

Fleming v TD Bank N.A.

2023 NY Slip Op 31400(U)

April 25, 2023

Supreme Court, New York County

Docket Number: Index No. 160562/2021

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12

Justice

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GURPREET BAJAJ FLEMING

Plaintiff,

- v -

TD BANK N.A.,

Defendant.

-----X

INDEX NO. 160562/2021

MOTION DATE 4/25/2023

MOTION SEQ. NO. 001

**DECISION AND ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS

On November 11, 2021, plaintiff Gupreet Bajaj Fleming (plaintiff) filed a summons and complaint pleading breach of contract, negligence, and gross negligence arising out of the moving and alleged loss of items held in the custody of defendant TD Bank N.A. (defendant) in a rented safety deposit box. Defendant now moves to dismiss all of plaintiff's claims pursuant to CPLR 3211 (a) (1) and (a) (7) on the basis of a defense founded upon documentary evidence and for failure to state a claim. Plaintiff opposes.

Oral argument was held on April 25, 2023, at which all parties were present.

I. Documentary Evidence

Defendant first moves to dismiss pursuant to CPLR 3211 (a) (1) on the grounds that the limitation of liability clause in parties' rental agreement bars plaintiff's claims for breach of contract and negligence.¹

¹ Paragraph 11 of the Rental Agreement Safe Deposit Rules and Regulations, which are incorporated into the parties' Safe Deposit Lease Contract, reads:

Liability of Bank. It is expressly understood and agreed that Bank has no knowledge of and exercises no supervision or control over the deposit, examination, or removal of any property in or from the safe deposit

Plaintiff opposes and argues, among other things, that the limited liability clause contained in the rental agreement is ambiguous and overly broad and that the removal of the property was not contemplated by the plaintiff when she entered the rental agreement. Plaintiff further maintains that implicit in the duties of leasing a safe deposit box is a duty to protect deposited property and preserve it from loss, which defendant failed to do.

Pursuant to CPLR 3211 (a) (1) “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that... a defense is founded on documentary evidence.” A motion pursuant to CPLR 3211 (a) (1) may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law. *See Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 (2002).

NY Banking Law § 93(3)(b) empowers banks to rent safe deposit boxes upon such terms and conditions to be prescribed by the bank. “An exculpatory provision ordinarily will be enforced when its language ‘expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant’s negligence’.” *Uribe v Merchants Bank of New York*, 91 NY2d 336 (1998), quoting *Lago v Krollage*, 78 NY2d 95, 100 (1991).

Here, defendant bank established that the terms of the safe deposit lease contract, which incorporated the safe deposit rules and regulations, conclusively absolve defendant of liability for negligence or breach of contract. *See Uribe v Merchants Bank of NY*, 91 NY2d 336 at 341. The rental agreement plainly states that defendant is not liable for any losses due to its alleged negligence and that plaintiff assumes all risks of loss or damages to the safe deposit box.

box. Lessee(s) assumes all risk arising out of the storage of property in the safe deposit box (including but not limited to...the negligence of the ban), expressly waives every presumption of law that a loss shall have occurred through the negligence of Bank and agrees that Bank shall not be liable for any loss sustained by Lesse(s)... (NYSCEF doc. no. 12).

In fact, the Second Department has upheld the enforcement of the same language contained in the rental agreement at issue here as a valid limitation of liability, and dismissed the negligence claim as a result. *See Elbayoumi v TD Bank, N.A.*, 185 AD3d 786. Moreover, defendant reserved its rights to remove the safe deposit box upon 30 days' notice.² Plaintiff does not contest the validity of the relevant contract or that the requisite 30 days' notice was given to her.

As such, it follows that plaintiff's negligence claim also fails. "A cause of action for negligence cannot be based on a breach of a contractual duty." *Calisch Assoc., Inc. v Manufacturers Hanover Tr. Co.*, 151 AD2d 446, 447 (1st Dept 1989). As plaintiff's negligence claim is premised solely on an alleged breach of contractual duty, such claim cannot survive. Accordingly, plaintiff's claims for breach of contract and negligence are dismissed upon a defense of documentary evidence.

However, the exculpatory provision of the parties' agreement is unenforceable against plaintiff's claim of gross negligence. *See Abacus Fed. Sav. Bank v ADT Sec. Sercs. Inc.*, 18 NY3d 675, 669 (2012). Therefore, defendant's motion to dismiss the claim for gross negligence upon a defense of documentary evidence and the limited liability clause of the parties' contract is denied.

II. Failure to State a Claim

Defendant also moves to dismiss the remaining claim of gross negligence for failure to state a claim pursuant to CPLR 3211 (a) (7). Pursuant to CPLR 3211 (a) (7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion the Court must accept the facts alleged as true and determine simply whether plaintiff's facts fit within any cognizable legal theory. *See CPLR 3026.*

² Paragraph 19 of the Rental Agreement Safe Deposit Rules and Regulations reads: "Transfer of Lease...The Bank ...reserves the right to remove the safe deposit box to any other business location of the Bank, upon at least 30 days prior written notice to the Lessee(s)." (NYSCEF doc. no 12).

Plaintiff sufficiently states a claim for gross negligence. In her complaint, plaintiff alleges that defendant was grossly negligent in failing to employ adequate procedures to safeguard plaintiff's property during the transfer of the contents of her safety deposit to the new bank branch. Plaintiff adequately pleads that defendant acted in a deliberately indifferent manner in moving her personally and financially valuable items.

Defendant's argument that it followed the proper policies and procedures during drilling and that it had no reckless disregard for plaintiff's rights is inapposite at this stage, as the Court is mandated to accept all allegations in the complaint as true on a motion to dismiss for failure to state a claim. Therefore, defendant's motion to dismiss plaintiff's claim for gross negligence for failure to state a claim is denied.

III. Conclusion

Accordingly, it is

ORDERED that defendant T.D. Bank's motion to dismiss is granted in part, and it is further ORDERED that plaintiff's claims for breach of contract and negligence are dismissed, and it is further

ORDERED that plaintiff's claim for gross negligence is severed and that the action shall continue with respect to that claim, and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to e-file a proposed preliminary conference order on or before June 2, 2023. A courtesy copy of such proposed order shall also be e-mailed directly to sfc-part12-clerk@nycourts.gov; and it is further

ORDERED that if counsel are unable to consent to a preliminary conference order, counsel shall file a joint letter with the Court via NYSCEF on or before June 2, 2023 requesting a preliminary conference and outlining the reasons that an agreement could not be reached. A courtesy copy of such letter shall be e-mailed directly to sfc-part12-clerk@nycourts.gov.

This constitutes the decision and order of the Court.

4/25/2023

DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE