

**Lane's Floor Coverings & Interiors, Inc. v Dilalla**

2022 NY Slip Op 31096(U)

March 30, 2022

Supreme Court, New York County

Docket Number: Index No. 157933/2016

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART 32

*Justice*

INDEX NO. 157933/2016

LANE'S FLOOR COVERINGS & INTERIORS, INC.,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 003

- v -

ANTHONY DILALLA, VALLEY NATIONAL BANK

**DECISION + ORDER ON  
MOTION**

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, the motion and cross motion are determined as follows:

Defendants Anthony DiLalla (DiLalla) and Valley National Bank (Bank) (together defendants), move, pursuant to CPLR 3211 (a) (1) and (a) (7) for dismissal of the amended complaint. Plaintiff Lane's Floor Coverings & Interiors, Inc. (plaintiff) opposes and cross moves to compel discovery and for sanctions. For the reasons set forth below, the motion is granted, and the cross motion is denied.

**Procedural History**

Plaintiff is a privately owned company that sells and installs floor coverings. It commenced this action in September 2016, seeking to recover company funds it discovered had been fraudulently taken as early as February 2011 by its former controller, Howard Smith (Smith) allegedly with the assistance of Bank's branch manager, DiLalla, and the acquiescence of Bank (*see* New York Supreme Court Electronic File [NYSCEF] Doc No. 97, complaint, ¶ 12; Doc No. 103, amended complaint, ¶ 12).<sup>1</sup> "On or after December 21, 2013," plaintiff discovered a "staggering amount of inconsistencies in [its] financial records" (NYSCEF Doc No. 103, ¶ 12). The amount at issue was \$60,066.67, drawn by Smith from one of plaintiff's corporate bank accounts at Bank, made out to American Express, and either not indorsed, or bearing an indorsement "unrelated to or unaffiliated with American Express" (*see* NYSCEF Doc No. 103, ¶¶ 14-16). American Express never received these payments and the monies have remained unaccounted for (*see* NYSCEF Doc No. 103, ¶¶ 15, 17). Plaintiff alleged fraud as against both defendants, and negligence, gross negligence, and breach of contract as against Bank (*see* NYSCEF Doc No. 97, complaint at 8-12).

<sup>1</sup> Smith subsequently pleaded guilty to grand larceny and is serving five to fifteen years in prison for fraud (*see* NYSCEF Doc No. 103, amended complaint, ¶ 24). A judgment was issued against him in favor of plaintiff in the amount of \$985,491.12 (*see* NYSCEF Doc No. 80, Judgment Order, Criminal Branch, New York County, signed on April 30, 2018, and filed with the New York County Clerk's office).

Defendants filed their answer in December 2016 (*see* NYSCEF Doc No. 126, answer). It contained 27 affirmative defenses including preclusion by UCC articles 3 and 4, failure to state a cause of action for fraud, and failure to give required and timely written notice pursuant to the parties' account agreement.

In July 2018, after some discovery had occurred, plaintiff moved to amend its complaint in part to include "no fewer than 60 additional checks" made out to American Express, also having either no indorsements or apparently fraudulent indorsements, paid between October 9, 2009, and December 12, 2013, during Smith's employ, totaling \$848,310.13 (*see* NYSCEF Doc No. 98, motion to amend; Doc No. 103, amended complaint, ¶¶ 20-21). Defendants opposed, arguing that the proposed amended complaint failed to state a cause of action: the claims were time-barred under the three-year statute of limitations provided by subsection (4) of UCC 4-406 ("Customer's Duty to Discover and Report Unauthorized Signature or Alteration"), and CPLR 214 (2) and precluded even if plaintiff could show Bank demonstrated a lack of care, because plaintiff failed to provide Bank with written notice of its claims within three years from the time the statements and checks were made available to it (*see* Doc No. 37, def memo in opposition to plaintiff's motion to amend at 10-18). Plaintiff also failed to provide Bank with written notice of the unauthorized checks within 90 days, as required by its Account Disclosure and Rules agreement governing its account with Bank (*see* NYSCEF Doc No. 37, defendants' memorandum of law in opposition to plaintiff's motion for leave to amend at 18-20).

The IAS court denied plaintiff's motion to amend, finding that plaintiff's failure to notify Bank in writing within 90 days of the unauthorized or missing indorsements, rendered its claims untimely; the court made no findings or ruling concerning defendants' other arguments (*see Lane's Floor Coverings & Interiors, Inc. v Dilalla*, 2018 NY Slip Op 33355 [U] [Sup Ct, New York County 2018]). The First Department reversed in April 2020, finding that defendants had "failed to establish that plaintiff's claims are patently lacking in merit," because they had not provided documentary evidence to show that plaintiff had agreed to the Bank's 90-day written notice requirement (*Lane's Floor Coverings & Interiors, Inc. v Anthony DiLalla*, 182 AD3d 498, 499 [1st Dept 2020] [internal quotation marks and citation omitted]). The Court reinstated the complaint and stated that "plaintiff is entitled to discovery with respect to the additional fraudulent checks" (*Lane's Floor Coverings & Interiors, Inc. v Anthony DiLalla*, 182 AD3d 498, 499 [1st Dept 2020]).

Plaintiff filed its amended complaint in August 2020. As did the initial complaint, it has seven causes of action.<sup>2</sup> Against Bank, it again alleges fraud; negligence; gross negligence, failure to act in good faith, and breach of the deposit agreement between plaintiff and Bank (*see* NYSCEF Doc 103, ¶¶ 26-36; 47-77). It alleges that Bank allowed the checks to be indorsed by a party who was not the intended payee, or allowed payments with no indorsement, thereby failing to exercise ordinary care or "observe reasonable commercial standards prevailing in the banking industry, violating UCC 3-404 (d)" (NYSCEF Doc No. 103, ¶ 33).<sup>3</sup> Bank negligently failed to detect the fraud, although its internal controls should have identified the discrepancies, and was grossly negligent by "recklessly

<sup>2</sup> Plaintiff provided a blackline version of its proposed amendments to the original complaint (*see* NYSCEF Doc No. 17, blackline version of proposed amended complaint). It shows that the document was amended primarily to include references to the newly discovered checks and to correct the amount at issue from \$60,000 to more than \$848,000 (*see* NYSCEF Doc No. 17, ¶¶ 24-24).

<sup>3</sup> Plaintiff has mistakenly cited the federal UCC provision 3-404 ("Unauthorized Signatures") rather than the appropriate New York State Provision ("Rights of One Not Holder in Due Course"). The court will not otherwise address the content of the mistakenly cited federal provision.

disregard[ing] any warning signs, and its own policies and procedures, that would have prevented the successful consummation of” the fraud (NYSCEF Doc No. 103, ¶¶ 57-59; 70-71). Bank breached the terms of its deposit agreement with plaintiff and failed to act in good faith (*see* NYSCEF Doc No. 103, ¶¶ 73-76). Upon information and belief, Bank knew of or intentionally ignored the suspicious actions, and Smith’s theft could not have occurred without DiLalla’s participation (*see* NYSCEF Doc No. 103, ¶ 50). Bank “engaged in conduct that helped DiLalla and Smith perpetrate their fraudulent scheme” (*see* NYSCEF Doc No. 103, ¶ 48). Its breach “provided a safe haven for the fruits of DiLalla’s and Smith’s fraudulent scheme” (NYSCEF Doc 103, ¶¶ 53-56).

As against DiLalla, the amended complaint again alleges fraud (*see* NYSCEF Doc No. 103, ¶¶ 37-47). DiLalla authorized the checks to be cashed despite the indorsement discrepancies; based on information and belief, the proceeds were shared by DiLalla and Smith (*see* NYSCEF Doc No. 103, ¶¶ 18, 39). DiLalla committed fraud by “intentionally and actively conceal[ing]” the “flagrant[ ]” cashing of the fraudulent checks (NYSCEF Doc No. 103, ¶¶ 44-46). Without DiLalla, Smith would not have been able to cash those checks (*see* NYSCEF Doc No. 103, ¶¶ 38-42). Pursuant to UCC 3-306, he is liable for the full amount of the checks, as he was “[a] person taking an instrument, other than a person having rights of a holder in due course,” and therefore subject to plaintiff’s claims to recover the proceeds (Doc 103, ¶¶ 40-41).<sup>4</sup>

### The motion and cross motion

#### **Defendants’ motion to dismiss**

Defendants move, pre-answer, pursuant to CPLR 3211 (a) (1) and (7), for dismissal of the amended complaint contending it has not stated “any cause of action on the alleged checks that were paid between October 9, 2009, and September 16, 2013” (*see* NYSCEF Doc No. 95, notice of motion). They argue that because plaintiff’s claims involve unauthorized payment of checks, UCC article 3 (“commercial paper”) and article 4 (“bank deposits and collections”) govern exclusively, rather than the common law (*see* NYSCEF Doc No. 104, defendants’ memo of law in support at 7, citing *Prudential-Bache Secs., Inc. v Citibank, N.A.*, 73 NY2d 263, 272 [1989] [allowing resort to common-law claims in situations where the Code precludes recovery, would contradict and nullify the Code provision and is “inconceivable”]). Because article 4 of New York’s UCC does not contain an explicit statute of limitations, it is well-understood that CPLR 214 (2), governing actions “to recover upon a liability, penalty or forfeiture created or imposed by statute,” controls and imposes a three-year statute of limitations (*see* NYSCEF Doc No. 104, defendants’ memorandum of law at 9, citing *Banca Commerciale Italiana v Northern Trust Intl. Banking Corp.*, 160 F3d 90, 94 [2d Cir 1998] [claim under UCC 4-1-211 departs from common law and therefore the three-year statute of limitations found in CPLR 214 [2] applies]; *Cardino v J.P. Morgan Chase Bank, N.A.*, 2013 NY Slip Op 32021 [U], \*5 [Supreme Ct, Suffolk County 2013]).

