

**Spectrum Inc. Gen. Contr. v  
Capital One Bank USA, N.A.**

2024 NY Slip Op 31814(U)

May 14, 2024

Supreme Court, New York County

Docket Number: Index No. 653799/2023

Judge: Nancy M. Bannon

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY M. BANNON PART 61M**

*Justice*

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SPECTRUM INC. GENERAL CONTRACTING,

Plaintiff,

- v -

CAPITAL ONE BANK USA, N.A.,

Defendant.

-----X

INDEX NO. 653799/2023

MOTION DATE 03/27/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 18

were read on this motion to/for DISMISSAL.

**I. INTRODUCTION**

In this action alleging, *inter alia*, breach of contract and violations of Uniform Commercial Code (“UCC”) provisions, the plaintiff, Spectrum Inc. General Contracting (“Spectrum”), seeks damages of \$7,016,129.50, plus expenses in recovering from embezzlement losses. The defendant, Capital One Bank USA, N.A. (“Capital”) moves, pre-answer, to dismiss all cause of action of the amended complaint pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). The plaintiff opposes. The motion is granted to the extent that the first and third causes of action are dismissed.

**II. BACKGROUND**

The plaintiff, seeking to open accounts with the defendant as a business customer, entered into a contract (the “General Provisions Agreement”), whereby the plaintiff agreed to abide by the defendant’s rules and regulations as a customer, and the defendant represented and agreed that it would follow commercially reasonable banking standards and practices in safeguarding the plaintiff’s funds. The parties also entered into a second contract (the “ACH Agreement”), to allow the plaintiff, as an originator, to use the Automated Clearing House Network (ACH) to initiate electronic funds transfers through the defendant as the originator’s bank. The ACH Agreement fully incorporates the General Provisions Agreement.

From October 2018 to August 2021, nonparty Kevin Lee served as the plaintiff's comptroller. Lee's had authority to disburse the plaintiff's funds through electronic funds transfers, including ACH transfers. During his employment, Lee embezzled \$7,016,129.50 of the plaintiff's funds by initiating numerous unauthorized ACH transfers of the funds, sometimes several per day and at hours well beyond normal business hours, to his personal accounts at Bank of America, Citibank and Goldman Sachs. The plaintiff discovered Lee's activities and terminated his employment in or around August 2021. Lee was subsequently arrested, charged, and pleaded guilty to ACH fraud in the United States District Court for the Eastern District of Virginia. On October 1, 2021, the plaintiff submitted a claim to the defendant bank for reimbursement of the plaintiff's losses of \$7,016,129.50, plus consequential expenses. The defendant denied these claims on or about October 15, 2021.

On August 7, 2023, the plaintiff commenced the instant action. The plaintiff filed its amended complaint on September 21, 2023, alleging four causes of action; (i) breach of statutory duties pursuant to Virginia Code § 8.4-103; (ii) violation of Virginia Code § 8.4A-207; (iii) breach of fiduciary duty; and (iv) breach of the General Provisions and ACH Agreements. The plaintiff alleges that the defendant owed a duty of care to safeguard the plaintiff's funds and failed to follow reasonable commercial and banking standards to detect Lee's fraud. The plaintiff further alleges that the bank actual knowledge of a misdescription of the beneficiaries of Lee's transfer's (in this case, Lee's personal accounts). The plaintiff seeks damages of \$7,016,129.50 plus other expenses arising from the embezzlement losses.

The instant motion ensued. In support, the defendant submits the General Provisions Agreement and the ACH Agreement. The plaintiff submits only a memorandum of law.

The court notes that the plaintiff's first and second causes of action allege violations of Virginia Code § 8.4 and § 8.4A, which are the relevant provisions of Virginia's version of the Uniform Commercial Code. However, Section 22 of the General Provisions Agreement states that New York law governs any disputes between the parties. As such, the complaint incorrectly asserts claims under the Virginia Code. However, both parties' motion papers cite to the appropriate, equivalent, and identical provisions of New York law, UCC § 4-103 and § 4-A-207, for the first and second causes of action, respectively. As such, the discussion is limited to the New York UCC § 4-103 and UCC § 4-A-207.

### III. DISCUSSION

#### A. CPLR 3211(a)(5)

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired.” Benn v Benn, 82 AD3d 548, 548 (1<sup>st</sup> Dept. 2011) (quoting Island ADC, Inc. v Baldassano Architectural Group, P.C., 49 AD3d 815, 816 [2<sup>nd</sup> Dept. 2008]); see also Gravel v Cicola, 297 AD2d 620 (2<sup>nd</sup> Dept. 2002). “The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable, or whether the action was actually commenced within the period propounded by the defendant.” QK Healthcare, Inc. v InSource, Inc., 108 AD3d 56, 65 (2<sup>nd</sup> Dept. 2013); see MTGLQ Investor, LP v Wozencraft, 172 AD3d 644 (1<sup>st</sup> Dept. 2019); Epiphany Community Nursery School v Levey, 171 AD3d 1 (1<sup>st</sup> Dept. 2019); J.A. Lee Elec., Inc. v City of New York, 119 AD3d 652 (2<sup>nd</sup> Dept. 2014). The plaintiff’s submissions in response to the motion “must be given their most favorable intendment.” Benn v Benn, *supra* at 548 (quoting Arrington v New York Times Co., 55 NY2d 433, 442 [1982]).

Claims brought under Article 4 and 4-A of the UCC are subject to a three-year statute of limitations under CPLR 214(2), as it would fall under claims to recover upon a liability created by statute, and not common law. See OneWest Bank, FSB v. Deutsche Bank Nat’l Tr. Co., 186 AD3d 92, 96 (1<sup>st</sup> Dept. 2020). A cause of action for breach of fiduciary duty is subject to a three-year statute of limitations under CPLR 214(4) when “the remedy sought is purely monetary in nature.” IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139 (2009). A breach of a services contract is subject to a six-year statute of limitations under CPLR 213(2). CPLR 201 allows parties to shorten the statute of limitations period by written agreement if the shorter time period is reasonable. See John J. Kassner & Co. v City of New York, 46 NY2d 544, 551 (1979), Exec. Plaza, LLC v Peerless Ins. Co., 22 NY3d 511, 519 (2014).

The defendant argues that all the plaintiff’s causes of action are time barred by the contractual one-year period for filing suit and should be dismissed under CPLR 3211(a)(5). Section 8(c) of the General Provisions Agreement states that any claim, action, or proceeding brought by the plaintiff to recover any losses related to the services rendered under the agreement must be brought within one year of the event giving rise the plaintiff’s claim. The defendant argues that the one-year period began to run on the latest date on which Lee

possibly initiated his fraudulent fund transfers was in August 2021, but the plaintiff did not commence this action until August 7, 2023. In response, the plaintiff points to Section 23 of the General Provisions Agreement, which states that “[n]o party’s failure or delay in exercising any right or remedy under the Agreement will operate as a waiver of such right or remedy.” This provision supports the plaintiff’s position that it thus was not contractually barred from commencing the action when it did. The plaintiff proffers no cogent argument in reply. Thus, in light of the conflicting and ambiguous language in the General Provisions Agreement, the defendant has not, at this juncture, established that the action is time barred. See Beltway 7 & Properties, Ltd. v Blackrock Realty Advisers, Inc., 167 AD3d 100, 106 (1<sup>st</sup> Dept. 2018), Nina Penina, Inc. v Njoku, 30 AD3d 193, 194 (1<sup>st</sup> Dept. 2006). Indeed, it is well settled that ambiguities in a contract are to be construed against the drafter, which in this case, is the defendant. See 327 Realty, LLC v Nextel of New York, Inc., 150 AD3d 581 (1<sup>st</sup> Dept. 2017). Therefore, the branch of the defendant’s motion to dismiss all causes of action as time barred under CPLR 3211(a)(5) is denied.

**B. CPLR 3211(a)(1) and 3211(a)(7)**

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action.” 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (*id.* at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts as alleged fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

Under CPLR 3211(a)(1), dismissal is warranted when the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1<sup>st</sup> Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1<sup>st</sup> Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2<sup>nd</sup> Dept. 2010).

**1) UCC § 4-103**

The defendant's motion to dismiss the first cause of action is granted based on failure to state a cause of action under CPLR 3211(a)(7). When courts interpret the UCC, they look to the "language of the statute, as well as the clear commentary on the relevant sections." Worthy Lending LLC v New Style Contr., Inc., 39 NY3d 99, 103 (2022). Article 4 of the UCC governs bank deposits and collections, while Article 4-A of the UCC governs commercial funds transfers, which are transactions that begin with an originator's payment order made for the purpose of paying a beneficiary of the order. A case involving wire transfer of funds is governed by Article 4-A, while claims under Article 4 involve improperly paid items such as bank deposits. See Clemente Bros. Contr. Corp. v Hafner-Milazzo, 23 NY3d 277, 288 (2014), John & Mary Markle Found. v Mfrs. Hanover Tr. Co., 209 AD2d 587 (2<sup>nd</sup> Dept. 1994); see also Receivers of Sabena SA v. Deutsche Bank A.G., 142 AD3d 242, 243 (1<sup>st</sup> Dept. 2016). Article 4-A of the UCC provides "the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation [it] cover[s]" involving funds transfers. UCC § 4-A-102, Official Comment. The gravamen of the complaint is Lee's embezzlement through funds transfers, including ACH transfers, which are governed by Article 4-A. Since the plaintiff's complaint makes no mention of bank deposits, it fails to state a cause of action under Article 4 of the UCC.

2) UCC § 4-A-207

Article 4-A of the UCC governs the rights and liabilities arising out of commercial electronic funds transfers. See Receivers of Sabena SA v Deutsche Bank A.G., 142 AD3d 242, 244 (1<sup>st</sup> Dept. 2016). Under UCC § 4-A-207(3)(b), the originator (in this case, the plaintiff), is not obliged to pay its order if it can prove that the person identified in the order by a bank account number or other identifying number was not entitled to receive payment from the plaintiff. However, the plaintiff will be obliged to pay its order if the originator's bank (in this case, the defendant), can show that the plaintiff had notice that the payment order issued may have been made by the beneficiary's bank (in this case, Lee's personal accounts) based on the listed bank account number or other identifying number. UCC § 4-A-207(3)(b). This notice can be proved by admissible evidence, including proof of the defendant providing the plaintiff "with a written statement of the required information and obtaining the [plaintiff]'s signature to the statement." Id., comment 3. In regard to CPLR 3211(a)(7), the plaintiff adequately alleges that the defendant had actual knowledge of a misdescription of Lee's wire transfers of funds from the plaintiff's account to Lee's personal accounts based on the varying amounts and significant volume of these transfers, as well as the unusual hours of these transfers.

The defendant points to Section 12 of the ACH Agreement as documentary evidence to dismiss the plaintiff's claim per CPLR 3211(a)(1), which provides that the defendant may rely on the account numbers provided by the plaintiff or the plaintiff's representatives in an order. However, Section 12 applies to orders made in error by the plaintiff, and not to fraudulently made orders, which makes up the crux of the plaintiff's complaint. Furthermore, the defendant provides no submissions to conclusively demonstrate that the defendant provided the plaintiff with notice of Lee's fraudulent transfers as they were occurring. That is, the submissions fail to "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, *supra* at 383. Therefore, the branch of the defendant's motion to dismiss the plaintiff's second cause of action is denied.

### 3) Breach of Fiduciary Duty

The legal relationship between a customer and a bank is ordinarily contractual in nature and does not create a fiduciary relationship (Bank Leumi Tr. Co. of New York v Block 3102 Corp., 180 AD2d 588, 589 [1<sup>st</sup> Dept. 1992], *lv denied* 80 N.Y.2d 754 [1992]), unless, the plaintiff sufficiently alleges that the parties had a relationship beyond that of a normal bank and customer, such as the bank providing investment banking advice or other advisory services. See Frydman & Co. v Credit Suisse First Bos. Corp., 272 AD2d 236, 237 (1<sup>st</sup> Dept. 2000), Wiener v Lazard Freres & Co., 241 AD2d 114, 122 (1<sup>st</sup> Dept. 1998).

The plaintiff fails to plead with particularity any facts demonstrating that the parties had a relationship beyond that of a normal bank and customer relationship, or that the defendant provided unique advisory services that could create a fiduciary relationship. The amended complaint merely alleges that the defendant owed the plaintiff a fiduciary duty to serve, maintain, and monitor the plaintiff's accounts, which is insufficient to plead a cause of action for breach of fiduciary duty under CPLR 3211(a)(7).

The plaintiff's third cause of action is also dismissed under CPLR 3211(a)(1), as Section 27 of the General Provisions Agreement states that the defendant "is not in a fiduciary or similar relationship with [the plaintiff]." The ACH Agreement does not contain any contradictory provisions. Although the plaintiff argues that Section 27 is unconscionable and unenforceable, it fails to provide a sufficient factual basis for such a finding.

Therefore, the branch of the defendant's motion to dismiss the plaintiff's third cause of action is granted based on failure to state a cause of action under CPLR 3211(a)(7) and a defense founded in documentary evidence under CPLR 3211(a)(1).

4) Breach of Contract

The branch of the defendant's motion to dismiss the fourth cause of action is denied. A cause of action for breach of contract must allege (1) the existence of a contract, (2) the plaintiffs' performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1<sup>st</sup> Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). The plaintiff adequately alleges a cause of action for breach of contract by alleging (1) the existence of the General Provisions Agreement and ACH Agreement, (2) the plaintiff performed, (3) the defendant breached, and (4) resulting damages. The defendant argues that the plaintiff's breach of contract claim is barred by the UCC. However, the UCC does not preempt common law causes of action unless a particular statutory provision expressly so provides. Bank of Hawaii Int'l Corp. v Marco Trading Corp., 261 AD2d 333 (1<sup>st</sup> Dept. 1999). Article 4-A of the UCC governs electronic funds transfers. "Principles of law or equity outside of Article 4-A [are] not appropriate to create rights, duties, and liabilities inconsistent" with those of Article 4-A. UCC § 4-A-102, Official Comment. The defendant fails to demonstrate how the plaintiff's cause of action for breach of contract is inconsistent or conflicts with the provisions of Article 4-A.

The defendant produces no documentary evidence to warrant dismissal of the plaintiff's breach of contract claim under CPLR 3211(a)(1). The defendant points to Section 3(c) of the General Provisions Agreement, which states that the defendant can rely on payment orders and instructions made by the plaintiff's authorized representatives. The defendant contends that because Lee was the plaintiff's comptroller, it was entitled to rely on Lee's instructions. The defendant also points to Section 6(b) of the General Provisions Agreement, which states that the plaintiff must notify the defendant of any errors in payment orders on the same business day, or else the plaintiff's claims are precluded. However, the plaintiff's claim is not that the defendant failed to recognize an error in Lee's activities, but rather that Lee's activities were fraudulent and thus unauthorized. Furthermore, the defendant's contention that, per Section 8(a) of the General Provisions Agreement, its liability to the plaintiff is limited to direct damages attributable to the defendant's gross negligence or willful misconduct, is premature. Whether the defendant failed to follow commercially reasonable banking standards and practices in

safeguarding the plaintiff's funds or committed gross negligence or willful misconduct are unresolved issues to be resolved in further proceedings.

IV. CONCLUSION

The defendant's motion to dismiss is granted as to the first and third causes of action, leaving the second (violation of UCC § 8.4A-207) and fourth (breach of the General Provisions and ACH Agreements) causes of action to proceed.


Accordingly, upon the foregoing papers, it is

ORDERED that the defendant's motion to dismiss is granted to the extent that the first and third causes of action of the amended complaint are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the defendant shall file an answer or otherwise respond to the remaining causes of action of the amended complaint within 30 days of the date of this order, and it is further

ORDERED that the parties shall proceed with discovery and appear for a status conference on July 25, 2024, at 10:00 am, as previously scheduled.

This constitutes the Decision and Order of the court.

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

5/14/2024  
DATE

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART