

<b>Person v Zellepay.com</b>
2021 NY Slip Op 32287(U)
October 28, 2021
Supreme Court, New York County
Docket Number: Index No. 652050/2021
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LAURENCE LOVE PART 63M**

*Justice*

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CARL PERSON,

Plaintiff,

- v -

ZELLEPAY.COM, JOHN DAVIS, CITIZENS FINANCIAL  
GROUP, INC., CITIZENS BANK, N.A., JOHN DOE

Defendant.

-----X

**INDEX NO.** 652050/2021

**MOTION DATE** 09/02/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the decision on defendants, Citizens Financial Group, Inc. (“CFG”) and Citizens Bank, NA’s (“Citizens”) motion to dismiss this action pursuant to CPLR 3211(a)(7) and plaintiff, Carl Person’s cross-motion seeking pre-filing discovery pursuant to CPLR 3102(c) and for an extension of time to serve John Davis, the “John Doe” defendant whose name may be “Tirson Melo” is as follows:

Plaintiff commenced the instant action by filing a summons and complaint on March 20, 2021 and thereafter filed an amended complaint on June 8, 2021 adding CFG and Citizens as defendants. The amended complaint alleges as follows: An unknown person identifying themselves as John Davis called plaintiff on or about 11:00 am on March 19, 2019 and after convincing plaintiff that the caller was an employee of ConEd, defrauded plaintiff out of \$998.64, sent to said unknown caller by Zelle, a service owned and created by Early Warning Systems, LLC, incorrectly sued herein as Zellepay.com. Plaintiff surmises that Melo has engaged in a fraudulent scheme to defraud other victims using the telephone number (857) 312-4371 and other

telephone numbers, using Citizens and other financial institutions unknown to plaintiff to defraud said other victims. Arising from said facts, plaintiff asserts causes of action for 1. Common Law Fraud, 2. Deceptive Acts and Practices pursuant to GBL 349(h), and 3. Seeks Pre-Filing Discovery pursuant to CPLR 3102(c).

Defendants CFG and Citizens now move to dismiss pursuant to CPLR 3211(a)(7). When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges. LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

CFG is not a proper party to this case because the sole allegation that Person asserts against CFG is that it is the parent company of Citizens Bank. “As a general rule, a parent corporation is not liable for the acts of a subsidiary.” *Dempsey v. Intercontinental Hotel Corp.*, 511 N.Y.S.2d 10, 11 (1st Dep’t 1987). when a complaint that asserts claims against an entity for the sole reason that it is a parent company, courts will not hesitate to dismiss the case as against the parent. See, e.g., *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 417, 419 (S.D.N.Y. 2011).

To state a claim for fraud, a plaintiff must allege “misrepresentation of a material fact, scienter, justifiable reliance, and injury.” *Sirohi v. Lee*, 634 N.Y.S.2d 119, 120 (1st Dep’t 1995). A claim of fraud must be pleaded with particularity. CPLR 3016(b), see also *H.P.P. Ice Rink, Inc. v. New York Islanders*, 674 N.Y.S.2d 667, 668 (1st Dep’t 1998). “To state a claim under General Business Law § 349 a plaintiff must plead: ‘first that the challenged act or practice was consumer-oriented; second that it was misleading in a material way; and third that the plaintiff suffered injury

as a result of the deceptive act.” *Singh v. Queens Ledger Newspaper Grp.*, 770 N.Y.S.2d 99, 100 (2d Dep’t 2003). Here, plaintiff fails to detail any fraud or misleading act by CFG and Citizens. Plaintiff details that he was allegedly a victim of a fraud by an unknown perpetrator and that the funds obtained by fraud were deposited in a Citizens bank account. As such, plaintiff has failed to state a cause of action against CFG and Citizens.

As discussed in *Uddin v. New York City Transit Auth.*, 27 A.D.3d 265, 266 (1<sup>st</sup> Dept. 2006), “Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order” (CPLR 3102 [c]). Thus, while pre-action disclosure may be appropriate to preserve evidence or to identify potential defendants, it may not be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing (*Matter of Gleich v Kissinger*, 111 AD2d 130, 131-132 [1985]). “A petition for pre-action discovery should only be granted when the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong” (*Holzman v Manhattan & Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347 [2000]). Here, petitioner’s notice of claim already set forth the time, place and particulars of the accident. The only purpose of inspecting the file at this point would be to explore alternative theories of liability, which is not a proper basis for invoking CPLR 3102 (c) (*id.* at 347-348).

Here, plaintiff has already commenced his action. As such, disclosure pursuant to CPLR 3102 (c) is inappropriate. In order to obtain the disclosure that he seeks, plaintiff must serve a subpoena upon Citizens.

ORDERED that the motion of defendants Citizens Financial Group, Inc. and Citizens Bank, NA to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, 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 said defendant; and it is further


ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that plaintiff’s cross-motion seeking pre-answer discovery is DENIED in its entirety.

<p><u>10/28/2021</u> DATE</p>			 <hr/> <p>LAURENCE LOVE, J.S.C.</p>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE