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SHORT FORM ORDER

INDEX NO.: 901-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 4-9-20
SUBMITTED: 6-18-20
MOTION NO.: 005-MOT D

MARIA CARDINO,

Plaintiff,

-against-

J.P. MORGAN CHASE BANK, N.A., J.P. MORGAN CHASE & CO. and DAVE BADEU,

Defendants.

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Attorney for Plaintiff
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Upon the following papers numbered 1-55 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-36 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 37-51 ; Replying Affidavits and supporting papers 52-55 ; it is,

ORDERED that this renewed motion by the defendants J.P. Morgan Chase Bank, N.A. and J.P. Morgan Chase & Co. for summary judgment dismissing the amended complaint is granted to the extent indicated; and it is further

ORDERED that the motion is otherwise denied.

The plaintiff was a shareholder and director of Sax and Sounds Productions, LLC, along with nonparty Laurie Schneider. The plaintiff maintained personal accounts at the defendant J.P. Morgan Chase Bank ("Chase"). The defendant Dave Badeu was employed Chase. The plaintiff alleges that Schneider opened two corporate accounts at Chase and, with Badeu's assistance, transferred funds from the plaintiff's personal accounts to Schneider's corporate accounts without the plaintiff's approval, authorization, or permission. On February 8, 2011, the plaintiff commenced this action against Chase and Badeu to recover for five allegedly unauthorized transactions in the total amount of $430,000: $50,000 on July 2, 2007; $200,000 on November 7, 2007; $60,000 on November 21, 2007; $20,000 on December 12, 2007; and $100,000 on December 19, 2007. By an order of this court dated August 16, 2013, the plaintiff's motion for leave to amend the complaint

was granted insofar as it sought to add a cause of action for breach of contract. Chase's cross motion to dismiss the original complaint was also granted. The complaint, as amended, contains a single cause of action alleging that Chase breached its contract with the plaintiff by failing to safeguard her funds.

Chase moved for summary judgment prior to the completion of discovery. In support thereof, Chase relied on the General Account Terms and Conditions in the Account Rules and Regulations applicable to the plaintiff's accounts, which provided, in pertinent part, as follows:

> "Notification of Errors, Forgeries and Unauthorized Signatures:
>
> * * *
>
> "You agree to reconcile your statement promptly upon receipt. If we honor a check or other item drawn on or posted to your Account that is altered in any way or was not drawn or otherwise authorized by you ('unauthorized item') or if your Account statement contains any errors, you agree to notify us in writing of such unauthorized item or error within 30 days of the date on which the unauthorized item, or the Account statement that contained a description of the unauthorized item or error, was mailed, transmitted or otherwise made available to you."

In the case of errors or questions about electronic funds transfers, the plaintiff was advised on the second page of each account statement to telephone or write to the bank no later than 60 days after the bank sent her the first statement on which the problem or error appeared.

The court found that Chase had established, prima facie, its entitlement to judgment as a matter of law and that the plaintiff had failed to demonstrate the existence of a triable issue of fact in opposition thereto. The record reflected that the unauthorized transfers had been included in the plaintiff's bank statements and that the plaintiff had failed to comply with the bank's General Account Terms and Conditions by reporting the unauthorized transfers in a timely manner. The record also reflected that the plaintiff did not report the unauthorized transfers to Chase until January 2009, well after expiration of both the 30-day and 60-day time periods in which to do so. Accordingly, the court granted Chase's motion for summary judgment dismissing the complaint.

By a decision and order dated November 16, 2016, the Second Department reversed (144 AD3d 857), finding there were triable issues of fact:

> "Contrary to the Supreme Court's determination, Chase failed to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any triable issues of fact (*see*

> *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). Under the circumstances of this case, triable issues of fact exist, inter alia, as to whether the plaintiff was, in fact, bound by the Account Rules and Regulations relied upon by Chase (*cf. Clemente Bros. Contr. Corp. v. Hafner–Milazzo,* 23 N.Y.3d 277, 289, 991 N.Y.S.2d 14, 14 N.E.3d 367), and, if so, whether a separate provision contained therein, which relates specifically to Electronic Funds Transfer Services, controls. Accordingly, Chase's motion should have been denied, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, 487 N.Y.S.2d 316, 476 N.E.2d 642)."

The case was restored to the court's calendar. After the parties completed discovery, Chase renewed its motion for summary judgment dismissing the complaint. Contrary to the plaintiff's contentions, the present motion for summary judgment does not violate the general proscription against successive summary judgment motions. While successive motions for summary judgment are generally disfavored, significant discovery has taken place since the defendants' last motion for summary judgment, including the plaintiff's deposition and additional document production (*see*, **Kobre v United Jewish Appeal-Fedn. of Jewish Philanthropies of N.Y., Inc.**, 32 AD3d 218, 222). Accordingly, the court finds that the present motion is entirely appropriate (**Fielding v Environmental Resources Mgt. Group**, 253 AD2d 713).

In support of summary judgment, Chase again relies on the Account Rules and Regulations, which required the plaintiff to notify Chase of any unauthorized transactions within 30 days after the account statements were sent to her (60 days in the case of electronic funds transfers). In opposition, the plaintiff contends, inter alia, that the Uniform Commercial Code is applicable to this action. Specifically, the plaintiff contends that UCC 4-406 [4] applies. It provides as follows:

> "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 . . . discover and report his unauthorized signature or any alteration on the face or back of the **item** or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration" (emphasis added).

New York's version of the Uniform Commercial Code imposes strict liability upon a bank that charges against its customer's account any "item" that is not "properly payable" (**UCC** 4-401 [1]; **Clemente v Hafner-Milazzo**, 23 NY3d 277, 283). An "item" is "any instrument for the

payment of money even though it is not negotiable, but does not include money" (**Id.**, *citing* **UCC** 4-104 [1] [g]). Black's Law Dictionary defines "instrument" as a "written legal document that defines rights, duties, entitlements, or liabilities. (**Id**. at 283-284). Put another way, a bank may not charge a check or other written document defining a right to, or liability for payment, bearing a forged signature against its customer's account (**Id**. at 284).

Contrary to the plaintiff's contentions, UCC 4-406 (4) is not applicable to the facts of this case. It applies to written instruments for the payment of money, such as checks and draw-down requests on lines of credit (**Id.** at 285). It does not apply to funds transfers, which are the subject of this action. Funds transfers are governed by article 4-A of the Uniform Commercial Code (**Id.** at 288; **UCC** 4-A-102). UCC 4-A-505 contains a one-year notice period similar to that found in UCC 4-406 (4) (**Id.**). UCC 4-A-505 provides as follows:

> "If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment **unless the customer notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer**." (emphasis added)

While the UCC permits parties to alter the provisions of article 4 by agreement, including UCC 4-406 (4) (**Id.** at 287), it does not allow parties to vary the one-year period found in UCC 4-A-505 by agreement (**Id**. at 288, *citing* **Regatos v North Fork Bank**, 5 NY3d 395).

Banks are liable under article 4-A of the UCC for improper funds transfers, similar to how they are liable under article 4 for improperly paid items (**Clemente**, *supra*). For fund transfers, however, UCC 4-A-204 (2) provides that "the obligation of a receiving bank to refund payment . . . may not otherwise be varied by agreement (**Id**.).[1] In **Regatos v North Fork Bank** (*supra* at 398-399), the Court of Appeals held that parties could not shorten the one-year period found in UCC 4-A-505 by agreement (**Clemente**, *supra* at 288). The Court reasoned that shortening the one-year period effectively would vary the bank's obligation to refund payment in violation of the plain language to UCC 4-A-204 (2) (**Id**.). Accordingly, Chase could not shorten the one-year period in which the plaintiff was required to give it notice of unauthorized funds transfers to 30, or even 60, days.

The customer must give notice to the bank of her objection to the payment within one year after the receiving notification from the bank reasonably identifying the payment order (**UCC** 4-

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[1]The "receiving bank" is the bank to which the sender's instruction is addressed (**UCC** 4-A-103 [d]), in this case Chase, and the "sender" is the person giving the instruction to the receiving bank (**UCC** 4-A-103 [e]).

A-505).[2] Here, the plaintiff received notification from Chase of the payment orders or funds transfers on her monthly account statements. The affidavit of Murali Sampath, Executive Director and Operations Director for Chase, reveals that, during the period in question, monthly account statements were sent to Chase's customers no more than nine business days after the closing date noted on each account statement. The closing dates on the account statements for the funds transfers that are the subject of this action are July 31, 2007; November 19, 2007; December 18, 2007; and January 17, 2008. Adding nine business days thereto, the court finds that the account statements were sent to the plaintiff, at the latest, on or about August 13, 2007; November 30, 2007; December 31, 2007; and January 30, 2008, respectively. According to Murali Sampath, the plaintiff would have received the statements shortly thereafter.[3]

In her affidavit in opposition to the present motion, which is dated April 27, 2020, the plaintiff avers that she notified Chase about the unauthorized funds transfers beginning in mid-2007:

> "19. I began inquiring when I noticed the first transfer in mid 2007. I continued to inquire by phone on several occasion[s] with no satisfaction or response from Chase.
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> "20. I again inquired at the end of 2007 and beginning of 2008 when I noticed funds missing from my accounts. I inquired more than one time with no response from Chase.
>
> "21. It was not until on or about January 2009, that I inquired again about the transfers which are the subject of this litigation. . . ."

The April 27, 2020 affidavit is inconsistent with a prior affidavit by the plaintiff dated June 4, 2013, which was submitted in opposition to one or both of the two prior motions by Chase. In that affidavit, the plaintiff stated, "That on or about January 2009, I inquired of the defendant about the transfers which are the subject of this litigation and the defendant informed me that I had made the transfers." The plaintiff made no mention in the prior affidavit of any inquiries into the unauthorized transfers before January 2009. The court finds that, under these circumstances, the April 27, 2020 affidavit was calculated to create a feigned issue of fact and must be rejected (*see*, **Saavedra v 89 Park Avenue LLC**, 143 AD3d 615; **Irazary v The Rose Bloch 107 University Place Partnership**, 12 Misc 3d 733, 738-739). Accordingly, the court finds that the plaintiff

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[2]A "payment order" is a instruction to the bank, transmitted orally, electronically, or in writing, to pay or cause another bank to pay a fixed or determinable amount of money to a beneficiary (**UCC** 4-A-103 [1] n[a]). A "funds transfer" is the series of transactions, beginning with a payment order, made for the purpose of making payment to the beneficiary of the order (**UCC** 4-A-104 [1]).

[3]Adding five days thereto for mailing (*see*, **CPLR** 2103[b] [2]), the account statements would have been received by the plaintiff, at the latest, on or about August 18, 2007; December 5, 2007; January 5, 2008; and February 4, 2008, respectively.

notified Chase of her objections to the transfers, at the earliest, on or about January 2009.[4]

The plaintiff had one year from her receipt of the bank statements to notify Chase of her objections to the unauthorized transfers on the statements. The first two transfers, for $50,000 and $200,000, were on the bank statements that were sent to the plaintiff on or about August 13, 2007, and November 30, 2007, respectively. The plaintiff first notified Chase that the transfers were unauthorized in or about January 2009, which is more than one year after she would have received those statements. The three remaining transfers for $60,000, $20,000, and $100,000 were on the bank statements that were sent to the plaintiff on or about December 31, 2007, and January 30, 2008. Thus, the plaintiff's notice to Chase in or about January 2009 that those transfers were unauthorized could have been timely.[5] Accordingly, Chase is awarded summary judgment dismissing the plaintiff's claims for the unauthorized transfers in the amounts of $50,000 and $200,000, and the parties are directed to proceed to trial on the remaining claims for $60,000, $20,000, and $100,000.

Chase contends that the plaintiff's recovery is barred by her failure to identify a specific contract or contractual provision that was breached. Under New York law, a contract cause of action is generally the legal theory of recovery available to a depositor against her bank (**Tevdorachvili v Chase Manhattan Bank**, 103 F Supp 2d 632, 640 [EDNY]). More specifically, the relationship of debtor and creditor between bank and depositor binds the bank to an implied contract under which it holds the deposit to be disbursed only in conformity with the customer's instructions and only upon the customer's order (**Id.**). When a bank charges its customer's account without authorization, the depositor has a cause of action against the bank that improperly charged her account (*see*, **Kings Premium Serv. Corp. v Manufacturers Hanover Trust Co.**, 115 AD2d 707, 708-709). In allowing the plaintiff to amend her complaint to add a cause of action for breach of contract, the court determined the plaintiff has a cause of action against Chase for breach of the implied contract between a bank and its depositor. No further identification of the contract is needed.

Chase's remaining contentions merely raise issues of fact as to whether the plaintiff's own conduct contributed to her losses. Accordingly, the motion is granted only to the extent indicated.

Dated: August 13, 2020

J.S.C.
HON. ELIZABETH HAZLITT EMERSON

[4]This finding is consistent with the court's two prior decisions in this case.

[5]The exact dates on which the plaintiff received the bank statements and the exact date on which she notified Chase of her objections thereto will have to be established at trial.