

Matter of Breer
2022 NY Slip Op 34448(U)
December 29, 2022
Surrogate's Court, Bronx County
Docket Number: File No. 2018-2142/B
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

December 29, 2022

ESTATE OF SHIRLEY M. BREER, Deceased
File No.: 2018-2142/B

In this turnover proceeding the administrator, Kerry Quarterman ("Petitioner"), seeks to recover monies that were allegedly misappropriated by Kileen Toni Hannon ("Hannon"), one of the decedent's daughters, and Darren Tracy Claudio ("Claudio"), a grandson. Petitioner also seeks an order effectively imposing joint and several liability against Citibank, N.A. ("Citibank") for the repayment of the decedent's funds that Claudio allegedly withdrew from the decedent's bank accounts.

Hannon and Citibank have each filed a motion to dismiss the instant proceeding pursuant to various provisions of CPLR § 3211 (a), which are opposed by Petitioner. The matters were extensively briefed. As set forth below, Hannon's motion to dismiss the petition on jurisdictional grounds is granted. Citibank's motion is granted in part and denied in part, without prejudice.

BACKGROUND

The decedent died on October 14, 2017. She was survived by four distributees, a group comprised of three children (Petitioner, Hannon and Kim Tracey Quartermann) and a grandson (Claudio). The three children are Florida domiciliaries. Claudio resides in New York.

The decedent's husband, Russell Breer ("Russell"), died on June 14, 2014, leaving his entire estate to the decedent. Petitioner alleges that upon Russell's death, the decedent had assets worth more than \$600,000, consisting of cash held in New York and

Florida bank accounts totaling \$213,000 and a single-family home located in the Bronx worth \$406,000. The bank accounts were jointly titled in the names of the decedent and Russell (collectively, the “First Accounts”). Petitioner further alleges that the decedent was diagnosed with Alzheimer’s disease in 2005 and incapable of managing her own finances or understanding significant financial decisions by the time Russell died.

The decedent went to live with Hannon in Florida immediately after Russell’s death and remained there until October 8, 2014. According to the petition, during this period Hannon took approximately \$100,000 from the decedent without authorization. The petition does not indicate what accounts were depleted or how this money was misappropriated. It only alleges that her attorneys are “in the process of obtaining further information as to this \$100,000.”¹

On October 8, 2014, the decedent moved back into her home in the Bronx. It is alleged that prior to this date, Claudio, his girlfriend, her two teenage children and two dogs had moved into the house.

The decedent opened a new Citibank checking and savings account in her own name (collectively, the “Second Accounts”) after returning to the Bronx. Petitioner claims that the Second Accounts were funded by transfers from the First Accounts.

On November 25, 2014, Citibank issued two teller’s checks at a Citibank branch in the Bronx totaling \$49,000.00, payable from the Second Accounts. Allegedly Claudio used the checks to purchase cars for himself and his girlfriend.

¹Hannon’s answer to the petition states “petitioner further alleges that your Objectant established a bank account at Compass Bank in St. Augustine, Florida in the name of the decedent from which Petitioner alleges that your objectant signed checks in the name of the decedent (see ¶7 of the answer).” The court does not find this allegation in the petition.

On December 14, 2014, the decedent executed a durable short form power of attorney appointing Claudio as her agent in fact (the “POA”). The POA was drafted by an attorney, and it purportedly permitted Claudio to engage in banking, real estate and health care transactions on behalf of the decedent. The POA did not authorize Claudio to make gifts to himself in excess of \$500 per year.

On or before February 2, 2015, Claudio allegedly used the POA to add himself as a signatory to the Second Accounts. According to Petitioner, when the Second Accounts were retitled they had a balance of \$124,000. By the end of 2015, only \$4,898.04 remained.

Petitioner avers that Claudio used the POA to obtain a reverse mortgage on the decedent’s home. The first drawdown on this reverse mortgage was in the amount of \$149,849, of which \$133,739 was wired to the Second Accounts.

In December 2015, new accounts were opened at Citibank (collectively, the “Third Accounts”) in the names of Claudio and the decedent, into which all of the funds in the Second Accounts were allegedly deposited. Also deposited into the Third Accounts was a second drawdown of the reverse mortgage, allegedly the amount of \$103,783.35. Thereafter, the decedent’s house was sold for \$389,000, and the net sale proceeds were deposited into the Third Accounts.

According to Petitioner, Claudio ultimately misappropriated nearly all of the funds in the Third Accounts with numerous cash withdrawals for his personal expenses, including payments for Claudio’s child support payments, taxes and automobile insurance premiums. Further, Petitioner alleges that, from the date the decedent returned from Florida and continuing until the decedent’s death, over one hundred cash withdrawals totaling

\$281,351 were taken from the decedent's accounts via automated teller machines located in the Bronx and upstate New York, where Claudio and the decedent allegedly resided after the decedent's house was sold.

Procedural History

The decedent left a purported last will and testament dated May 11, 2000. Under the instrument, Hannon is the nominated executor and the residuary is bequeathed in equal shares to the decedent's distributees. The instrument was filed with the court but Hannon took no steps to have it admitted to probate.

On September 13, 2018, Petitioner filed an application for letters of administration, alleging that the estate consisted of \$450,000 in personal property and a cause of action for wrongful death. The application was uncontested (all of the other distributees, including Hannon and Claudio, executed renunciations, waivers and consents). Letters of administration issued to Petitioner on November 6, 2019, after she posted a surety bond in the penal sum of \$450,000.

Petitioner filed the instant turnover proceeding on October 23, 2020 to recover assets allegedly misappropriated from the decedent by Claudio and Hannon. The petition seeks recourse against Claudio for conversion; fraud, unjust enrichment; money had and received; and breach of fiduciary duty. Claims against Hannon are brought on theories of conversion, unjust enrichment and money had and received. As for Citibank, the petition asserts claims based on theories of negligence, breach of contract and the bank's alleged violation of New York Uniform Commercial Code ("UCC") § 4-103. The petition requests, *inter alia*, an order directing (i) Hannon and Claudio to turn over the monies they allegedly

misappropriated from the decedent and (ii) Citibank to reimburse the estate for the funds that Claudio improperly received from the decedent's accounts at the bank, less any amounts the estate actually recovers from Claudio.

In response, Hannon filed verified objections asserting, *inter alia*, that the court lacks personal jurisdiction over her and the statute of limitations expired for the conversion claim. Citibank filed a verified answer with cross-claims against Claudio and Hannon for indemnification and/or contribution as well as equitable grounds.

Hannon's motion to dismiss

The Hannon motion seeks an order denying all of the claims against her and directing that Petitioner personally pay her legal fees and disbursements. Hannon argues that (i) the court lacks personal jurisdiction over her because she lives in Florida and the alleged wrongdoing occurred entirely in that state; (ii) the petition fails to state a cause of action against her because it fails to specifically identify the money or personalty which was allegedly misappropriated; and (iii) the claim for conversion is barred by the applicable statute of limitations.

Petitioner's opposition to Hannon's motion

In opposition, Petitioner filed a supplemental affidavit alleging that (i) when Russell died, he held a joint account with the decedent containing \$180,000 (the identity and location of the account are not provided); (ii) while the decedent was alive, Hannon admitted to Petitioner that she took \$100,000 from this account and sent the remaining \$80,000 to Claudio, and (iii) Hannon did not probate the decedent's will because she did not want to account for the misappropriated funds.

Petitioner further argues that the (i) court has personal jurisdiction over Hannon because she executed a renunciation and waiver in the prior administration proceeding; (ii) the petition, in conjunction with the supplemental affidavit, states a cause of action for conversion; and (iii) Hannon's statute of limitations defense is not viable because (a) the conversion claim did not accrue until this proceeding was commenced, when a demand was made for the \$100,000 misappropriated by Hannon, and (b) the statute of limitations was tolled under CPLR § 204(a) for the period beginning with the decedent's death and ending on November 6, 2019, the date that Petitioner was appointed the estate's administrator. According to Petitioner, there is no basis for an award against her for Hannon's legal fees, costs and disbursements.

Hannon's reply to Petitioner's opposition

In reply, Hannon contends that (i) her alleged waiver was only applicable to the separate administration proceeding, not to the present matter; (ii) the supplemental affidavit is nothing more than self-serving hearsay; and (iii) the statute of limitations for the conversion claim is a three-year period which began on the date that Hannon allegedly assumed unauthorized possession of the decedent's funds, which purportedly occurred prior to the decedent moving back to New York on October 8, 2014, over six years before the instant proceeding was commenced. According to Hannon, there was no tolling of the statute of limitations after the decedent died.

Citibank's motion to dismiss

Citibank moves pursuant to CPLR §§ 3211 (a) (1) and (a)(7) for an order dismissing the petition's ninth, tenth and eleventh causes of action. In support of its motion

Citibank submits, through the affirmation of one of its officers, (i) a copy of the POA appointing Claudio as the decedent's agent in fact; (ii) the client manual governing Citibank's relationship with Claudio and the decedent relative to the Second Accounts; and (iii) the client manual governing Citibank's relationship with Claudio and the decedent relative to the Third Accounts. Collectively, these manuals will hereafter be referred to as the "Deposit Agreements." Notably, Citibank did not provide a copy of any customer agreement for the First Accounts. Petitioner does not contest that the Deposit Agreements govern the Second and Third Accounts.

