct, NY County 2012]).

In this instance, the statements in support of the commercial bad faith cause of action are wholly conclusory (*see Josephs v Bank of N.Y.*, 302 AD2d 318, 318 [1st Dept 2003]). The complaint alleges that defendant knew of the Account Holders' fraudulent scheme and failed to act, but these allegations amount to "merely a lapse of wary vigilance." This is insufficient (*Calisch Assoc. v Manufacturers Hanover Trust Co.*, 151 AD2d 446, 447 [1st Dept 1989], quoting *Prudential-Bache Sec. v Citibank, N.A.*, 73 NY2d 263, 276 [1989]).

The complaint does not plead specific "facts inculpating the principals of the bank as actual participants in unlawful activity" (*Retail Shoe Health Commn. v Manufacturers Hanover Trust Co.*, 160 AD2d 47, 51 [1st Dept 1990] [stating that there was no showing a bank employee was engaged in fraudulent conduct]; *Arrow Transp. Sys., Inc. v FleetBoston Fin. Corp*., 6 Misc

3d 1012[A], 2005 NY Slip Op 50034[U], *3 [Sup Ct, Nassau County 2005] [granting summary judgment in favor the defendant bank where the plaintiff failed to show fraudulent conduct on the part of any bank employee]). Notably, the complaint does not allege that a bank employee was complicit in the alleged fraudulent scheme either at the time plaintiff was allegedly induced to initiate the payment orders or at the time the Account Holder withdrew them. As discussed earlier, absent an injunction or a valid cancellation, defendant was obliged to pay the Account Holder once it accepted the three payment orders.

Lastly, plaintiff's request for leave to replead is denied. Plaintiff has not submitted any proposed amendments that would cure the pleading deficiencies (*see FCRC Modular, LLC v Skanska Modular LLC*, 159 AD3d 413, 416 [1st Dept 2018]) or presented any arguments to show that it can state viable causes of action upon repleading (*see Genger v Genger*, 135 AD3d 454, 455 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]).

Accordingly, it is

ORDERED that the motion of defendant CTBC Bank Corp. (USA) to dismiss the complaint against it is granted, and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of this defendant.

Dated: May 2, 2020

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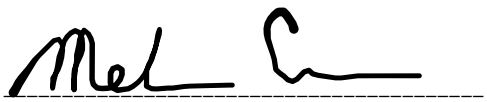

J.S.C.