Nationstar Mtge., LLC v TD Bank, N.A.
2023 NY Slip Op 35339(U)
March 21, 2023
Supreme Court, Nassau County
Docket Number: Index No. 614093-2020
Judge: Jerome C. Murphy
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 5

NATIONSTAR MORTGAGE, LLC d/b/a MR. COOPER,

Plaintiff,

Index No. 614093-2020
Motion Date: 11-29-2023
Sequence No.: 010

- against -

DECISION AND ORDER

TD BANK, N.A., ANTHONY LIPARI, ANTHONY LIPARI and ASSOCIATES, MARK VAUGHAN, SANTINA VAUGHAN, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Defendants.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

JPMORGAN CHASE BANK, N.A.,

Third-Party Defendant.

The following papers have been read on this motion:

Notice of Motion, Affidavit, and Exhibits	1
Memorandum of Law in Support	2
Affirmation in Opposition with Exhibits	3
Memorandum of Law in Opposition	4
Reply Memorandum of Law	5

PRELIMINARY STATEMENT

Third party defendant moves, pursuant to CPLR 3211(a)(5) and (7), to dismiss the third party complaint, with prejudice, and for such other relief as the Court deems just and proper. Opposition and reply have been submitted.

BACKGROUND

On October 25, 2017, there was a fire at property owned by defendant Mark Vaughan (hereinafter Mark)(*see* NYSCEF Doc. No. 150). As a result, he filed a claim with defendant third party plaintiff Nationwide Mutual Insurance Fire Company (hereinafter Nationwide Mutual), which had issued a homeowners' insurance policy in the names of Mark, defendant Santina Vaughan (hereinafter Santina), and nonparty James A. Vaughan, covering the subject property (*see* NYSCEF Doc. Nos. 150, 201).

Subsequently, Nationwide Mutual, with respect to the claim, issued a check, in the amount of $280,209.72, on December 6, 2017, to Mark and plaintiff, and a second check, in the amount of $14,747.88, on December 27, 2017, to plaintiff, Mark, and Mark's public adjuster, defendant Anthony Lipari (*see* NYSCEF Doc. No. 150). The checks were drawn on Nationwide Mutual's account with third party defendant JP Morgan Chase Bank, N.A. (hereinafter Chase)(*see id.*). They were allegedly deposited on September 18, 2018 and January 19, 2018, respectively, without the proper indorsements and were not deposited into any account held by plaintiff (*see id.*).

On December 4, 2020, plaintiff commenced this action to recover damages, inter alia, for conversion and violation of the UCC[1] (*see* NYSCEF Doc. Nos. 1-2). Thereafter, in April 2023, plaintiff, with leave pursuant to stipulation of the parties, filed its third amended complaint (*see* NYSCEF Doc. No. 150).

On September 20, 2023, Nationwide Mutual commenced a third party action against Chase

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[1] Chase was originally named as one of the direct defendants in the main action (*see* NYSCEF Doc. Nos. 1-2). Chase moved, pursuant to CPLR 3211(a)(7), to dismiss the amended complaint insofar as asserted against it. In a decision and order, entered December 3, 2021, this Court granted Chase's motion and dismissed the direct action insofar as it was asserted against Chase (*see* NYSCEF Doc. No. 85).

alleging claims of strict liability against Chase under UCC §§ 3-116(b) and 3-419(1)(c) (Counts I and II); breach of implied contract (Count III); and contribution (Count IV).

Chase now moves, pursuant to CPLR 3211(a)(5) and (7), to dismiss the third party complaint, with prejudice. Nationwide Mutual opposes the motion.

DISCUSSION

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant has the initial burden of establishing, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*Celestin v Simpson*, 153 AD3d 656, 657 [2nd Dept. 2017][internal citations omitted]).

"On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7), the factual allegations in the pleading must be deemed true, and the [plaintiff] must be afforded the benefit of every favorable inference" (*Matter of Palmore v Board of Educ. of Hempstead Union Free Sch. Dist.*, 145 AD3d 1072, 1073 [2nd Dept. 2016][citations and internal quotation marks omitted]). However, "[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Matter of Clavin v Mitchell*, 131 AD3d 612, 614 [2nd Dept. 2015]). "Whether [the pleading party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

All Causes of Action in the Third Party Complaint

Here, the evidence submitted by Chase does not demonstrate that a shortened two year limitations is applicable. Chase is correct that "[a]n action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action" (CPLR 201; *see Van Der Velde v New York Prop. Underwriting Assoc.*, 205 AD3d 970, 971 [2nd Dept. 2022]). Further, it is true that "[p]arties to a contract may agree to limit the period of time within which an action must be commenced to a period shorter than that provided by the applicable statute of limitations" (*J. Construction Co., LLC v Westchester Fire Ins. Co.*, 165 AD3d 1076, 1078 [2nd Dept. 2018]; *D & S Restoration, Inc. v Wenger Constr. Co., Inc.*, 160 AD3d 924, 925-926 [2nd Dept. 2018]). Although there is a provision in the three versions of the Deposit Account Agreements, annexed as exhibits to the affidavit of Chase's vice president, senior product manager, submitted in support of this motion, which state that "[y]ou must file any lawsuit . . . against us within two years after the cause of action arises" (NYSCEF Doc. Nos. 184 at p. 15, 185 at p. 15, 186 at p. 13), each Deposit Account Agreement states at the outset, "Welcome to Chase. Thank you for opening your account with Chase" (NYSCEF Doc. Nos. 184 at p. 1, 185 at p. 1, 186 at p. 1). In the accompanying affidavit, the affiant Laura L. Deck does not state that the terms set forth in these three account agreements, effective for January 1, 2018 through May 19, 2018, May 20, 2018 through November 10, 2018, and November 11, 2018 through December 31, 2018, addressed to new clients, were binding upon Nationwide Mutual, a customer of Chase's prior to the issuance of these agreement given that the checks at issue were written in 2017. Consequently, the evidence as submitted by Chase at this stage does not support Chase's contention that this third party action, as a whole, is barred by a contractual two-year limitations period. Since the evidence submitted by Chase does not demonstrate initially that a shortened statute of limitations of two years is applicable, the burden has not shifted to Nationwide Mutual on this issue.

First and Second Causes of Action in the Third Party Complaint

"Pursuant to UCC 3-419(1)(c), an instrument is converted when it is paid on a forged indorsement" (*Mouradian v Astoria Fed. Sav. and Loan*, 91 NY2d 124, 128 [1997]). Conversion is subject to a three-year limitations period (*see* CPLR 214[3]; *Merlino v Knudson*, 214 AD3d 642, 645 [2nd Dept. 2023]). "A cause of action for conversion accrues when the conversion or taking occurred, and not from discovery" (*Merlino v Knudson*, 214 AD3d at 645 [internal citations and quotation marks omitted]; *see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44-45 [1995]; *Obstfeld v Thermo Niton Analyzers, LLC*, 168 AD3d 1080, 1083 [2nd Dept.

2019]).

Here, Chase demonstrates that the first two counts of the third party complaint are time-barred since the statute of limitations for these two causes of action began to run on September 18, 2018 with respect to the first count, and on January 19, 2018 with respect to the second count, which is more than three years prior to the commencement of the third party action (*see* CPLR 214[3]; *see e.g. Merlino v Knudson*, 214 AD3d at 645).

In opposition, Nationwide Mutual contends that the conversion claims asserted in the third party complaint are timely pursuant to the relation-back doctrine. Nationwide Mutual notes that it was not joined as a party to the main action until the filing of the third party complaint on April 4, 2023, and that in response it then commenced the third party action against Chase on September 20, 2023 (*see* NYSCEF Doc. Nos. 196-197). Nationwide Mutual maintains that since the original complaint was filed on December 4, 2020, prior to the running of the three year statute of limitations, and because Chase was originally a direct defendant, regardless of the fact that the direct action was dismissed insofar as asserted against Chase, the original complaint gave Chase notice of the transactions and occurrences from which the third party causes of action stem. Thus, Nationwide Mutual asserts Chase cannot claim prejudice or surprise of the third party claims against it.

As per the relation-back doctrine "a claim asserted against a defendant in an amended filing [is allowed] to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest'" (*Buran v Coupal*, 87 NY2d 173, 177 [1995]). The doctrine provides that:

> "a plaintiff must demonstrate that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in maintaining his of her defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well" (*Rivera v Wyckoff Heights Med. Ctr.*, 175 AD3d 522, 524 [2nd Dept. 2019]).

Here, Nationwide Mutual does not submit any authority for the Court to consider which demonstrates that untimely causes of action asserted in a third party action can relate back to the filing of the original action for statute of limitations purposes with respect to the timeliness of the third party claims. Although Chase was originally a defendant in the main action, that action was dismissed insofar as asserted against it and, as a result, there is nothing linking Chase to any of those remaining defendants. Moreover, the nature of the first and second causes of action asserted in the third party complaint brought by Nationwide Mutual are not the same causes of action that were brought in the original action and plaintiff does not demonstrate that Chase is united in interest with any of the remaining defendants. Consequently, that branch of Chase's motion which is pursuant to CPLR 3211(a)(5) to dismiss the first two causes of action set forth in the third party complaint are granted.

In light of this Court's determination with respect to that branch of Chase's motion which is pursuant to CPLR 3211(a)(5) to dismiss the first and second causes of action, this Court need not consider that branch of Chase's motion which is pursuant to CPLR 3211(a)(7) to dismiss those same causes of action.

Third Cause of Action in the Third Party Complaint

An implied contract arises "from a mutual agreement and an 'intent to promise, when the agreement and promise have simply not been expressed in words'" (*Maas v Cornell Univ.*, 94 NY2d 87, 93 [1999], *quoting* 1 Williston, Contracts § 1:5, at 20 [4th ed. 1990]). "This type of contract still requires such elements as consideration, mutual assent, legal capacity and legal subject matter" (*Maas v Cornell Univ.*, 94 NY2d at 93-94, *citing* 1 Williston, Contracts § 1:5, at 22). "A '[m]anifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance'" (*Maas v Cornell Univ.*, 94 NY2d at 94, *quoting* Restatement [Second] of Contracts § 18). Moreover, "[t]he conduct of a party may manifest assent if the party intends to engage in such conduct and knows that such conduct gives rise to an inference of assent. Thus, a promise may be implied when a court may justifiably infer that the promise would have been explicitly made, had attention been drawn to it" (*Maas v Cornell Univ.*, 94 NY2d at 93-94 [internal citations omitted]).

As noted, a cause of action predicated on a theory of implied contract or quasi-contract is not viable where there is an express agreement that governs the subject matter underlying the action (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). "A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*id.* at 388).

Here, with respect to the third cause of action set forth in the third party complaint, Nationwide Mutual alleged as follows:

> "62. Nationwide [Mutual]was a depositor at Chase Bank creating an implied contract in which Chase Bank received the benefits of holding funds owed to Nationwide [Mutual], and Chase Bank agrees to and is obligated to pay out only on instruments properly payable against funds deposited by Nationwide [Mutual].
>
> 63. Chase Bank made payment on the First Check, check number 10410858 in the amount of $280,209.72. See Exhibit 'B.'
>
> 64. Chase Bank made payment on the Second Check, check number 10522602 in the amount of $14,747.88. See Exhibit 'C.'
>
> 65. Both checks lacked necessary indorsements.
>
> 66. Consequently, the Checks were not properly payable.
>
> 67. Chase Bank breached the contract by paying on instruments that lacked necessary indorsements" (NYSCEF Doc. No. 169).

Chase argues that the third cause of action fails since the parties' relationship is governed by a written agreement and refers to the deposit agreements annexed to Deck's affidavit. However, as noted infra, Chase did not demonstrate on this record that the agreements annexed to Deck's affidavit pertain to Nationwide Mutual. Moreover, Nationwide Mutual alleged that Chase agreed to and is obligated to pay out only on instruments properly payable against funds deposited by Nationwide Mutual, in exchange for having the benefit of holding those funds, and breached that promise by paying out on checks that lacked the necessary indorsement, which caused damage to Nationwide Mutual for the value of those checks sufficiently pleading a cause of action for breach of an implied contract. Consequently, that branch of plaintiff's motion which is, pursuant to CPLR

3211(a)(7), to dismiss the third cause of action set forth in the third party complaint is denied.

Fourth Cause of Action in the Third Party Complaint

"To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries" (*Guerra v St. Catherine of Sienna*, 79 AD3d 808, 809 [2nd Dept. 2010]). "[A] defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule" (*Raquet v Braun*, 90 NY2d 177, 182 [1997]).

"[P]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute [CPLR 1401]" (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987], *quoting* CPLR 1401). As a result, "contribution is not available where the damages sought are exclusively for breach of contract" (*Praxis Intl. Corp. v Prime Alliance Grp., Ltd.*, 202 AD3d 840, 841 [2nd Dept. 2022]; *Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d 1349, 1350 [2nd Dept. 2011]). However, where the underlying complaint sounds, even in part, in tort, a third party claim for contribution should not be dismissed for failure to state a cause of action (*see Praxis Intl. Corp. v Prime Alliance Grp., Ltd.*, 202 AD3d at 841; *Eisman v Village of E. Hills*, 149 AD3d 806, 809 [2nd Dept. 2017]; *Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d at 1350-1351).

Here, in the third party complaint, for its fourth cause of action, Nationwide Mutual alleged as follows:

> "69. If Nationwide [Mutual] is found liable to any of the named parties Nationstar Mortgage, LLC d/b/a Mr. Cooper, TD Bank, N.A., Anthony Lipari, Anthony Lipari and Associates, Mark Vaughan, and Santina Vaughan (collectively the "Co-Parties"), which liability is specifically denied, Nationwide [Mutual] asserts that Chase Bank contributorily causes the liability.
>
> 70. If Nationwide [Mutual] is found liable to any of the Co-Parties, for which liability is specifically denied, Nationwide asserts that the Chase Bank was jointly liable, of which liability is shared with the Chase Bank.

> 71. If Nationwide [Mutual] is found liable to any of the Co-Parties, which liability is specifically denied, Third-Party Plaintiff Nationwide [Mutual] asserts that the Chase Bank was severally liable.
>
> 72. As a result of the foregoing, Nationwide [Mutual] is entitled to contribution from Chase Bank, pursuant to all applicable statutory and common law"(NYSCEF Doc. No. 169).

Further, Nationwide Mutual alleged that Chase improperly released funds from its account despite the first check's lack of necessary indorsements and the second check's forged indorsement and further alleged that the basis of the third party complaint was Chase's "wrongful conduct" (*id.*). In addition, in the underlying action, plaintiff alleged causes of action against the defendants sounding in tort, to wit, fraud, breach of fiduciary duty, and conversion, along with the breach of contract claim against Nationwide Mutual (*see* NYSCEF Doc. No. 196). Cross claims have been interposed by Mark and Santina for, inter alia, contribution from Nationwide Mutual with respect to the tort causes of action asserted against them (*see* NYSCEF Doc. Nos. 156, 179). Nationwide Mutual alleged, in the fourth cause of action, that if it is found liable to any of the "co-parties", which includes Mark and Santina, from whom plaintiff seeks damages for causes of action sounding in tort, then Nationwide Mutual is entitled to contribution from Chase. In light of all of the pleadings, the fourth cause of action in the third party complaint is not subject to dismissal pursuant to CPLR 3211(a)(7) (*see Praxis Int'l Corp. v Prime Alliance Grp., Ltd.*, 202 AD3d at 841; *Eisman v Village of E. Hills*, 149 AD3d at 809; *Sound Refrig. & A.C., Inc. v All City Testing & Balancing Corp.*, 84 AD3d at 1350-1351).

Accordingly, it is

ORDERED that the branches of the motion of third party defendant JPMorgan Chase Bank, N.A., which are, pursuant to CPLR 3211(a)(5), to dismiss the first and second causes of action set forth in the third party complaint are GRANTED; and it is further

ORDERED that the branches of the motion of third party defendant JPMorgan Chase Bank, N.A., which are, pursuant to CPLR 3211(a)(5) and (7), to dismiss the third and fourth causes of action set forth in the third party complaint are DENIED.

To the extent that any other requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
March 21, 2023

E N T ER:

Jerome C. Murphy

HON. JEROME C. MURPHY
J.S.C.

ENTERED
Mar 25 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE