Fashion One (Asia) Ltd. v Citibank N.A.
2020 NY Slip Op 33015(U)
September 15, 2020
Supreme Court, New York County
Docket Number: 152274/2018
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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FASHION ONE (ASIA) LIMITED

Plaintiff,

- v -

CITIBANK N.A.,

Defendant.

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INDEX NO. 152274/2018

MOTION DATE 09/14/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for a summary judgment by defendant is granted.

Background

Plaintiff seeks a declaration that a power of attorney tendered by plaintiff to defendant is valid and in effect. It claims it maintained a business checking account with defendant and in October 2017, it became aware of several unauthorized transactions between July and October 2017 totaling over $1,000. Plaintiff alleges it notified defendant of the fraudulent charges and it later authorized a law firm to handle the matter via a power of attorney dated November 13, 2017.

Plaintiff claims that defendant told plaintiff's attorney that it would not accept the November 2017 power of attorney and it had to execute a customized power of attorney. Plaintiff contends its attorney did that in December 2017. It alleges that despite these efforts, defendant refused to process plaintiff's claims concerning the purportedly unauthorized transactions unless Mr. Gleissner (plaintiff's president) personally disputed the charges. Plaintiff

also claims it became aware of more unauthorized charges and defendant against refused to allow plaintiff to dispute the charges via its attorney. It claims these unauthorized charges totaled $2,867.22. Plaintiff seeks a declaratory judgment declaring that the November 13, 2017 power of attorney valid and that defendant is liable under a negligence theory for failing to accept a valid power of attorney or investigate the disputed charges.

Defendant moves for summary judgment dismissing the case on the ground that a company cannot give a power of attorney under the applicable New York statute. It claims that only an individual can give a power of attorney. Defendant also argues that even if the power of attorney was valid, only a depositor can challenge an unauthorized withdrawal and an attorney-in-fact cannot swear or sign an affidavit in a principal's name. It points out that despite informing plaintiff that the signer of the business account (Mr. Gleissner) had to sign a statement under penalty of perjury, plaintiff never complied with this directive.

Defendant also seeks attorneys' fees based on Mr. Gleissner's refusal to appear for a deposition in accordance with court orders dated April 10, 2019 and June 18, 2019. According to defendant, Mr. Gleissner appeared at the designated location for a deposition on August 15, 2019 but refused to present his identification and was denied entrance to the building.

In opposition, plaintiff offers the affidavit of Mr. Gleissner who claims that he refused to provide a copy of his passport for copying because there was no agreement with the security firm in the lobby of this building concerning the safeguarding of this confidential information. He claims that he agreed to have the deposition anywhere he did not have to submit his passport for photocopying. Mr. Gleissner points out that he is sensitive to his personal information because he is a victim of identity theft and he (along with his companies) have had thousands of dollars stolen over the past few years.

Plaintiff claims that there are material issues of fact that compel denial of the motion. It claims that the power of attorney at issue here is exempted from the General Obligations Law provision relied upon by defendant. Plaintiff asserts that because the power of attorney was given for primarily business purposes, it was permissible for a corporate entity to execute a power of attorney. It also argues that the law firm had personal knowledge about the fraudulent transactions and was in a position to swear under penalty of perjury about the facts at issue.

In reply, defendant disputes that a corporation can give a power of attorney. It also claims that the power of attorney was not signed before a notary and it does not contain the required statutory language. Defendant argues that the opposition makes its point clear: that the attorney's alleged personal knowledge about the facts at issue derive from Mr. Gleissner and, therefore are not personal knowledge but actually hearsay.

Discussion

"The 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The Court begins its analysis with whether defendant was negligent in failing to investigate the disputed charges. There is no question that plaintiff eventually filled out a power of attorney using defendant's form power of attorney (NYSCEF Doc. No. 4). After the execution

of this power of attorney, defendant sent an email to plaintiff's attorney stating that it needed Mr. Gleissner to "sign and date the affidavit" (NYSCEF Doc. No. 29) about the unauthorized charges. A month later in April 2018, a representative for defendant sent an email explaining that "an attorney in fact is not permitted to execute an affidavit on behalf of a signer because the affiant attests that facts in the affidavit are true based on his personal knowledge. Only the signer has that personal knowledge, and an attorney in fact cannot possess it. As the signer did not execute the requested affidavits, we were unable to charge those debits back" (NYSCEF Doc. No. 30).

The Court finds that this reaction was reasonable and defendant was not negligent in refusing to investigate the disputed charges. The December 2017 power of attorney did not permit plaintiff's attorney to assert facts that Mr. Gleissner possessed and it is a reasonable policy for defendant to insist that he submit an affidavit attesting to the disputed charges he wanted investigated. This is not a case where the principal is incapacitated (and might need a guardian) and is incapable of signing an affidavit. Instead, the power of attorney permitted the attorney to handle certain activities. Moreover, Mr. Gleissner seems perfectly capable of submitting an affidavit as he did in connection with this motion (NYSCEF Doc. No. 39). The Court does not understand why he simply didn't sign an affidavit about the charges he disputed and let his attorney in fact handle the rest.

The Court's finding that defendant was not negligent compels dismissal of the second cause of action and renders the first cause of action moot. That cause of action sought a declaration that the November 2017 power of attorney was valid. That document is of no moment because plaintiff ultimately agreed to sign a power of attorney using defendant's form and even if the November 2017 power of attorney was valid, it would not change the Court's

finding that defendant's policy of requiring a principal to attest to facts in an affidavit is reasonable as a matter of law. In other words, it does not matter if the November 2017 power of attorney was valid because defendant's decision not to investigate was reasonable under the circumstances here.

The Court also grants the portion of defendant's motion that seeks discovery sanctions pursuant to CPLR 3126. There is no dispute that Mr. Gleissner refused to turn over his identification on the morning of his scheduled deposition. When the parties called the judge previously assigned to the case about the issue, he stated "Tell [Mr. Gleissner] to show his license, like everybody else, and sit for his deposition. If he doesn't he's gonna face the consequences. . . Mr. Popov, go tell your client either he get[s] in the chair, or he's going to have dire consequences" (NYSCEF Doc. No. 35 at 11-12).

Counsel for defendant then explained that Mr. Gleissner continued to refuse to show his identification to building security (*id*. at 12). Counsel for plaintiff acknowledged that his client had refused to show ID but insisted he was amenable to conducting the deposition somewhere else in New York (*id*. at 13).

While the Court understands that people who have been the victim of identity theft (as Mr. Gleissner allegedly was) might be wary about showing identification, that does not justify ignoring a direct order from the Court to sit for a deposition. An unsubstantiated assertion that giving identification to building security might result in further identity theft is not a good reason to ignore a Court order. Any visitor to an office building, especially in Midtown Manhattan, knows that he or she will likely have to show identification. And if this was an issue, then it should have been raised in the previous conference orders which directed the holding of Mr. Gleissner's deposition. In fact, the latest order stated that the deposition had to take place or it

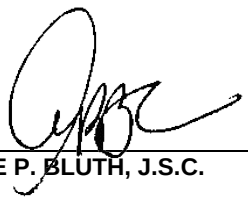
might result in the Court dismissing the action (NYSCEF Doc. No. 33). For Mr. Gleissner to suddenly raise objections to turning over his identification on the morning of the deposition and continue to refuse to turn over his ID after the Court rejected his objection is a valid basis for sanctions.

Counsel for defendant is entitled to attorneys' fees for that day and associated costs (such as the court reporter, room reservation). Defendant shall submit a proposed order for these fees along with supporting exhibits. If the Court finds that the amount sought is unreasonable, it will hold a hearing to ascertain the amount due.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant is granted, this case is dismissed and the Clerk is directed to enter judgment when practicable in favor of defendant along with costs and disbursements after presentation of proper papers therefor; and it is further

ORDERED that the issue of attorneys' fees and costs relating to the attempted deposition of Mr. Gleissner is severed and defendant shall submit, via e-filing, a proposed order along with an affirmation and exhibits detailing the amount it seeks within 30 days and plaintiff may e-file opposition to the amount due if it desires within 10 days.



9/15/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE