SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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DAVID GUENNI,

Plaintiff,

- v -

UBS AG and UBS FINANCIAL SERVICES, INC.,

Defendants.

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INDEX NO. 651482/2021

MOTION DATE 04/01/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, and 18

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Defendants' motion to dismiss the complaint is granted, per the following memorandum.

Background:[1]

On or about July 16, 2015, Plaintiff and UBS AG entered into, among other things, a Borrower Agreement and Credit Agreement (collectively, the "Loan Agreement"). (Affirmation of Joshua S. Bratspies, Esq., dated April 1, 2021, Ex. A ["Complaint"] at ¶13.) Pursuant to the Loan Agreement, UBS AG established an uncommitted demand revolving line of credit by which UBS AG, upon Plaintiff's request, could in its sole and absolute discretion make advances to Plaintiff (the "Loan"). (Credit Agreement at §2[a].) The Loan Agreement expressly states that Plaintiff's Loan is not extended for any specific term or duration and that UBS AG, in its sole and absolute discretion, may demand repayment of Plaintiff's Loan at any time and without cause.

[1] The facts are derived from the allegations of the complaint, unless contradicted or independently confirmed by documentary evidence submitted by the parties, as appropriate on a motion to dismiss.

Plaintiff also acknowledged and agreed in the Loan Agreement that UBS AG, in its sole and absolute discretion, may terminate and cancel Plaintiff's Loan at any time, in which case the Loan will be accelerated and immediately due and payable in full.

Moreover, the Loan Agreement requires Plaintiff to reimburse UBS AG for all breakage fees and costs incurred by UBS in connection with the termination of Plaintiff's Loan, regardless of whether such breakage fees and costs resulted from UBS AG's acceleration of the Loan.

Plaintiff and his trust have maintained certain brokerage accounts (the "Collateral Accounts") at UBS AG and its affiliate, UBS Financial Services Inc. Pursuant to the Loan Agreement, Plaintiff's Loan was secured by, among other things, the assets contained in the Collateral Accounts. (Borrower Agreement at p. 3.) More specifically, the Loan Agreement provides, in relevant part:

> To secure payment and performance of the Obligations, the Borrower and each other Pledgor assigns, transfers and pledges to the Bank, and grants to the Bank a first priority lien and security interest in the following assets and rights of the Borrower and each other Pledgor…: (i) each Collateral Account; (ii) any and all money, credit balances, certificated and uncertificated securities, security entitlements, commodity contracts, deposits, certificates of deposit, instruments, documents, partnership interests, general intangibles, financial assets and other investment property now or in the future credited to or carried, held or maintained in any Collateral Account…(iv) any and all accounts of the Borrower and each other Pledgor at the Bank or any of its affiliates….

(Credit Agreement at §9[a].)

The Loan Agreement also authorizes UBS AG, as a secured creditor, to exercise "exclusive control over the Collateral Account[s]" and provides that under such circumstances UBS "shall no longer comply with entitlement orders originated by the Borrower" relating to the Collateral Accounts. (Credit Agreement at §10[b].) UBS AG also has the right under the Loan Agreement to, "in its sole and absolute discretion, liquidate, withdrawal or sell all or any part of the Collateral and apply the same, as well as the proceeds of any liquidation or sale, to any

amounts owed to the Bank, including without limitation, any applicable Breakage Costs and Breakage Fee." (Credit Agreement at §11[a].)

In or around July 2020, UBS AG terminated Plaintiff's Loan, accelerated the outstanding loan balance and demanded that Plaintiff repay the loan, including all breakage fees and costs. (Complaint at ¶25.) When Plaintiff refused to repay his Loan, UBS AG exercised its rights as a secured creditor, took control of the Collateral Accounts and declined to release them until Plaintiff's Loan was fully repaid. (Complaint at ¶¶28, 33.)

In November 25, 2020, Plaintiff repaid the outstanding Loan balance, except for $280,385.92 in breakage fees and costs. (Complaint at ¶35.) As expressly permitted under the Loan Agreement, UBS at that time used funds in the Collateral Accounts to satisfy the remaining amounts due under Plaintiff's Loan, and then released the balance of the assets in the Collateral Accounts to Plaintiff. (Complaint at ¶36.)

On or about March 3, 2021, Plaintiff commenced the instant action against UBS, asserting claims for: (i) breach of contract, (ii) breach of the implied convent of good and fair dealing, (iii) conversion, and (iv) breach of fiduciary duty.

The Applicable Standard:

A complaint should be dismissed under CPLR §3211(a)(7) if "the pleading fails to state a cause of action." (CPLR §3211[a][7].) While the pleaded facts are presumed to be true and accorded the most favorable inference on a motion to dismiss, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence," will not be given such consideration. (*Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000].) A complaint should be dismissed under CPLR §3211(a)(1) "'where the documentary evidence utterly refutes

[the complaint's] factual allegations, conclusively establishing a defense as a matter of law.'" (*Lopez v Fenn*, 90 AD3d 569, 572 [1st Dept 2011], *appeal dismissed* 19 NY3d 1022 [2012].) When a "defendant adduces documentary proof which disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted." (*McGuire v. Sterling Doubleday Enterprises, L.P.*, 19 AD3d 660, 661-62 [2d Dept 2005], *lv denied* 7 NY3d 701 [2006].)

Discussion:

The First Cause of Action for Breach of Contract Fails to State a Viable Claim:

The parties' Loan Agreement consists of a Borrower Agreement, which Plaintiff acknowledges he received and signed, along with a Credit Agreement that is expressly cited in and incorporated by reference into the Borrower Agreement. Most of the loan provisions are set forth in the Credit Agreement portion of the Loan Agreement.

In an effort to avoid the clear terms of the parties' Loan Agreement, Plaintiff contends in his opposition papers that he agreed to only the Borrower Agreement, but not the Credit Agreement. However, the Borrower Agreement expressly and unambiguously states:

> BY SIGNING BELOW, THE UNDERSIGNED BORROWER (THE "BORROWER") UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT:
>
> A. The Borrower has received and read a copy of this Borrower Agreement, the attached Credit Agreement, Note and the Loan Disclosure Statement explaining the risk factors that the Borrower should consider before obtaining a loan secured by the Borrower's securities account. The Borrower agrees to be bound by the terms and conditions contained in this Borrower Agreement, and also agrees to be bound by the terms and conditions contained in the Credit Agreement and the Note (which terms and conditions of each are incorporated herein by reference) and any and all other documents and agreements entered into by the Borrower in connection with this Borrower Agreement, the Credit Agreement or the Note. Capitalized terms used in this Borrower Agreement have the meanings set forth in the Credit Agreement.

(Borrower Agreement at §A.)

Thus, by signing the Borrower Agreement, Plaintiff expressly acknowledged and agreed, among other things, that: (i) he "received and read a copy" of "the attached Credit Agreement"; (ii) he "agrees to be bound by the terms and conditions contained in the Credit Agreement"; and (ii) the "terms and conditions" of the Credit Agreement "are incorporated herein by reference."

Under New York law, documents extrinsic to a contract are incorporated as terms of the contract when they are specifically referenced in the contract. (*See, PaineWebber, Inc. v Bybyk,* 81 F3d 1193, 1201 [2d Cir 1996].) If the extrinsic document can be identified "beyond all reasonable doubt" by the description in the contract, then it may be inferred that parties have knowledge of the document and assent to its terms, regardless of whether they are given a copy. (*Id.; see also, Kearins v Panalpina, Inc.,* 570 Fed Appx 9, 10-11 [2d Cir 2014] [finding party was conclusively bound by terms of contract incorporated by reference, even despite claim that it had no knowledge of the Terms and Conditions of Service]; *Madison Who's Who of Executives and Professionals Throughout The World, Inc. v SecureNet Payment Systems, LLC,* 2010 WL 2091691, at *3 [ED NY, May 25, 2010].) Here, the Borrower Agreement explicitly states that the signor, Plaintiff, "acknowledges that he has received the Credit Agreement and is bound by the terms of the Credit Agreement." (Borrower Agreement at §A.) As a matter of law, because Plaintiff signed the Borrower Agreement that explicitly referred to the Credit Agreement, Plaintiff is bound by the terms of the Credit Agreement, irrespective of Plaintiff's assertion that he did not receive a copy of it.

The case law cited in Plaintiff's opposition is clearly distinguishable from the present matter. In *Chiacchia v Natl. Westminster Bank USA* (124 AD2d 626, 628 [2d Dept 1986]), a bank customer signed a safety deposit box rental agreement which contained "no direct reference to, or description of" the agreement that the bank therein had sought to enforce. Similarly, in

Kenner v Avis Rent A Car Sys. (254 AD2d 704, 704 [4th Dept 1988]), there was only an "oblique reference to an otherwise unidentified" document being incorporated by reference. Here, in contrast, the Credit Agreement is explicitly referenced in the Borrower Agreement and, thus, there is no genuine issue whatsoever that its terms were fully incorporated.

That Plaintiff claims he allegedly did not receive and/or read the Credit Agreement is of no moment. "The law simply does not protect someone who willingly signs an agreement which references and incorporates other controlling documents which he or she has not seen." (*Butvin v DoubleClick, Inc.*, 2001 WL 228121, at * 5 [SD NY, Mar. 7, 2001], *affd* 22 Fed Appx 57 [2d Cir 2001]); *see also*, *Patterson v Somerset Investors Corp.*, 96 AD3d 817 [2d Dept 2012].)

Moreover, a plaintiff cannot claim lack of mutual assent when he alleges breach of contract. (*See, Johnson v Chase Manhattan Bank USA*, 2004 WL 413213, at *5 [Sup Ct, NY County, Feb. 27, 2004], *affd* 13 AD3d 322 [1st Dept 2004].)

With respect to the breakage fees and costs, Plaintiff claims that the Borrower Agreement is vague and ambiguous. However, the Borrower Agreement states in plain language that "Prepayments of Fixed Rate Advances will be subject to an administrative fee and may result in a prepayment fee." (Borrower Agreement, at §N.) Further, Plaintiff's opposition overlooks the applicable provisions in the Credit Agreement that provide for breakage costs and fees and detail how such charges are calculated (*see*, Credit Agreement, at §6).

Thus, the two components of the Loan Agreement, read in conjunction, clearly state that UBS may charge certain breakage fees and costs incurred in connection with the termination of Plaintiff's Loan. Indeed, the Appellate Division, First Department, in *Fesseha v TD Waterhouse Investor Servs.* (305 AD2d 268, 269 [1st Dept 2003]) found that when the statement in the "Customer Agreement and the Truth in Lending Disclosure Document are read together and the

relevant language is given its plain and ordinary meaning," the defendant-broker had the right to take control over the plaintiff's brokerage account, liquidate the account assets, and use the proceeds to repay the plaintiff's loan.

Finally, contrary to Plaintiff's claims, there is nothing unconscionable about the Loan Agreement. "An unconscionable contract is one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." (*Sablosky v Gordon Co.*, 73 NY2d 133, 139 [1989].) Here, Plaintiff chose to borrow money against the investments that he and his trust held in brokerage accounts at UBS. Having voluntarily accepted the benefits under the Loan Agreement by leveraging the assets in his brokerage account assets, Plaintiff cannot now be heard to complaint that the Loan Agreement is unconscionable.

The Second Cause of Action for Breach of an Implied Covenant of Good Faith and Fair Dealing Fails to State a Viable Claim:

Plaintiff's opposition concedes that UBS had the express right under the Loan Agreement, in its sole and absolute discretion, to demand repayment of Plaintiff's Loan at any time and without cause. The implied covenant of good faith and fair dealing "cannot negate express provisions of the agreement, nor is it violated where," as here, "the contract terms unambiguously afford [a party] the right to exercise its absolute discretion." (*Veneto Hotel & Casino, S.A. v. Ger. Am. Cap. Corp.*, 160 AD3d 451, 452 [1st Dept 2017].) Here, the plain terms of the Borrower Agreement and the Credit Agreement allow UBS to terminate the Loan at any time and for any or no reason, in UBS's sole and absolute discretion. Moreover, Plaintiff's claim for breach of the covenant of good faith and fair dealing is based on the same facts underlying his breach of contract claim and should be dismissed for that reason, as well. (*See, e.g., Amcan*

Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423, 426 [1st Dept], *lv denied* 15 NY3d 704 [2010].)

The Third Cause of Action for Conversion Cannot be Sustained:

The Complaint alleges that UBS converted Plaintiff's property when UBS AG exercised its rights as a secured creditor, took control of the Collateral Accounts and declined to release them until Plaintiff's Loan was fully repaid. (Complaint at ¶¶53-55.) "[T]o establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights." (*Independence Discount Corp. v Bressner*, 47 AD2d 756, 757 [2d Dept 1975].) Here, Plaintiff's conversion claim against UBS fails because, under the express terms of the parties' Loan Agreement, UBS AG had superior rights to the Collateral Accounts and was authorized to take exclusive control of them upon Plaintiff's refusal to repay the Loan.

Specifically, to secure the Loan, Plaintiff: (i) granted UBS AG a first priority lien and security interest in the Collateral Accounts (Credit Agreement at §9[a]); and (ii) authorized UBS AG to take control of the Collateral Accounts and, in its sole and absolute discretion, to liquidate assets in the Collateral Accounts and use the proceeds to repay any amounts owed under Plaintiff's Loan, including all breakage fees and costs. (Credit Agreement at §§10[b], 11[a].)

As a matter of law, UBS AG's exercise of its rights as a secured creditor under these contractual provisions cannot give rise to a conversion claim. (*See, 87 Mezz Member LLC v Ger. Am. Cap. Corp.,* 162 AD3d 524 [1st Dept 2018] ["Supreme Court also properly dismissed plaintiff's conversion claim as [the lender] possessed the right to foreclose on the collateral

following [the plaintiff's] failure to make the necessary payments at maturity, and therefore was not 'unauthorized' in its possession of the collateral"]; *Chemical Bank v Ettinger*, 196 AD2d 711, 714 [1st Dept 1993] [trial court erred in declining to dismiss counterclaim against bank alleging conversion of "collateral pledged to satisfy [borrower's] obligations" where lender's "actions were expressly authorized by the loan documents…."].)[2]

In addition, Plaintiff's conversion claim fails because it is duplicative of Plaintiff's claim that UBS breached the parties' Loan Agreement by taking over control of the Collateral Accounts and declining to release them to Plaintiff until the Loan was repaid. (Complaint at ¶42.) As the Appellate Division, First Department, held in rejecting a similar conversation claim:

> Plaintiff's claim for conversion was properly dismissed. A cause of action for conversation cannot be predicated on a mere breach of contract. Here, plaintiff's conversion claim alleged no independent facts sufficient to give rise to liability and, thus, was nothing more than a restatement of his breach of contract claim.

(*Fesseha v TD Waterhouse Investor Servs.*, 305 AD2d 268, 269 [1st Dept 2003]; *see also, Yeterian v Heather Mills N. V. Inc.*, 183 AD2d 493 [1st Dept 1992] [conversion claim properly dismissed where "it merely restates the cause of action for breach of contract and alleges no independent facts sufficient to give rise to tort liability"].)

The Fourth Cause of Action for Breach of Fiduciary Duty Cannot be Sustained:

The relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship; and a brokerage firm does not owe any fiduciary duty where, as here, there are no allegations that the firm had discretionary authority to

[2] Plaintiff's suggestion that UBS did not perfect its security interest in the Collateral Accounts is misguided. "The purpose of perfection of a security interest is to secure priority of the holder of a perfected interest against subsequent purchasers and lienholders." (Am Jur 2d, Secured Transactions §259 [2008].) Regardless of whether UBS properly perfected its security interest to obtain priority over other creditors, UBS's security interest and lien in the Collateral Accounts would, in any event, be enforceable against Plaintiff obligor.

trade and make investment decisions in the subject accounts. (*See, e.g., Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.,* 180 AD2d 588 [1st Dept], *lv denied* 80 NY2d 754 [1992]; *Banque Nationale de Paris v 1567 Broadway Ownership Assocs.*, 214 AD2d 359 [1st Dept 1995].)

Plaintiff claims that the relationship between UBS and Plaintiff gave rise to a fiduciary duty based on UBS's alleged dominance and control. However, in the two cases cited by Plaintiff – *Société Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v Salomon Bros, Int'l* (251 AD2d 137 [1st Dept 1998], *lv denied* 95 NY2d 762 [2000]) and *Ciccone v Hersh* (530 F Supp 2d 574 [SD NY 2008]), *affd* 320 F Appx 48 [2d Cir 2009]) – the courts found that no fiduciary duty existed between a customer and broker. In *Cicccone*, the court addressed the issue of the scope of the duty a broker owes to a customer in connection with a non-discretionary account:

> It is uncontested that a broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis. The broker's duties ordinarily end after each transaction is done, and thus do not include a duty to offer unsolicited information, advice, or warnings concerning the customer's investments. A nondiscretionary customer by definition keeps control over the account and has full responsibility for trading decisions. On a transaction-by-transaction basis, the broker owes duties of diligence and competence in executing the client's trade orders, and is obliged to give honest and complete information when recommending a purchase or sale. The client may enjoy the broker's advice and recommendations with respect to a given trade, but has no legal claim on the broker's ongoing attention. The giving of advice triggers no ongoing duty to do so.

(530 F Supp 2d at 578.) Thus, Plaintiff's argument that he relied upon representations of UBS's representative in signing the Borrower Agreement and subsequent dealings with UBS, including transactions brokered by UBS, does not give rise to a fiduciary relationship.

Plaintiff further argues that the Borrower Agreement waived only UBS's duty to act as an investment advisor for forced liquidations of the Collateral Accounts, but not generally. However, the provision on which Plaintiff relies – Section K of the Borrower Agreement –

plainly states that the parties' relationship is one of debtor-creditor, which does not give rise to a fiduciary relationship. (Borrower Agreement at §K ["The Bank and its affiliate will act as creditors and, accordingly, their interests may be inconsistent with, and potentially adverse to, the Borrower's interest].)

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint is granted and, therefore, the complaint is hereby dismissed.

This will constitute the decision and order of the court.

ENTER:

4/18/2023
DATE

LOUIS L. NOCK, 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