Underground Utils., Inc. v JP Morgan Chase Bank, N.A.
2016 NY Slip Op 30115(U)
January 21, 2016
Supreme Court, New York County
Docket Number: 653124/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 39

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UNDERGROUND UTILITIES, INC.

Plaintiff,

- against - Index No.: 653124/2014

JP MORGAN CHASE BANK, N.A.,

Defendant.

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SCARPULLA, J.:

In this action for breach of fiduciary duty, defendant JP Morgan Chase Bank, N.A. (Chase), moves pursuant to CPLR 3211 to dismiss plaintiff Underground Utilities, Inc.'s (plaintiff) complaint. This action concerns assets which were deposited by plaintiff into four bank accounts which were maintained by Chase. Plaintiff alleges that the assets were held in escrow for its own benefit, and that Chase breached the fiduciary duty it owed plaintiff by disbursing the funds to the Comptroller of the City of New York (Comptroller) without its permission. The accounts contained bonds (which subsequently matured into cash) that plaintiff purchased from Chase to serve as collateral for the accurate and timely completion of road construction contracts with the City of New York (the City).

Underground purchased three of the bonds in or around 1996, and purchased the remaining bond in or around 2005. On July 25, 2012, the Comptroller instructed Chase to close the four accounts, and disburse $1,570,000 in aggregate from the accounts to the

Comptroller. Chase complied with these instructions and disbursed the funds on July 27, 2012. Plaintiff commenced this action on October 14, 2014.

Discussion

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158 [2008][internal citations and quotation marks omitted]). "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]).

In the complaint, plaintiff alleges that Chase owed it a fiduciary duty by virtue of holding its funds in escrow for its benefit.

> "An escrow is a written agreement that imports a legal obligation to deposit an instrument or property by the promisor (TFC) with a third party (the law firm) to be kept by the latter in the capacity of depositary or escrowee until the performance of a condition or the happening of an event, which then is to be delivered by the escrow agent to the promisee (plaintiff)"

(*Natlional Union Fire Ins. Co. Pittsburgh, Pa. v Proskauer Rose Goetz & Mendelsohn*, 165 Misc 2d 539, 544 [Sup Ct. NY County, Aug. 2, 1994], affd 227 AD2d 106 [1st Dept 1996]) "[I]t is settled law that an escrow agent owes his or her beneficiary a fiduciary duty" (*Talansky v Schulman*, 2 AD3d 355, 359 [1st Dept 2003]).

In evidentiary support of its motion to dismiss, Chase submits a "Custodial Service Agreement"[1] (CSA) between Chase and the Comptroller, dated March 9, 2000 (Urkowitz affidavit in support, exhibit A). "While a complaint is to be liberally construed in favor of plaintiff on a CPLR 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). Chase contends that the four accounts were governed by the express terms of the CSA, and that the CSA indisputably demonstrates that Chase did not owe a fiduciary duty to the plaintiff. Chase also submits letters of instruction from the Comptroller to Chase to disburse the funds from all four accounts at issue, dated July 25, 2012.

Underground opposes, arguing that the CSA does not provide a basis for dismissal because Underground never signed the agreement, the agreement was never disclosed to it, and that the agreement was executed after the assets were deposited. Underground submits monthly statements it received from Chase as evidence that Chase held the funds in escrow for its benefit. The "account title" on the statements reads "Comptroller New York City- Underground Utilities Inc."

In 2005 (five years after the CSA was executed), plaintiff purchased a bond for $45,000, and deposited it into account G51256. The CSA, which indisputably governed

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[1] The full title of the CSA is "CUSTODIAL SERVICE AGREEMENT FOR ACCOUNTS WITH COLLATERAL FOR CONTRACT RETAINAGE AND FRANCHISE SECURITY."

the terms of this account, is not an escrow agreement, but an agreement to establish and administer custodial accounts on behalf of the City. The agreement recites that its purpose is to provide

> "for the provision of custodial services for the maintenance of securities collateral deposited with the City as contract retainage and franchise security by vendors, franchisees, lessees, concessionaires and privileged holders who must deposit as security cash or securities as required by New York law or due to contractual relationships with the City"

(Urkowitz affidavit in support, exhibit A, at 4). The CSA defines a depositor as "any person, corporation or entity who, either by State law or due to a contractual relationship with the City, must deposit cash or securities as collateral with the City" (*id.*, at 5). The CSA also states that Chase shall "[d]eliver securities, liquidate securities and pay the proceeds to the City whenever so instructed by the City. Such activity will be initiated solely on instruction from the City" (*id.*, § 3.3.5), and "[a]ccept the securities that are to be deposited as collateral to the designated CRFS Account, as instructed on the deposit form for contract retainage or franchise security, as applicable, received from the City signed by an Authorized Person (the 'Deposit Form')" (*id.*, at § 3.2.1).

The CSA conclusively disproves the allegation that Chase owed Underground a fiduciary duty as to account G51256. The CSA does not include a condition precedent clause governing disbursements, nor any language that would indicate an intention to establish Chase as an escrow agent, or as a fiduciary in any other manner.

In addition to the CSA itself, the July 25, 2012 letter of instruction from the Comptroller to Chase (which bears account number G51256) contains no indicia that the accounts were subject to an escrow agreement. The letters of instruction bear the title "RETAINED PERCENTAGE RELEASE," and includes the instructions "CHASE: PLEASE ISSUE **TWO** CHECKS PAYABLE TO THE NYC COMPTROLLER OFFICE"[2], and "CHASE: Please CLOSE Custody Account Upon Completion of the Transaction." Chase's subsequent compliance with the unilateral directions of the Comptroller comport with the language of section 3.3.5 of the CSA, and is further evidence that the accounts were not governed by an escrow agreement.

Plaintiff's arguments that the CSA does not apply to account G51256 because it did not sign, or have notice of the CSA, are not persuasive. The court is not aware of any authority, nor has plaintiff submitted any authority, for the proposition that a depositor must execute an agreement with a bank in order to deposit assets into an account that it does not own.

Likewise, plaintiff's argument that its status "as a depositor created a fiduciary duty with respect to all banking transactions is unsupported by law." (*Nathan v J & I Enters., Ltd.*, 212 AD2d 677 [2d Dept 1995]). Nor has plaintiff submitted any authority for the proposition that merely sending out periodic statements results in the creation of a fiduciary duty.

[2] One check was for a $20 transaction fee, the other check was for the remaining funds.

While the letters of instruction and statements from all four accounts are identical, Chase has not submitted the custodial agreement between it and the City that governed accounts G51102, G51164 and G51264, at the time the accounts were created in 1996. Nevertheless, Chase argues, a general integration clause in the CSA, which states that "[t]his agreement, together with [appendices] constitutes the entire understanding between the parties with respect to its subject matter and supersedes all prior negotiations and Agreements" shows that the 2000 agreement governs accounts G51102, G51164 and G51264. Chase also submits the affidavit of a bank representative who avers that the CSA superseded the custodial agreement between Chase and the City in effect in 1996. Plaintiff does not submit any evidence to raise an issue of fact in dispute. Accordingly, Chase has also disproved plaintiff's breach of fiduciary duty claim as to the remaining accounts.

In accordance with the foregoing, it is

ORDERED that the motion of defendant JP Morgan Chase, N.A. to dismiss the complaint is granted, the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

January 21, 2016

ENTER

Hon. Saliann Scarpulla, J.S.C.