SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

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EAST SIDE AUTO, INC., : Index No. 653753/2019

Plaintiff, : DECISION & ORDER

-against- :

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, :

Defendant. :

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LOUIS L. NOCK, J.

Defendant moves (seq. no. 001) to dismiss the verified complaint pursuant to CPLR 3211 (a) (1) (documentary evidence), (5) (statute of limitations), and (7) (failure to state a claim). The motion is opposed.

NATURE OF THE CASE

This case is about a corporation which alleges that it was the unfortunate victim of an internal fraud by one of its employees – not a party to this action – who since has been convicted of Petit Larceny in the First Degree on account of said fraud. It is alleged that the employee, one, Andy Delasnueces, made non-corporate-related use of plaintiff's JP Morgan Chase ("Chase") business checking account to pay for his own personal credit card bills, without permission from plaintiff, in the aggregate amount of $60,000. Delasnueces has not been sued in this action by the plaintiff on account of said alleged fraud (or in any other action, for that matter, as far as the pleading goes). Instead, plaintiff has chosen to sue only Chase, referring to it as having "allowed" Delasnueces' fraud "to continue with [its] full knowledge and participation" (Complaint ¶ 17).

The complaint seeks recoupment on Delasnueces' transactions, not from Delasnueces, but from Chase, asserting what it purports to be causes of action against Chase for breach of fiduciary duty, breach of contract, and aiding and abetting fraud.

DISCUSSION

Whether Plaintiff is Time-Barred

Chase argues that the claims are contractually time-barred. Chase submits an affidavit from Executive Director J.P. Godzik (NYSCEF Doc. No. 9) attesting that online monthly account statements were made available to plaintiff, which would have included the subject unauthorized charges, stated by plaintiff to have taken place from October through December 2016 (NYSCEF Doc. No. 20). Mr. Godzik's affidavit is not accompanied by any independent documentary evidence regarding such online statements.

Chase further submits an affidavit from Vice President Laura Deck (NYSCEF Doc. No. 10) exhibiting Chase's Account Rules and Regulations, and Chase's Business Accounts Deposit Agreement, and attesting that all accountholders are provided with same. No independent documentary evidence is exhibited to support the attestation that plaintiff, in particular, was so provided. The Deposit Agreement requires accountholders to notify Chase of any unauthorized transactions within 14 days of any statement listing such transactions, and further fixes a two-year time limit on litigation regarding same, measured from the time of the transaction.

Based on the foregoing affidavits, Chase argues that this action must be summarily dismissed at this time, because plaintiff did not notify Chase of the problem until March 30, 2017 (*see*, Affidavit of Chase Vice President Ann Marie Snuffer [NYSCEF Doc. No. 18]), which was more than 14 days after the 2016 transactions. Chase also points to the fact that this action was

not commenced until June 27, 2019 – more than two years after the last transaction in December 2016.

The problem is, plaintiff's president, Noah Shalem, submits an affidavit (NYSCEF Doc. No. 27) disputing that he ever received any of the above-referenced account statements, rules and regulations, and deposit agreement from Chase (*see, id.*, ¶¶ 2, 5). Moreover, he attests that he only first discovered Delasnueces' unauthorized transactions the day he reported them to Chase, which was March 30, 2017 (*id.*, ¶ 8; NYSCEF Doc. No. 20).[1] Thus, were we to believe that – which we are required to do on this motion to dismiss[2] – plaintiff cannot be held to the contractual time limitations found in Chase's referenced Deposit Agreement.

Chase also argues that the claims are statutorily time-barred, citing UCC 4-406 (4), which provides that:

> Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature . . . is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

A similar argument is made by Chase, predicated on 15 USC 1693f, which requires bank customers to notify banks of unauthorized transactions within 60 days of receipt of documentation indicating same. However, again, this court cannot determine conclusively whether plaintiff falls into those statutory categories, having read Mr. Shalem's affidavit testimony that plaintiff never received any account statements. It is not the province of the court to assess the credibility of affidavits on a motion to dismiss.[3] The court is restricted to the four

[1] An affidavit submitted by the plaintiff in opposition to a motion to dismiss may be considered by the court (*e.g., Rovello v Orofini Realty Co., Inc.,* 40 NY2d 633 [1976]; *Sheridan v Carter*, 48 AD3d 444 [2d Dept 2008]).
[2] *E.g., id*.
[3] Mr. Shalem goes into no detail on how he ultimately learned of the transactions, on March 30, 2017 – a proper subject of inquiry for deposition (or examination at trial). But we are not there yet at this point in the litigation.

corners of the complaint, as supplemented by plaintiff's affidavit submitted in opposition to the motion (*e.g., Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]; *Sheridan v Carter*, 48 AD3d 444 [2d Dept 2008]). And it is again worth noting that defendant's affiants have not presented the court with any independent documentary evidence refuting Mr. Shalem's affidavit testimony. All of that may change at trial; but right now, on this motion to dismiss, insufficient evidence has been submitted by defendant to permit dismissal of the verified complaint at this point in time, on grounds of untimeliness, whether that be contractually or statutorily based.

Breach of Fiduciary Duty

The claim for breach of fiduciary duty is subject to dismissal on the principle that "the underlying relationship between a bank and its depositor is the contractual one of debtor and creditor" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Chemical Bank*, 57 NY2d 439, 444 [1982]; *see also, Fallon v Wall St. Clearing Co.*, 182 AD2d 245 [1st Dept 1992] [no fiduciary relationship]; *Bank Leumi Trust Co. v Block 3102 Corp.*, 180 AD2d 588, 589 [1st Dept] [same], *lv denied* 80 NY2d 754 [1992]). Relatedly, when "[a] cause of action for breach of fiduciary duty . . . is merely duplicative of a breach of contract claim [it] cannot stand" (*William Kaufman Organization, Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000]).

Aiding and Abetting Fraud

A claim for aiding and abetting fraud must plead that the defendant had actual knowledge of the fraud (*Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]). The complaint falls short of that allegation, going only so far as alleging that Chase "became aware of a suspicious pattern of charges on Plaintiff's business accounts on or about March 10, 2015. . . ." (Complaint ¶ 33.)[4]

[4] The complaint alleges that Chase actually initiated an investigation regarding the subject transactions in 2015, but only contacted Delasnueces in that regard without making inquiry of plaintiff's president, Mr. Shalem, who was the sole signatory of Chase's Business Signature Card, opening the account (*see*, Complaint ¶¶ 33-34; NYSCEF Doc. No. 8).

(*See also, In re Sharp Intl. Corp.*, 302 BR 760 [EDNY 2003] [suspicions are insufficient to establish the element of actual knowledge], *affd* 403 F3d 43 [2d Cir 2005].)

UCC 4-401 (1)

Notwithstanding the above dismissal of the breach of fiduciary duty and aiding and abetting causes of action: in determining a motion to dismiss for failure to state a claim, the court is charged to assess whether causes of action have been stated (*see, Rovello, supra*, at 634 ["Under modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists."). Thus, in addition to the breach of contract claim (yet to be proven), this court recognizes the statement of a claim under UCC 4-401 (1) (also yet to be proven).[5] The Court of Appeals has held that:

> New York's version of the Uniform Commercial Code (hereinafter UCC) imposes strict liability upon a bank that charges against its customer's account any "item" that is not "properly payable" (UCC 4-401 [1]; *Monreal v Fleet Bank*, 95 NY2d 204, 207 [2000]).

(*Clemente Bros. Contracting Corp. v Hafner-Milazzo*, 23 NY3d 277, 283 [2014].) Of course, the Court of Appeals follows up that point by noting the various time limitations and other customer obligations limiting banks' exposure, such as those cited by defendant which can be explored during discovery (or at trial) as noted earlier herein (*see, id.*, at 284).

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted only to the extent of plaintiff's causes of action for breach of fiduciary duty and aiding and abetting fraud, and is otherwise denied; and it is, therefore, further

[5] Defendant itself recognized the relevance of UCC Article 4 (specifically, UCC 4-406 [1]) in its attempt to secure dismissal on time limitations grounds.

ORDERED that plaintiff's causes of action for breach of fiduciary duty (the first cause of action) and for aiding and abetting fraud (the third cause of action) are dismissed.

This shall constitute the decision and order of the court.

Dated: New York, New York
May 11, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.