Customers have a duty to promptly examine their bank statements (*see* NYSCEF Doc No. 104 at 12-13, citing *Touro College v Bank Leumi Trust Co.*, 186 AD2d 425, 426 [1st Dept 1992]). Where a bank has paid on a check that contains an unauthorized indorsement, UCC 4-406 (4) places the burden on the bank customer to discover and report that fact to the bank within three years “from the time the

<sup>4</sup> Plaintiff has mistakenly cited the federal UCC provision 3-306 (“Notice to Purchaser”), rather than the appropriate New York State provision (“Rights of One Not Holder in Due Course”). The court will not otherwise address the content of the mistakenly cited provision.

statement and items are made available” to it (*see* NYSCEF Doc No. 104 at 12-13, quoting UCC 4-406 [4]).<sup>5</sup> Whether or not the bank or the customer acted with a lack of care, failure of the customer to timely report unauthorized indorsements precludes it from making such a claim against the bank (*see* NYSCEF Doc No. 104 at 14, citing UCC 4-604 [4]).

Defendants contend that the applicable three-year statute of limitations has long passed, because plaintiff only filed its motion for leave to amend on July 10, 2018, and the three-year period from its receipt of the statements had expired between October 9, 2012, and September 16, 2016 (*see* NYSCEF Doc No. 104 at 12). It is not a defense that Smith was able to hide the fraud for several years because he was fully in charge of its finances; the bank account statements were mailed to plaintiff at the address in the signature card, and under the law, plaintiff was in the best position to prevent the fraud (*see* NYSCEF Doc No. 104 at 14, citing *Robinson Motor Xpress, Inc. v HSBC Bank, USA*, 37 AD3d 117, 119-120 [2d Dept 2006] [holding the “bank is entitled to the (three-year statute of limitations) protections afforded by UCC 4-406 (4) even if the statements are thereafter intercepted by a dishonest employee or other ill-intentioned third party”]).

Defendants argue they have no liability pursuant to UCC 3-405, the “fictitious payee” or “padded payroll rule” (*see Retail Show Health Com. v Manufacturers Hanover Trust Co.*, 160 AD2d 47, 50 [1st Dept 1990]). That statute provides that “an indorsement by any person in the name of a named payee is effective if ... an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest” (NYSCEF Doc No. 104 at 11, quoting UCC 3-405 [1] [c]). The Court of Appeals has stated that UCC 3-405 “was calculated by the Legislature ‘to shift the balance in favor of the bank in situations in which the drawer’s own employee has perpetrated a fraud or committed the crime giving rise to the loss’” (*see* NYSCEF Doc No. 104 at 11, quoting *Prudential-Bache Secs., Inc. v Citibank*, 73 NY2d at 270-271). *Prudential-Bache* also held that UCC 3-405 (1) (c) addresses not only forged indorsements, but “situations where an employee starts the wheels of normal business procedure in motion to produce a check for a nonauthorized transaction” (NYSCEF Doc No. 104 at 11, quoting *Prudential-Bache* at 271 [internal quotation marks and citation omitted]).

### **Plaintiff’s opposition and cross motion**

In opposition, plaintiff first argues that defendants’ motion violates the “single motion rule” set forth in CPLR 3211 (e), which allows only one subdivision CPLR 3211 (a) pre-answer motion per case (*see* NYSCEF Doc No. 120, affirmation by plaintiff’s counsel in opposition, ¶ 60). Defendants previously raised the same statute of limitations arguments under UCC 4-406 (4) as well as the 90-day notice requirement in its opposition to amendment of the complaint. The court considered those arguments and denied plaintiff’s motion on the ground that plaintiff did not comply with the 90-day written notice requirement (*see* NYSCEF Doc No. 120, ¶¶ 63-65). Defendants may not now move to dismiss the complaint based on the same statute of limitations arguments (*see* NYSCEF Doc No. 120, ¶¶ 65-67).

### Statutes of Limitations

In any event, plaintiff argues that neither subsection (4) of UCC 4-406 nor the three-year statute of limitations imposed by CPLR 214 (2), is applicable (*see* NYSCEF Doc No. 120, ¶ 70). Plaintiff is not alleging that Bank failed to exercise ordinary care in the performance of its duties (*see* NYSCEF

<sup>5</sup> A check is considered “an item” (*see Monreal v Fleet Bank*, 95 NY2d 204, 207 [2000]).

Doc No. 120, ¶¶ 71-72). Rather, it alleges that when Smith presented certain checks made out to American Express, DiLalla knowingly cashed them in spite of there being no indorsement or a fraudulent indorsement, and Bank allowed and assisted in its employee's fraudulent conduct (*see* NYSCEF Doc No. 120, ¶¶ 73-74). This is not mere negligence of defendants' failure to uncover a fraud, but is, rather, their active and knowing participation in fraud (*see* NYSCEF Doc No. 120, ¶ 74).

The applicable statutory subsection is UCC 4-406 (3), which provides that the three-year statute of limitations does not apply if the customer establishes "lack of ordinary care on the part of the bank in paying the item(s)" (NYSCEF Doc No. 120, ¶ 109, quoting UCC 4-406 [3]). Subsection (3) "shifts the loss of even repeated forgeries back to the bank" where the customer, even if it failed in its duty to timely inspect its canceled checks and statements, can "establish that the bank lacked ordinary care in paying the forged checks" (NYSCEF Doc No. 120, ¶ 109, quoting *Putnam Rolling Ladder Co. v Manufacturers Hanover Tr. Co.*, 74 NY2d 340, 345-346 [1989]).

Defendants cannot rely, plaintiff further argues, on UCC 3-405, the "fictitious payee rule," which is intended to shield depository banks from failures to discover fraudulent indorsements or signatures when it is the drawer rather than the bank who is best able to prevent the loss (*see* NYSCEF Doc No. 120, ¶ 97). As stated by the Court of Appeals, this statute does not shield a bank which acts dishonestly and has "actual knowledge of facts and circumstances that amount to bad faith, thus itself becoming a participant in the fraudulent scheme" (NYSCEF Doc No. 120, ¶¶ 96, 98, quoting *Prudential-Bache Sec., Inc.*, 73 NY2d at 275). Here, Bank repeatedly and knowingly failed to stop payment on checks with no indorsements or fraudulent indorsements, exhibiting unreasonable commercial practices that constituted fraud, and therefore plaintiff's claims can be brought within the statutory period allotted to fraud, as set forth in CPLR 213 (8).

For a claim of fraud, "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued *or* two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud or could, with reasonable diligence have discovered it" (NYSCEF Doc No. 120, ¶ 81, quoting CPLR 213 [8], emphasis added). Plaintiff relies on the second prong of the statute that allows two years from the time it discovered or could have discovered the fraud to commence its action and to amend its complaint to include the additional checks dated between 2009 and 2013 (CPLR 213 [8]).

Plaintiff notes that the question of when a plaintiff discovers the fraud is a mixed question of law and fact, and "where it does not conclusively appear that the plaintiff[] had knowledge of facts of [the fraudulent acts], a complaint should not be dismissed on motion" (NYSCEF Doc No. 120, ¶ 82, quoting *Erbe v Lincoln Rochester Tr. Co.*, 3 NY2d 321, 326 [1957] [internal quotation marks and citation omitted]). *Erbe* holds that a plaintiff can be deemed to have discovered the fraud when it acquires "knowledge of facts from which [fraud can] be reasonably inferred" (Doc No. 120, ¶¶ 81, 83, quoting *Erbe* at 326). Plaintiff argues that it "did not acquire knowledge of some of the operative facts concerning [d]efendants' involvement in the fraud" until 2017, after its meeting with the Office of the Manhattan District Attorney (Manhattan DA) on December 16, 2016; once it was "apprised" of defendants' involvement and of "the potential scope of[] the fraudulent plan," it "undertook an exhaustive investigation" (NYSCEF Doc No. 120, ¶ 83). Accordingly, its motion to amend its complaint, filed on July 10, 2018, was timely made within two years of its discovery in December 2016 of defendants' fraudulent involvement (*see* NYSCEF Doc No. 120, ¶ 86).

Equitable tolling

New York courts, plaintiff argues, “have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant’s affirmative wrongdoing -- a carefully concealed crime here -- which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding” (NYSCEF Doc No. 120, ¶ 93, quoting *General Stencils, Inc. v Chiappa*, 18 NY2d 125, 128 [1966]). Plaintiff “did not come to suspect that [d]efendants were involved in the fraudulent scheme until meeting with the [Manhattan] DA on December 16, 2016” (NYSCEF Doc No. 120, ¶ 94). Defendants continue to conceal their involvement in the ongoing fraud and plaintiff still does not know the full extent of defendants’ deception, and therefore the statute of limitations should be equitably tolled (*see* NYSCEF Doc No. 120, ¶¶ 92-93, 95, citing *General Stencils, Inc. v Chiappa*, 18 NY2d at 128 [citation omitted]).

Cross Motion

Plaintiff cross-moves pursuant to CPLR 3124 to compel defendants to produce all responsive, non-privileged documents it had previously requested, referenced in the First Department’s holding of April 23, 2020, which stated that plaintiff “is entitled to discovery with respect to the additional fraudulent checks” (NYSCEF Doc No. 120, affirmation in support of cross motion, ¶¶ 51, 121, quoting *Lane’s Floor Coverings & Interiors*, 182 AD3d at 498). Defendants have refused to produce the documents that Bank provided to the Manhattan DA, continuing to conceal the scope of their role in the fraud of which they knew prior to plaintiff’s meeting with the DA (*see* NYSCEF Doc No. 120, ¶¶ 95, 115). They are engaged in bad faith efforts to delay and obfuscate (*see* NYSCEF Doc No. 120, ¶ 117).

Plaintiff seeks the imposition of monetary sanctions pursuant to CPLR 3126 and NYCRR § 130-1.1, for defendants’ willful failure to comply with discovery (*see* NYSCEF Doc No. 120, ¶ 119, citing *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222, 222 [1st Dept 2003]). In particular, defendants continue to fail to disclose the documents they had provided to the Manhattan DA (Doc No. 120, ¶ 50 [f]), and what they have disclosed was “woefully inadequate,” and “largely...immaterial,” and not responsive to the period of 2009 to 2013 (Doc No. 120, ¶¶ 47-48).

**Defendants’ opposition and reply**Single Motion Rule

The “single motion rule” is not at issue. This is defendants’ first motion seeking to dismiss pursuant to CPLR 3211; previously they filed opposition pursuant to CPLR 3211 (a) (5) and (7) to plaintiff’s motion seeking to amend the original complaint (*see* NYSCEF Doc No. 137, def reply memorandum at 5 and n 5). Moreover, the original complaint only asserted claims as to five checks, and defendants could not have previously made a motion to dismiss the causes of action pertaining to all of the checks now at issue (*see* NYSCEF Doc No. 137, at 5-6, citing *Kocourek v Booz Allen Hamilton Inc.*, 114 AD3d 567, 569 [1st Dept 2014] [“single motion rule” does not bar a motion to dismiss where the cause of action at issue was not set forth in the original complaint]).

Statute of Limitations

Defendants assert that it is well-established that UCC articles 3 and 4 displace all common law claims and exclusively governs claims of wrongful payment of checks having unauthorized

indorsements (*see* NYSCEF Doc 137 at 6, citing *Prudential-Bache Secs., Inc. v Citibank, N.A.*, 73 NY2d at 272-273 [holding that because UCC 3-405 (1) (c) “unmistakably precludes recovery” on a claim for conversion or money had and received, the plaintiff could not assert those claims outside the UCC]). Plaintiff failed to report the checks or bring a lawsuit within three years of the statements and checks being made available to it. Its motion to amend to add the additional checks occurred only in July 2018—long after the statute of limitations had expired (*see* NYSCEF Doc No. 137 at 2, 7, 11, citing *OneWest Bank, FSB v Deutsche Bank Natl. Trust Co.*, 186 AD3d 92, 98 [1st Dept 2020] [observing that the plaintiff “might well have had” a claim under UCC 4-401 against the bank that made payment of a misappropriated and improperly indorsed check, but was precluded by the three-year statute of limitations]).

Plaintiff errs in arguing that Bank’s alleged “commercial bad faith” in cashing the checks over unauthorized indorsements, negates the necessity to report the newly discovered 60 checks to Bank within the three-year period mandated by UCC 4-406 (4) (*see* NYSCEF Doc No. 137 at 17). Defendants point to *Weiser v Citigroup, Inc.* (175 AD3d 1125 [1st Dept 2019]), where the plaintiff did not discover and notify its bank in writing of the unauthorized check signatures within the time required under UCC 4-406 (4), and also failed to comply with the bank’s rules and regulations pertaining to checking accounts (*Weiser*, 175 AD3d at 1126). In *Weiser*, the First Department rejected the plaintiff’s argument that the bank’s “commercial bad faith” excused the plaintiff’s failure to discover and report the altered checks, finding that the claims against Citibank were barred “by [the] plaintiff’s failure to satisfy a condition precedent to suit created by UCC 4-406 (4),” namely to notify the bank of the lack of authorization in one year, as well as to report to the same to the bank within 30 days, in compliance with Citibank’s rules and regulations set forth in the client manual (NYSCEF Doc No. 137 at 3, quoting *Weiser*, 175 AD3d at 1126).

Plaintiff also fails to plead fraud with the particularity required by CPLR 3016 (b) (*see* NYSCEF Doc 137 at 11). The amended complaint alleges only “upon information and belief” that at Smith’s “direction,” DiLalla authorized the cashing of the checks at issue with the proceeds going to Smith and DiLalla, and that Bank knew of or intentionally ignored the handling of the suspicious checks (NYSCEF Doc No. 137 at 13). These bare and conclusory allegations are simply insufficient to allege fraud (NYSCEF Doc No. 137 at 13, citing *Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 615 [1<sup>st</sup> Dept 2015]). It must therefore be found that plaintiff’s claims fall under UCC 4-406, that the statute of limitations is three years, and plaintiff’s claims are untimely.

### Equitable Tolling

Plaintiff may not claim equitable tolling of the statute of limitations. Plaintiff is required to sufficiently allege that defendants actively misled the plaintiff, or that plaintiff “in some extraordinary way had been prevented from complying with the limitations period” (NYSCEF Doc No. 137 at 15, quoting *O’Hara v Bayliner*, 89 NY2d 636, 646 [1997]). Plaintiff must demonstrate that the failure to timely commence its lawsuit was not attributable to its own lack of diligence (*see* NYSCEF Doc No. 137, at 15, citing *Kotlyarsky v NY Post*, 195 Misc 2d 150, 154 [Sup Ct, Kings County 2003]).

Plaintiff has not presented any facts to show that Bank “actively misled” it, or that plaintiff in some “extraordinary way” was prevented from timely filing claims on all of the checks (*see* NYSCEF Doc No. 137 at 15). The amended complaint in fact reveals that plaintiff, in discovering Smith’s fraud “on or after December 23, 2013,” had in its possession “[a]ll of the information necessary to identify the [66 checks], including account statements and cancelled checks” (NYSCEF Doc No. 137 at 15-16,

quoting Doc No. 103, amended complaint, ¶ 12). Yet, plaintiff only commenced its action in September 2016 when it claimed damages for five checks cashed in 2013, and not until July 2018 did it seek to amend to include the additional checks, more than four and a half years after its discovery of Smith's fraud, and nearly two years after filing its original complaint (*see* NYSCEF Doc No. 137 at 15-16). It is plaintiff's own lack of diligence, not anything Bank did, that resulted in plaintiff not timely filing claims on the newly found checks (*see* NYSCEF Doc No. 137 at 4). Plaintiff's dilatory conduct precludes any basis for equitable tolling (*see* NYSCEF Doc No. 137 at 16 and n 1).

### Discovery demands

Defendants argue they are not yet obligated to respond to plaintiff's discovery demands because they have not yet served an answer to the amended complaint (*see* NYSCEF Doc No. 137 at 4). They contend they will respond to the discovery demands if their motion is denied, and after they serve an answer to the amended complaint (*see* NYSCEF Doc No. 137 at 4). There argue there are currently no grounds for a motion to compel, and Bank has not violated any court order concerning discovery that would permit an award of sanctions (*see* NYSCEF Doc No. 137 at 4).

### Discussion

The single motion rule provides that, "[a]t any time *before service of the responsive pleading* is required, a party may move on one or more of the grounds set forth in subdivision (a), *and no more than one such motion shall be permitted*" (CPLR 3211 [e] [emphases added]). This means that a second motion cannot be brought under CPLR 3211 (a) seeking dismissal of the same claim on the same grounds raised during a prior motion. For example, in *B.S.L. One Owners Corp. v Key Intl. Mfg., Inc.* (225 AD2d 643, 644 [2d Dept 1996]), where the defendants moved pursuant to CPLR 3211 (a) to dismiss all three claims in the complaint, and one claim was dismissed, after which the plaintiff filed an amended complaint that was "essentially the same as the original complaint" but substituted a new claim in lieu of the one dismissed, the "single motion rule" precluded the defendants from moving to again dismiss the original two claims. In *Ross v Epstein* (26 AD2d 658 [2d Dept 1966]), the defendants' CPLR 3211 motion to dismiss the complaint was denied, and the plaintiff was directed to serve an amended complaint "for clarification purposes" only; the single motion rule barred the defendants from then moving to dismiss the complaint based on the statute of limitations, a new theory (26 AD2d at 658-659).

The statutory restriction is designed to avoid duplication and repeated postponement of the service of the answer (*see Held v Kaufman*, 91 NY2d 425, 430 [1998]; Siegel, NY Practice [6th ed] at 519, § 273). Notably, the defense of failure to state a cause of action "is not lost" by the failure to include it in the motion under CPLR 3211 (e). "Although it may not be raised in another motion under that section (of which the statute permits only one) it may be later raised in another form" (*McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983], citing *Rich v Lefkovits*, 56 NY2d 276, 281-282 [1982]).

The single motion rule does not bar a successive motion to dismiss where the causes of action were newly made in an amended pleading (*see Kocourek v Booz Allen Hamilton Inc.*, 114 AD3d 567, 568, [1st Dept 2014]; *Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013] [the single motion rule did not bar two of the defendants from moving to dismiss the amended complaint, because the fraud cause of action in the amended complaint was not the same as the corresponding cause of action in the original complaint, and no fraud claim had previously been asserted as against one of the defendants, so that it could not have moved to dismiss that claim earlier]). It is not violated where the amended

complaint introduces “substantial new material” which the defendant moves to dismiss (*see Matter of 8430985 Can., Inc. v Frydman*, 188 AD3d 401, 401 [1st Dept 2020]; *Barbarito v Zahavi*, 107 AD3d at 420).

It is manifestly obvious that this is indeed defendants’ first motion to dismiss under CPLR 3211 (a). Admittedly, defendants’ initial arguments opposing amendment of the complaint are brought again in this motion to dismiss the complaint, namely that under UCC 4-406, the claims were time-barred. In reply to plaintiff’s opposition arguing that fraud is the actual claim at issue, defendants for the first time articulate their arguments as to the insufficiency of plaintiff’s claims of fraud.

The court will follow the literal reading of CPLR 3211 (e) to hold that defendants’ motion is not precluded by the single motion rule, as their first motion to dismiss is made “*before service of the responsive pleading*” (CPLR 3211 [e] [emphases added]). This is all the more reasonable when it is noted that a motion to amend has a somewhat different standard of review than a motion to dismiss.

Where the motion is to amend a pleading, the “general rule” is that “leave to amend a pleading should be freely granted . . . where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court” (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks and citation omitted]; *see Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012] [the movant “need not establish the merit of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit”]; CPLR 3025 [b]). Here, the First Department found in its sound discretion that the proposed amended complaint was not patently lacking in merit.

Now before the court, in comparison, is the motion to dismiss pursuant to CPLR 3211 (a) (7). The court’s role is “to determine whether [the] pleadings state a cause of action” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). The court “liberally construe[s]” the allegations, “accept[s] the facts alleged . . . as true,” and accords them “the benefit of every possible favorable inference,” to determine whether a cause of action has been adequately stated (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, at 152). The sole question is whether the facts, as alleged, fit within any cognizable legal theory (*id.*; *see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). This standard of review differs from that used in a motion to amend and is further support for finding that defendants’ motion is not subject to CPLR 3211 (e), the single motion rule.

The two intertwined questions here are whether the amended complaint adequately alleges a claim of fraud and identifying the correct statute of limitations governing plaintiff’s claims.

Plaintiff alleges that defendants engaged in commercial bad faith by their fraudulent conduct. The courts recognize claims of commercial bad faith “[w]here a depository bank acts dishonestly -- where it has actual knowledge of facts and circumstances that amount to bad faith, thus itself becoming a participant in a fraudulent scheme” (*Prudential-Bache Sec.*, 73 NY2d at 275). “[S]uch conduct falls wholly outside the allocation of business risks that was contemplated by UCC 3-405 (1) (c)” (*Calisch Assoc. v Manufacturers Hanover Trust Co.*, 151 AD2d 446, 447 [1st Dept 1989], quoting *Prudential-Bache Sec.*, at 275]). Notably, a bank’s demonstrated fraud would strip of the protections afforded by UCC 3-405 (1) (c).

A claim of fraud must allege “the circumstances constituting the wrong...in detail” (CPLR 3016 [b]). The elements to be pleaded are “a misrepresentation or a material omission of fact which was false and known to be false by 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” (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). A claim is sufficiently pleaded when the alleged facts are “sufficient to permit a reasonable inference of the alleged misconduct” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008] [internal quotation marks omitted]). The claim must “be pleaded in sufficient detail to give adequate notice,” but in a pre-answer motion to dismiss, plaintiffs “need not...establish the truth of their allegations,” rather they “need only allege specific facts from which it is possible to infer defendant’s knowledge of the falsity of its statements” (*Oster v Kirschner*, 77 AD3d 51, 58 [1st Dept 2010] [internal quotation marks and citation omitted]). A plaintiff must “set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud” (*Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005], quoting *Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

Here, the complaint alleges upon information and belief that Bank knew of or intentionally ignored the checks being fraudulently cashed and paid by its employee to Smith. Additionally, it claims upon information and belief that the proceeds were allegedly shared between DiLalla and Smith. Bank provided “a safe haven” for DiLalla’s and Smith’s fraudulent scheme.

Key allegations made to support a claim of fraud that are pleaded on information and belief, are insufficient alone to state the claim (*see Elmrock Opportunity Master Fund I, L.P. v Citicorp N. Am., Inc.*, 155 AD3d 411, 412 [1st Dept 2017]; *Schwarz v Consolidated Edison, Inc.*, 147 AD3d 447, 447-448 [1st Dept 2017]). Allegations of fraud based on information and belief should include the source of such information (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010], citing *Kanbar v Aronow*, 260 AD2d 182, 182 [1st Dept 1999] [claims upon information and belief, asserted without disclosing the sources of the information that form the basis of the belief, and an affidavit saying that “various people” had told the plaintiff about the default, were insufficient to allege fraud]; *Belco Petroleum Corp. v AIG Oil Rig*, 164 AD2d 583, 598-599 [1st Dept 1991]).

Although it might be presumed that plaintiff’s allegations are based on what it learned from its meeting with the Manhattan DA, its complaint is noticeably silent as to the source for its claims. The failure to identify the source or sources of its information means that the claims are only based on supposition and suggestion, insufficient to allege fraud (*see Kanbar v Aronow*, 260 AD2d at 182; *compare Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d at 367-368 [where the complaint alleged “in fair detail the way in which defendants or their agents purposely concealed three pages of the four-page equipment lease,” identified the defendants by position, and included allegations that the defendants did not provide the plaintiff with fully executed copies of the leases which “tend(ed) to show an intentional and deceptive concealment,” the pleading requirements of CPLR 3016 (b) were satisfied, in particular as no discovery had yet been done]).

Here, even granting plaintiff the most favorable inferences, the complaint simply fails to meet the specificity required by CPLR 3016 (b) (*compare Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). There are only suppositions and conclusions claiming that Bank officials were aware of and condoned or ignored or even assisted the activities of DiLalla, and only conclusions concerning DiLalla’s intent and role. There are no alleged facts that would inculcate officials of Bank as actual

participants who were knowledgeable and condoning of the fraudulent activity (*see Retail Shoe Health Commn. v Manufacturers Hanover Trust Co.*, 160 AD2d at 51).

Were the court to find, for the purposes of this pre-answer motion, that the complaint sufficiently alleged fraudulent acts, there is still the question of the timeliness of the complaint. Fraud has a statute of limitations that is either “the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it” (CPLR 213 [8]).

“Where there is knowledge of facts sufficient to suggest to a person of ordinary intelligence the probability that he [or she] has been defrauded, a duty of inquiry arises and may thus start the running of the statute” (*Melcher v Greenberg Traurig, LLP*, 102 AD 3d 497, 500 [1st Dept 2013] [internal quotation marks and citation omitted], *reversed on other grounds* 23 NY3d 10 [2013]). A cause of action accrues “as soon as a claimant is able to state the elements of that cause of action, and hence, to assert a valid right to some sort of legal relief” (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 26 [2d Dept 1989], citing *City of New York v State of New York*, 40 NY2d 659, 668 [1976]). Plaintiff allegedly initially discovered “on or after” December 23, 2013, that its employee Smith had been illegally diverting its funds since February 2011 by cashing fraudulent checks. Although plaintiff asserts that it did not understand defendants’ full involvement until it met with the Manhattan DA in December 2016, nevertheless it had commenced this action against defendants in September 2016, before meeting with the DA. Clearly, plaintiff had come to believe that defendants played a fundamental role in Smith’s fraud, at least as to the five checks dated 2013, the subject of the original complaint.

“The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was ‘possessed of knowledge of facts from which [the fraud] could be reasonably inferred’” (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009], quoting *Erbe v Lincoln Rochester Trust Co.*, 3 NY2d at 326). In late 2013, plaintiff was in possession of all of the checks and bank statements and knew that Smith’s fraud began as early as 2011; it claims it learned later, perhaps after its meeting with the Manhattan DA, that Smith’s fraud went back as far as 2009. Timely investigation would have revealed that the checks were all made out to American Express, lacked proper indorsements, and were cashed at Bank. Reasonable diligence would have led to plaintiff to the logical inference that defendants were involved in fraud occurring not just as to the five checks, but to all the checks now at issue (*see Sargiss v Magarelli*, 12 NY3d at 532). Based on this analysis, plaintiff’s claims of fraud would be untimely.

The doctrine of equitable tolling is not applicable. Plaintiff has not demonstrated that defendants have “misled” it, or prevented it, “in some extraordinary way,” from complying with the limitations period (*Shared Communications Servs. of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325, 325 [1st Dept 2007]). Defendants make a persuasive argument that they did not disclose documents pertaining to checks dated before 2013 because they were not a subject of the initial complaint.

It can be held that the complaint alleges negligence against Bank for its failure to monitor, provide oversight, or instruct its personnel (*see Calisch v Manufacturers Hanover Trust*, 151 AD2d at 448). All of plaintiff’s claims are therefore governed by UCC 4-406 with its shifting duties between the bank and the customer. UCC 4-406 (3) provides that where the customer can establish “lack of ordinary care” by the bank in making payments, the customer will not be precluded from making a claim as to unauthorized signatures or alterations of the check, even if the bank establishes that the customer had not “exercise[d] reasonable care and promptness” in initially examining its statements and making

prompt notification to the bank (*see* UCC 4-406 [1]). However, a bank’s failure to use ordinary care in handling a check does not remove the statutory protection afforded by UCC-3-405 (1) (c), the “fictitious payee” rule (*see Prudential-Bache Secs., Inc. v Citibank, N.A.*, 73 NY2d at 274). UCC 3-405 (1) (c) provides that “[l]osses arising out of forged indorsements are allocated to the party best able to take precautions to prevent them” (*Prudential-Bache Sec.*, 73 NY2d at 269; *see Merrill Lynch, Pierce, Fenner & Smith v Chemical Bank*, 57 NY2d 439, 447 [1982]; *Touro Coll. v Bank Leumi Trust Co.*, 186 AD2d at 427). It shifts the balance, where a drawer’s own employee has perpetrated the fraud, in favor of the bank (*see Prudential-Bache Secs.*, 73 NY2d at 270-271).

Furthermore, even if plaintiff sufficiently alleges commercial bad faith, its claim is still governed by UCC 4-406 (4) which requires that a customer must notify its bank within three years of fraudulent indorsements. This was clearly stated in *Weiser v Citigroup, Inc.* (175 AD3d 1125), where the First Department held that even though it found that the plaintiff’s claims against Citibank were not barred by UCC 3-405 (1) (c), the plaintiff had failed to satisfy UCC 4-406 (4)’s “condition precedent” to bringing suit, which in that case was that the plaintiff had notified Citibank within one year of forged signatures, and that it had notified Citibank within 30 days, as required by the checking account rules (*see Weiser*, 175 AD3d at 1126). So too here, even if plaintiff sufficiently established commercial bad faith, its failure to have notified Bank within three years is fatal to its claim.<sup>6</sup>

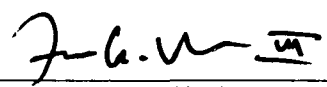
Accordingly, it is

ORDERED that defendants’ motion to dismiss is granted; and it is further

ORDERED that the cross motion is denied as academic; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

3/30/2022			
DATE			FRANCIS A. KAHN III, A.J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<b>HON. FRANCIS A. KAHN III</b>
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	NON-FINAL DISPOSITION
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<b>J.S.C.</b>
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE

<sup>6</sup> The Appellate Division previously ruled that defendants had not submitted evidence to show that plaintiff had agreed to be bound by the requirement that it report fraud to Bank within 90 days (*see Lane’s Floor Coverings & Interiors, Inc.*, 182 AD3d at 498-499).