Citibank offers four arguments for dismissing Petitioner's claims against it. First, Citibank alleges that the POA authorized Claudio to engage in banking transactions, including drawing checks and making ATM withdrawals from Citibank accounts. According to Citibank, under New York law a bank cannot be held liable for acting pursuant to a facially valid power of attorney.

Second, Citibank asserts that Claudio was an authorized signer on the Second and Third Accounts. Inasmuch as Citibank was not only entitled, but required to comply with Claudio's instructions, Citibank concludes that it exercised ordinary care as a matter of law.

Third, Citibank contends that it only had a contractual, debtor-creditor relationship with the decedent. As such, it owed the decedent no fiduciary duty to monitor her account transactions.

Fourth, Citibank argues that the claims against it are time-barred under the Deposit Agreements, the Electronic Funds Transfer Act (15 USCS § 1693 *et seq.*, the "EFTA") and UCC § 4-406. According to Citibank, the decedent was contractually and

statutorily required to give notices of its claims and commence an action within strict time constraints. Citibank argues that the decedent's failure to timely give these notices precludes Petitioner from bringing this proceeding.

Petitioner's opposition to Citibank's motion

In opposition, Petitioner argues, *inter alia*, that (i) her allegations of the bank's negligence raise issues of fact which cannot be resolved on a motion to dismiss; (ii) Citibank did not follow common practices in the banking industry by allowing Claudio to create joint accounts using a POA that was signed by the decedent while she lacked capacity; (iii) under New York General Obligations Law ("GOL") § 5-1504, Citibank could have refused to honor the POA if there was a reasonable basis for believing that the instrument was procured through fraud, duress or undue influence, and such basis existed because of the volume and size of the transactions by Claudio.

Petitioner further contends that insofar as accounts titled in the names of the Decedent and Claudio were merely convenience accounts, Claudio should not have been allowed to withdraw more than one half of their funds.

Finally, Petitioner claims there are issues of fact regarding whether (i) Citibank's actions violated its duty to comply with the POA and (ii) whether the decedent was incapacitated and unable to monitor her account and its statements, thereby tolling the time to contest the improper withdrawals by Claudio.

Citibank's reply to Petitioner's opposition

In reply, Citibank responds that GOL § 5-1504 relieves it of any liability for Claudio's misuse of a facially valid POA unless it was accepted with the actual knowledge

that the principal lacked capacity to execute it, or that it was procured through fraud, duress or undue influence. According to Citibank, such actual knowledge was never alleged, so the petition against it must be dismissed as a matter of law.

Citibank also argues that there is no legal basis for Petitioner's claim that the bank could only honor those transactions that were for the benefit of the decedent because the joint accounts were convenience accounts. To that point, Citibank counters, it is protected from liability by New York State Banking Law § 678.

Additionally, Citibank asserts that it could not "breach" the POA as alleged, because it was not a party to it and had no privity with Claudio or the decedent, and it had no independent duty to ensure that Claudio's conduct pursuant to the POA was proper.

Finally, Citibank posits that Petitioner has never denied a claim by Citibank's counsel that the decedent failed to send notices required by the Deposits Agreements and the EFTA as conditions precedent to commencing an action. According to Citibank, Petitioner's silence regarding this claim must be deemed an admission of its truth.

DISCUSSION

Hannon's motion to dismiss

According to Petitioner, Hannon's alleged unauthorized taking of the decedent's funds occurred in the state of Florida. Petitioner has not alleged that Hannon committed any wrongful acts outside of Florida, nor has she suggested that the misappropriated funds have any ties to New York State.

The burden of proving jurisdiction is on the party asserting it (see *Jacob v. Zurich Ins. Co.*, 53 AD2d 524 [1st Dept 1976]). On this record, Petitioner has not provided

any basis for asserting personal jurisdiction over Hannon in this proceeding (see *In re Obregon*, 230 AD2d 47 [1st Dept 1997]). Therefore, the claims against Hannon are dismissed, without prejudice to Petitioner commencing an ancillary turnover proceeding in Florida (see *In Re Katz*, 81 AD2d 145 [2d Dept 1981]). In light of this determination, the court need not address Hannon's remaining arguments for dismissal.

Citibank's arguments that Petitioner fails to state a cause of action

On a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord Petitioner the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Skillgames, LLC v. Brody*, 1AD3d 247 [1st Dept 2003]; *Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851[2d Dept 2012]; *Daub v Future Tech Enter., Inc.*, 65 AD3d 1004, 1005 [2d Dept 2009]).

Further, the court may consider any factual submissions made in opposition to a motion to dismiss a pleading in order to remedy pleading defects (see *Quinones v Schaap*, 91 AD3d 739, 740 [2d Dept 2012]; *Doe v Ascend Charter Schs.*, 181 AD3d 648 [2d Dept 2020]; *Daub v Future Tech Enter., Inc.*, 65 AD3d at 1005). Nevertheless, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Skillgames, LLC v. Brody*, 1AD3d 247 [1st Dept 2003] *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022, [2d Dept 2007]; see *Daub v Future Tech Enter., Inc.*, 65 AD3d at 1005).

Moreover, "[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether Petitioner has a cause of action, not whether Petitioner has stated one, and unless it has been shown that a material fact as claimed by Petitioner to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d at 851-852; *Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]).

Applying the above standards, Citibank's motion to dismiss the ninth cause of action, sounding in negligence, is denied. As Citibank correctly points out, a claim for negligence cannot be based on a breach of a contractual duty (see *Calish Associates, Inc. v. Manufacturers Hanover Trust Co.*, 151 AD2d 446 [1st Dept 1989]). Here, however, the court understands Petitioner's negligence claim as not being based on contract or common law, but on Citibank's duty under UCC §§ 4-406 (1) and (3) to exercise ordinary care in paying out items (see *Putnam Rolling Ladder v. Manufacturer's Hanover Trust Co.*, 74 NY2d 340 [1989]; *Pincover v. J.P. Morgan Chase Bank, N.A.*, 592 F.Supp3d 212 [S.D.N.Y. 2022]). This duty of care cannot be abrogated, absolved or abridged by the Deposit Agreements (see UCC § 4-103), and under UCC § 1-103 (b), Petitioner may pursue a claim of negligence if this duty is violated.

Petitioner's tenth cause of action attempts to assert a claim against Citibank under UCC § 4-103 by repeating essentially the same allegations pleaded in the ninth cause of action. While UCC § 4-103 recognizes that banks owe a duty of care to their customers,

it does so in the context of prohibiting contracts that either disclaim its duty to exercise ordinary care or which limit the damages payable under UCC § 4-103(e). Here, the petition does not allege that the Deposit Agreements, or any other contracts between Citibank and the decedent contain such limiting language. Accordingly, the tenth cause of action is dismissed for failing to state a cause of action.

The petition's eleventh cause of action is titled as a claim for breach of contract and the implied covenant of good faith and fair dealing. It pleads a cognizable claim for Citibank's alleged breach of the Deposit Agreements' explicit contractual obligation to act with ordinary care (see page 6 of each Deposit Agreement). As no contract or agreement was produced for the First Accounts, at this juncture the court finds that the eleventh cause of action also states a viable claim for a breach of an implied covenant of good faith and fair dealing (see *Jaffe v. Paramount Communications*, 222 AD2d 17 [1st Dept 1996]). Consequently, Citibank's motion to dismiss the eleventh cause of action is denied.

Citibank's arguments that Petitioner's claims are time-barred

Citibank argues that there are various time limits for bringing a claim under the Deposit Agreements, the EFTA and UCC § 4-406 which establish an absolute defense to Petitioner's claims.

The Deposit Agreements require, as a condition precedent to suit, that customers notify Citibank of all unauthorized transactions shown in an account statement, other than those involving electronic funds transfers (i.e., ATM withdrawals) within 30 days of the date that the statement is sent to the customer or made available for review. Any

lawsuit or demand for arbitration must be brought within one year after the date of the first account statement sent to the decedent on which the unauthorized transaction appears.

Moreover, with respect to ATM withdrawals, the Deposit Agreements and the EFTA require a customer to notify the bank of an unauthorized ATM withdrawal within 60 days of the date that the statement showing such unauthorized transaction(s) are sent or made available to a customer. If the customer gives such notice, a customer's liability for an unauthorized ATM withdrawal shall be capped at \$50. If timely notice is not given, then the bank need not reimburse the customer for financial losses if it can show that "but for" the failure of the customer to give proper and timely notice of the unauthorized transfer, the losses would not have occurred.² Any action based on a bank's violation of the EFTA must be commenced within one year from the date the violation occurs (see USCS § 1693m).

Under UCC § 4-406, if a bank makes a statement available to a customer, the customer has a duty to examine the statement and identify any items which were paid pursuant to an unauthorized signature or alteration. The customer must promptly notify the bank after any such discovery. If the customer fails to act with reasonable promptness, the customer is precluded from asserting a claim for reimbursement unless the customer can establish the bank did not exercise ordinary care in paying out the disputed item.

Furthermore, UCC § 4-406 states that regardless of whether the bank exercised ordinary care, a customer will be precluded from asserting a claim against the

²The Deposit Agreements state that this 60-day notice period will be extended if a good reason, such as a long trip or a hospital stay, delayed the customer from timely reporting an unauthorized ATM withdrawal (see also USCS § 1693g [a]).

bank for reimbursement of a payment resulting from an unauthorized signature or alteration that is not reported within one year after the statement showing the item is made available to the customer. This one year limitation is a statute of repose, meaning that it is a jurisdictional prerequisite for an action or proceeding that cannot be extended or tolled (see *Billings v. East River Sav. Bank*, 33 AD2d 997 [1st Dept 1970]).

All of the above time limits are measured from the date that an account statement showing each alleged unauthorized transaction was sent or made available to the decedent. The burden was on Citibank to establish that all of Petitioner's claims were time-barred, but it failed to provide sufficient proof in admissible form showing that such account statements were sent or made available to the decedent. Nor did Citibank provide a copy of the agreement governing the First Accounts, which would ostensibly include contractual time limits for bringing suit. This agreement would be relevant because Petitioner alleges that Claudio made unauthorized withdrawals from the First Accounts through ATM's.

Likewise, Citibank failed to provide sufficient proof, in admissible form, that it had not received any notices of unauthorized transfers from the decedent. Citibank suggests that it did not need to provide such evidence because Petitioner failed to deny a claim by Citibank's counsel that the decedent never sent such notices. Insofar as this claim was asserted by counsel in a memorandum of law submitted in support of Citibank's motion, the court does not find that Petitioner's silence regarding the issue constitutes an admission of its truth (see *Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *Johnsen v. ACP Distribution, Inc.*, 31 AD3d 172 [1st Dept 2006]).

Accordingly, Citibank's motion to dismiss Petitioner's claims on the grounds that they are time-barred under statute and/or the Deposit Agreements is denied.

Citibank's motion to dismiss pursuant to CPLR § 3211 (a) (1)

A motion to dismiss a complaint based on documentary evidence pursuant to CPLR § 3211 (a) (1) may only be granted "where the documentary evidence utterly refutes Petitioner's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d at 851).

On this state of the record, the court does not find, as a matter of law, that Citibank has proven its defenses. There are factual issues regarding the POA which was allegedly used by Claudio to become a signatory to the Second Accounts including, *inter alia*, the circumstances surrounding the bank's acceptance of the POA, whether there was reasonable cause for Citibank to refuse to honor the POA (see GOL § 5-1504 [2]) and if Claudio was not acting in conformity with the POA, whether Citibank had independent notice of this and despite such awareness took no action to protect the decedent's funds (see *Matter of Knox*, 64 NY2d 434,488 [1985]). Similarly, the documents submitted by Citibank in support of its motion do not definitively establish that it exercised ordinary care with respect to the opening of the Third Accounts and the processing of payments from all of the decedent's accounts at issue. Finally, as noted earlier, there is an insufficient basis for the court to find that Petitioner's claims are time-barred as alleged.

Accordingly, that branch of Citibank's motion to dismiss pursuant to CPLR § 3211 (a) (1) is denied.

The denial of Citibank's motion is without prejudice

On the record presented, Citibank has not established its defenses as a matter of law. At this early stage of the litigation, with no discovery having been conducted, it is too soon to determine the merits of the parties' claims. As such, the denial of Citibank's motion is without prejudice to renewal on a supplemented record, following a reasonable time to complete discovery.

CONCLUSION

Hannon's motion is granted to the extent that all claims in the petition asserted against her are dismissed, without prejudice to Petitioner bringing an ancillary proceeding in the State of Florida;

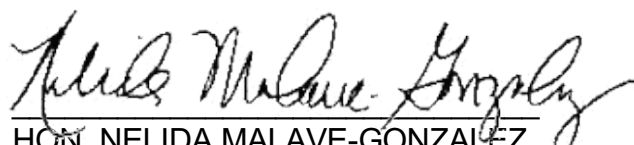
Citibank's cross-claims as against Hannon are dismissed as moot, without prejudice; and

Citibank's motion is granted in part to the extent that the petition's tenth cause of action is dismissed; and

Except as set forth above, Citibank's motion is denied in all other respects, without prejudice to renew after a reasonable time for the completion of discovery; and

On January 17, 2023, at a time to be determined, counsel for Petitioner and Citibank shall appear for a conference to schedule discovery.

This decision constitutes the order of the court.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE