

Ben-Dor v Alchemy Consultant LLC

2023 NY Slip Op 31401(U)

April 26, 2023

Supreme Court, New York County

Docket Number: Index No. 161104/2020

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

In support of its motion to dismiss, Chase argues that plaintiff authorized the subject wire and that Chase complied with plaintiff's request to transfer the money to Alchemy. Chase further argues that the Uniform Commercial Code (UCC) governs plaintiff's claims against Chase, and since it transferred the funds as instructed by plaintiff, plaintiff's claim against Chase fails. Next, Chase argues that plaintiff's claim is also precluded by the documentary evidence, including the deposit account agreement and the wire transfer agreement. Specifically, Chase contends that the documentary evidence essentially states that Chase was authorized to subtract \$300,000 from plaintiff's account on November 12, 2020, that plaintiff authorized the wire transfer, and that plaintiff was responsible for providing the proper account information for where the wire was to be sent. Chase also argues that plaintiff's claim is barred by the economic loss doctrine, since the alleged damage is purely economic, and Chase does not owe plaintiff a duty independent of the contract. Further, Chase argues that it does not owe plaintiff a duty concerning opening and monitoring Alchemy's account.

In opposition, plaintiff argues that her claim for negligence is premised on the allegation that Chase owed her a duty of care as she was a customer of the bank. Plaintiff further contends that her negligence claim is not prompted by statute or the economic loss doctrine. Plaintiff next argues that the bank records do not establish that Chase was not negligent. Finally, plaintiff argues that Chase's motion for summary judgment should be denied on the basis that discovery is incomplete.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "factual allegations ... that consist of bare legal conclusions, or that are inherently incredible are not entitled to such consideration" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). On a motion pursuant to CPLR 3211(a)(7), "defendants bear the burden of establishing that the complaint fails to state a viable cause of action" (*Connolly v Long Island Power Auth.*, 30 NY3d 719, 728 [2018]).

Initially, the parties agree that New Jersey law governs the substantive claims in this matter, since plaintiff's Chase bank account was located in New Jersey and the situs of the fraudulent Alchemy Chase bank account is in New Jersey. Accordingly, the Court will analyze the substantive contentions raised in the instant motion pursuant to New Jersey law.

Chase first contends that this matter is governed by UCC Article 4A, adopted in New Jersey as N.J. Stat. §§ 12A:4A-101 *et seq.* New Jersey Uniform Commercial Code § 4A-212 states, in relevant part:

"Liability based on acceptance [of a payment order such as a wire transfer request] ... is limited to that provided in this division. A receiving bank is not the

agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this division or by express agreement.”

(N.J. Stat. § 12A:4A-212; *see DeFazio v Wells Fargo Bank Natl Assn*, 2020 WL 1888252 [D.N.J. Apr. 16, 2020] [Article 4A of the UCC applies to claims arising out of wire transfers]).

“A wire transfer is a ‘payment order,’ and a ‘receiving bank’ is defined as ‘the bank to which the sender’s instruction is addressed’ (N.J. Stat § 12A:4A-103[a][1], [4]). A bank accepts the wire transfer by executing it (N.J. Stat § 12A:4A -209[a]).

Chase argues that plaintiff authorized the wire transfer from her bank account with Chase in the amount of \$300,000 to an account maintained by Alchemy. Thus, Chase contends, its liability for accepting the wire transfer is limited to its liability, if any, under UCC Article 4A. Chase is partially correct. As Chase followed plaintiff’s specific directions on the source of the funds to be transferred, the amount to be transferred, and the receiving account of the transferred funds, plaintiff may not maintain a claim against Chase under the UCC based on the wire transfer.

However, plaintiff’s negligence claim against Chase does not rest on the subject wire transfer itself, but rather Chase’s breach of its duty by opening and maintaining an account for Alchemy in violation of its own policies. “Article 4A governs only those actions occurring between the originator’s wire fund instruction and the beneficiary bank’s acceptance of the wire transferred funds . . . Thus, any claim premised on the opening of the [a]ccount falls outside the scope of Article 4A” (*Fragale v Wells Fargo Bank, N.A.*, 2020 WL 4815804 [E.D. PA Aug. 19, 2020]; *see Eisenberg v Wachovia Bank, N.A.*, 301 F.3d 220, 225 [4th Cir. 2002] [finding that plaintiff’s claim alleging the negligent opening of a fraudulent bank account used to effect wire transfers was not preempted by the UCC]; *Remtek Servs. v Wells Fargo Bank, N.A.*, 2020 WL 241332, at *10 [D.N.J. Jan. 16, 2020], quoting *ADS Assocs. Grp. v Oritani Sav. Bank*, 219 NJ 496 [2014] [“claims alleging negligence in the opening of an account that are not inconsistent with Article 4A may go forward”]; *Gilson v TD Bank, N.A.*, 2011 WL 294447, at *9 [S.D. Fla. Jan. 27, 2011] [“Because the crux of Plaintiffs’ negligence claim is TD Bank’s lack of care during the account openings, not the wire transfers, the Court finds that the negligence claim does not create rights, duties and liabilities inconsistent with those stated in Article 4A, which governs only wire transfers”]).

Chase cites to *ADS Assocs. Grp., Inc. v Oritani Sav. Bank* (219 NJ 496, 525 [2014]) for the proposition that plaintiff’s common law negligence claims are displaced by the UCC because Article 4A specifically defines the scope of the duty of care and the allocation of losses stemming from a wire transfer. In *ADS*, the court determined that the plaintiff’s claims for negligence concerning a wire transfer from funds at the defendant bank to another account at the same bank were preempted by Article 4A (*id.*). *ADS* does not compel a different result. As discussed above, plaintiff’s claim concerning the opening of the Alchemy account does not contravene a provision of Article 4A governing wire transfers, and other than the broad proposition that plaintiff may not state a common law negligence claim against Chase in transferring the funds out, Chase does not cite to any portion of *ADS* that specifically addresses

plaintiff's claim (*see DeFazio v Wells Fargo Bank Natl Assn*, 2020 WL 1888252, at *4 [DNJ Apr. 16, 2020], citing *ADS* at 519-520 ["Plaintiff correctly notes this aspect of his negligence claim is not barred by Article 4A, as only claims inconsistent with Article 4A are displaced by the statute"]).

Accordingly, the Court finds that while UCC Article 4A preempts plaintiff's claims to the extent they are based solely on the wire transfer, that statute does not preempt plaintiff's claims based on the negligent opening or handling of the alleged sham bank account.

To state a claim for negligence, a plaintiff must state facts "showing a duty of care on the part of the defendant, a breach of that duty, proximate cause and actual damages" (*Polzo v County of Essex*, 196 NJ 569 [2008]). "There can be no actionable negligence if defendant or the act violated no duty to the injured plaintiff" (*Ryans v Lowell*, 197 N.J. Super. 266, 274 [App. Div. 1984]). "Further, the issue of whether a duty exists to support a negligence claim is an issue of law for the court to decide" (*Woods Corporate Assocs. v Signet Star Holdings, Inc.*, 910 F. Supp. 1019, 1033 [D.N.J. 1995]).

In support of its argument that it did not have a duty to verify or investigate the identity of alleged fraudsters on behalf of an affected plaintiff, Chase cites to *Cartier Saada S.A. v Bank of Am., N.A.* (2022 WL 195598, at *2 [S.D. N.Y. Jan. 21, 2022]), and *Ludlow Essex Partners LLC v Wells Fargo Bank, N.A.* (2017 WL 2963488, at *2 [S.D. N.Y. July 11, 2017]). However, the plaintiff in those cases were noncustomers of the defendant bank, whereas here, plaintiff was a customer of Chase—a critical distinction to determine whether Chase breached a duty of care owed to plaintiff (*see DeFazio v Wells Fargo Bank Natl Assn*, 2020 WL 1888252, at *4 [D.N.J. Apr. 16, 2020] ["absent special circumstances, banks do not owe non-customers a duty to exercise reasonable care or to protect them from the intentional torts of their customers"]). The Court notes that the factual allegations in *Silverman Partners, L.P. v First Bank* (687 F. Supp. 2d 269, 281 [E.D. N.Y. 2010]), also cited by Chase, is factually distinct from this matter in that the court in *Silverman Partners, L.P.* determined that the defendant bank did not owe plaintiff a duty where the plaintiff alleged that the defendant bank negligently failed to investigate the background of a co-borrower and negligently failed to inform the plaintiffs that their co-borrower was misusing funds drawn from their account.

Chase next argues that, even though plaintiff was a customer of the bank, Chase did not breach a duty of care by opening the Alchemy account. Specifically, Chase contends that the scope of Chase's duties to plaintiff as a customer are expressly defined and limited by the terms of the parties' agreements. Chase cites to the deposit account agreement and the wire transfer agreement, both of which govern the relationship between the parties concerning wire transfers. However, neither of these agreements have any bearing on the relevant question on this motion: whether Chase breached a duty of care to plaintiff by opening the account. Indeed, those documents do not refute plaintiff's negligence claims. Instead, those documents would support Chase's argument if the Court were to analyze plaintiff's claim under the Article 4A rubric, which, as discussed above, it is not. Chase otherwise fails to cite to any caselaw supporting its proposition that Chase does not owe plaintiff a duty of care. Accordingly, Chase's motion to dismiss the amended complaint is denied.

In any event, the Court finds that plaintiff states a claim for common law negligence. Initially, plaintiff cites to *New Jersey Steel Corp. v Warburton* (139 NJ 536, 547 [1995]) and *DeFazio*, in support of its argument that Chase owes a duty of care, however, both cases are distinguishable from the facts in the instant matter.

In *New Jersey Steel*, plaintiff commenced an action against the defendant bank alleging that the bank failed to verify the recipient for certain payments made stemming from a check forgery scheme. However, *New Jersey Steel* is inapposite to the facts herein because the court in that case analyzed the bank's alleged breach pursuant to a statutory scheme. Specifically, the court set out to determine the "allocation of check-fraud losses under specific provisions of Articles 3 and 4 of the Uniform Commercial Code [], adopted in New Jersey as N.J.S.A. 12A:3-406 and N.J.S.A. 12A:4-406" (*id.* at 538). N.J.S.A. 12A:4-406 concerned a customer's duty to discover and report unauthorized signature or alteration, whereas 12A:3-406 concerned negligence contributing to alteration or unauthorized signature. The court in *New Jersey Steel* determined that "[a]ny lack of reasonable care and promptness in the conduct of N.J. Steel 'in examining its bank statements is of no weight under the statutory scheme if the bank is proven to have failed to use ordinary care in paying the items' " (*id.* at 547, citing *Hanover Ins. Companies v Bhd. State Bank*, 482 F. Supp. 501, 505 [D. Kan. 1979]). The portion of the case plaintiff appears to rely on states that a lack of ordinary care under N.J.S.A. 12A:4-406(3) "may be established by proof either that the bank's procedures were below standard or that the bank's employees failed to exercise care in processing the items" (*id.* at 546). The court determined that "Midlantic Bank had voluntarily assumed a certain standard of care in promulgating written policies and procedures for accepting checks" but that it breached its duty of care when its tellers failed to follow its own official procedures" (*id.* at 551). Thus, while the court in *New Jersey Steel* ultimately found that the bank failed to exercise ordinary care "in accordance with industry standards as well as its own institutional policies" (*id.* at 549), the court did not make the broad determination that any violation by a bank of its internal policies may be a basis for a duty running from Chase to plaintiff. Instead, the court in *New Jersey Steel* analyzed the reasonableness of the bank's failure to act pursuant to a New Jersey statute, a critical distinction from the instant case where no such statute exists.

Plaintiff next cites to *DeFazio* for the proposition that defendant breached its duty of care by opening the account in violation of its open policies. In *DeFazio*, the plaintiff commenced an action for negligence and gross negligence, among other claims, against the defendant bank stemming from an alleged fraud against the plaintiff by some unknown third party by gaining unauthorized access to the computer systems of a law firm representing the plaintiff in a real estate transaction and causing the plaintiff to wire funds to the fraudster's Wells Fargo bank account instead of the law firm's escrow account (*id.* at *1-2). The plaintiff sought to hold the defendant Wells Fargo and the law firm defendants liable for their alleged role in allowing the fraud to be committed. Specifically, the plaintiff alleged that the "[p]laintiff was harmed by Wells Fargo's lack of care in the management and maintenance of the accounts. It avers, in particular that the bank was negligent in opening the Wells Fargo Account and in failing to ensure that the Wells Fargo Account was opened for legitimate purposes and not used in a manner to facilitate frauds and steal money" (*id.* at *4 [internal quotation marks and citations omitted]). The court determined that while plaintiff's negligence claim was not based solely on wire transfers, and thus not precluded by Article 4A, the claim was nonetheless dismissed because the plaintiff

failed to allege that Wells Fargo owed plaintiff, a non-customer of the bank, a duty of care under New Jersey law (*id.* at *5).

Thus, as in *New Jersey Steel, DeFazio* does not stand for the blanket proposition that a bank's breach of its internal policies is a basis to find that a bank breached a duty of care owed to a plaintiff.

However, since the instant motion was fully briefed, the issue of whether plaintiff's allegations state a claim for negligence became a bit clearer. In *LD Mgmt. LLC v First Republic Bank, Inc.* (2022 WL 4536297 [D.N.J. Sept. 27, 2022]), the plaintiffs alleged that the bank defendant negligence in accepting forged documents and an invalid power of attorney giving the bank's employee authority to act on behalf of plaintiffs with respect to plaintiff's accounts at the bank, which the employee transferred assets for her own benefit. In determining that plaintiff's allegations stated a claim for common law negligence, the court held that "[w]hile unauthorized checks and wire transfers typically fall within the sole purview of the UCC, *claims alleging negligence in the opening of an account may go forward*" (*id.* at *7, citing *ADS* at 536 [Albin, J., dissenting] [emphasis added]). In *Remtek Servs. v Wells Fargo Bank, N.A.* (2020 WL 241332, at *10 [D.N.J. Jan. 16, 2020]), the plaintiff commenced an action after a fraudulent bank account was created at defendant bank using the plaintiff's identity, which was then used to defraud plaintiff. The court held that "Article 4A may not preempt [the plaintiff] from bringing a claim asserting that Wells Fargo was negligent in allowing the fraudsters to open an account in the first place" (*id.* at *4). The court in *Gilson v TD Bank, N.A.* (2011 WL 294447 [S.D. Fla. Jan. 27, 2011]) similarly determined that plaintiff stated a cause of action for common law negligence where "[t]he basis for their negligence claim extends beyond TD Bank's conduct with regard to the wire transfers into and out of the accounts. Indeed, Plaintiffs' negligence claim centers on the Bank's allegedly negligent and reckless conduct with regard to opening the accounts" (*id.* at *9). Thus, the decisions in *LD Mgmt.*, *Remtek*, and *Gilson* support the proposition that Chase breached a duty owed to plaintiff by its alleged failure to perform due diligence when opening the Alchemy account.

Here, plaintiff alleges that Chase breached its duty of care opening the fraudulent Alchemy account in violation of its own policies. Plaintiff specifically alleges that "Chase [] opened, maintained, and managed the fraudulent Alchemy bank account without confirming the bona fides of Alchemy by requiring Alchemy to submit corporate authorization and without obtaining a government-issued I.D. of "David Tate," the person purporting to be an Alchemy officer who opened the corporate account (amended compl at ¶ 3). Chase further alleges that "recorded on the account opening documentation that the 'Taxpayer ID #' for Tate is '00-0000000' – a glaring red-flag and indicator of fraud to which [Chase] turned a blind-eye (*id.*). In addition, plaintiff alleges that Chase "[p]ublicly advertised and posted on its website that it would not permit a person to open a business account at Chase Bank unless the person opening such an account had proper identification and properly documented corporate records, including in the case of limited liability companies, operating agreements and/or company authorizations designating the managing member or authorized representatives (*id.* at ¶ 18). Moreover, according to plaintiff, Chase's "[e]xpress guidelines, moreover, require a 'Tax Identification Number,' including either a social security number for a single-member LLC or a corporate tax identification number" (*id.* at ¶ 19). Accordingly, plaintiff alleges, in opening, maintaining, and

managing the Alchemy account, Chase failed to conduct any reasonable due diligence and violated its own publicly stated standard of care to its own customer (*id.* at ¶ 22).

Chase further argues that plaintiff’s common law negligence claim is barred by the economic loss doctrine. “Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law” (*Saltiel v GSI Consultants, Inc.*, 170 N.J. 297 [2002] [citation omitted]). “[T]he economic loss doctrine provides that, when parties have entered into a contract, contract law rather than tort law governs disputes within the subject matter of the contract, and a party cannot use a tort claim to bypass the legal relationship created by the contract” (*Saltiel*, 280–281; *see Cudjoe v Ventures Tr. 2013I-H-R by MCM Cap. Partners, LLP*, 2019 WL 949301, at *4 [D.N.J. Feb. 26, 2019]). “The economic loss doctrine prohibits the recovery in a tort action of economic losses arising out of a breach of contract” (*Sun Chem. Corp. v Fike Corp.*, 243 N.J. 319, 328 n. 2 [2020]).

Here, the economic loss doctrine is inapplicable to plaintiff’s common law negligence claims. As discussed above, plaintiff’s claims do not arise from the agreement between the parties, but rather from an alleged breach of duty apart from any contract between the parties or otherwise arising from an agreement. Therefore, plaintiff’s claim for common law negligence is not barred by the economic loss doctrine (*see Durr Mech. Constr., Inc. v PSEG Fossil, LLC*, 516 F. Supp. 3d 407, 423 [D.N.J. 2021] [“The doctrine does not apply when a plaintiff alleges that the defendant’s conduct breached an independent duty, rather than a duty imposed by the contract”] [internal quotation marks omitted]).

As Chase’s motion for summary dismissal of plaintiff’s claims are premised on the agreements between the parties and the wire transfer documents, and the Court’s finding that those documents are not determinative of plaintiff’s common law negligence claim, the branch of Chase’s motion for summary dismissal of the amended complaint is also denied.

Accordingly, it is hereby

ORDERED that Chase’s motion pursuant to CPLR 3211 and 3212 is denied; and it is further

ORDERED that the parties shall appear for a discovery conference on May 9, 2023 at 9:30 a.m.; and it is further

ORDERED that Chase shall serve a copy of this decision and order upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

4/26/2023

DATE

D. Ramsey
SIS 4/26/23
DAKOTA D. RAMSEUR, 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