Galitsa v Berkley
2016 NY Slip Op 32468(U)
December 16, 2016
Supreme Court, New York County
Docket Number: 161833/2015
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Fyodor Galitsa,

Plaintiff,

- v -

Allen Berkley & J.P. Morgan Chase & Co.,

Defendants.

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Index No.
161833/2015
DECISION and ORDER
Mot. Seq. 001

HON. EILEEN A. RAKOWER

Presently before the Court is a motion by defendant, JP Morgan Chase Bank NA, incorrectly sued here as JP Morgan Chase & Company ("Chase") seeking to dismiss this action as against it pursuant to CPLR §§ 3211(a)(1) and (a)(7). In support of its motion, Chase submits the attorney affirmation of Owen A. Kloter; the affidavit of Cheryl Cimperman, a Vice President at Chase; a copy of a Personal Signature Card dated March 6, 2014 ("Signature Card") signed by plaintiff, Fyodor Galitsa ("Galitsa"); and copies of Chase's Deposit Account Agreements dated March 6, 2014 and March 23, 2014. Galitsa opposes. Galitsa submits the attorney affirmation of Joel M. Lutwin; Signature Card; and a "Type Exemplar" showing an example of eight point type print. Oral argument was held.

As alleged in the Verified Complaint, in 2014, Galitsa "was engaged by defendant Berkley to do handyman jobs at Berkley's apartment and fabricate a special desk for Berkley." Galitsa received eight checks from defendant, Allen Berkley ("Berkley") for the work he performed, and Galitsa deposited the checks into his bank account at Chase. After Galitsa deposited the checks, Berkley "claimed that he had never signed the checks and that plaintiff forged his signature on these checks." Berkley contacted Chase and informed Chase that Galitsa had forged Berkley's name on the checks, and Chase withdrew the sum of $24,451.65 from Galista's bank account with Chase. Chase returned the money to Berkley.

As further alleged in the Verified Complaint, Berkley thereafter filed a formal complaint to the District Attorney of New York County, and "upon information and belief, testified before the Grand Jury resulting in plaintiff being indicted on two counts of Grand Larceny in the Third Degree, Six counts of Grand Larceny in the

fourth degree, six counts of identity theft in the first degree, six counts of identity theft in another section of the penal law, two counts of Identity Theft in the second degree, [and] eight counts of criminal possession of a forged instrument in the second degree." Galitsa was incarcerated from July 14, 2014 to December 22, 2014, at which time he made bail and was released from custody. In the course of the criminal proceeding, Galitsa "signed a proffer agreement" and "spoke to the DA in charge of the case for samples of plaintiff's handwriting to be analyzed by experts employed by the New York City Policy Department handwriting analyses section (HAS)." According to the Verified Complaint, "The results of the New York City Police Department handwriting experts was that in all probability was made by Berkley and not by the plaintiff on the 8 checks in question." On October 22, 2015, the charges against Galitsa were formally dismissed and the records sealed. It is further alleged in the complaint that Chase has refused to return the money to Galitsa that Chase had previously taken from Galitsa's account upon receipt of Berkley's claim of forgery.

The Verified Complaint contains four causes of action. The first, second, and third causes of action are asserted only as against Berkley.[1] The fourth cause of action is asserted against Chase. It alleges that "Chase wrongfully withdrew the sum of $24,451.65 from plaintiff's chase [sic] account based on nothing but accusations made by defendant berkley [sic] as a consequence of their wrongfully misappropriating plaintiff's money, plaintiff is entitled to return of said sum plus interest from July 24, 2014." Chase seeks to dismiss the fourth cause of action in its motion to dismiss.

Turning to Chase's motion to dismiss, CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

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[1] The first cause of action alleges that Berkley "was negligent in not comparing the signature on the aforementioned 8 checks with his own signature despite the fact that he had a duty to the plaintiff to carefully compare the signature on the 8 checks with his own handwriting." The second cause of action alleges that "Berkley maliciously falsified the fact that the signatures on the 8 checks were not his." The third cause of action alleges that "Berkley had converted the plaintiff's personal property to his own use by refusing to return the tools left by the plaintiff in defendant Berkley's apartment when plaintiff was denied access thereto."

> (1) a defense is founded upon documentary evidence; or
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> (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep't 2007] [citation omitted]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

Chase seeks to dismiss the Complaint as against it under CPLR § 3211(a)(1) on the grounds that the Deposit Account Agreements, which Galitsa agreed to be bound by when Galista signed the Signature Card that referred to them, permit Chase to reverse payments to a customer's account when a forgery is suspected and discharges Chase from any liability for such actions.

In connection with the opening of a deposit account with Chase, Galitsa signed the Signature Card, in which Galitsa agreed as follows:

> I acknowledge receipt of the Bank's Deposit Account Agreement or other applicable account agreement [...] which includes all provisions that apply to this deposit account [...] and agree to be bound by the terms and conditions therein as amended from time to time.

Both applicable Deposit Account Agreements provide, in relevant part:

> If there are conflicting instructions or there is any dispute regarding your account, we may take any action described in Section I.3 [..]. If any person notifies us of a dispute, we do not have to decide if the dispute has merit before we take further action. We may take these actions without any liability and without advance notice, unless the law says otherwise. [Section I.2]
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> [...] We may refuse, freeze, reverse, or delay any specific withdrawal, payment, or transfer of funds to or from your account, or we may remove funds from your account to hold them pending investigation, including one or more of the following circumstances:
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> • [...] We suspect that any transaction may involve illegal activity or be fraudulent [...]
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> We will have no liability for any action we take under this section. [Section I.3]

Here, the Deposit Account Agreements referenced in the Signature Card allowed Chase to rely on Berkley's representations of fraud concerning the checks deposited into Galitsa's account when it debited Galitsa's account. The Deposit Account Agreements further relieve Chase of any liability for its actions, such as reversing payments, relating to an account dispute. Accordingly, the Deposit Account Agreements referenced in the Signature Card signed by Galitsa flatly contradicts the legal conclusions and factual allegations of the complaint.

In opposing Chase's motion to dismiss the Complaint, Galitsa argues that the Signature Card violates the provisions of CPLR § 4544 because the pertinent language that Chase relies upon is less than 8 points in depth" Galitsa argues, "Since upon information and belief, Mr. Galitsa started an individual account, it is apparent that the alleged agreement involves a consumer transaction and as a result it violates the mandate of 8 points [,] the signature card cannot be used as evidence in this case and therefore its reference to deposit account agreements also fail." The Court notes that Galitsa does not dispute that he received the Signature Card and signed it.

CPLR § 4544 provides that "[t]he portion of any printed contract or agreement involving a consumer transaction [...] where the print is not clear and legible or is less than eight points in depth [...] may not be received in evidence". It further states,

"As used in the immediately preceding sentence, the term "consumer transaction" means a transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes." In *Ayala v. Jamaica Savings Bank*, 121 Misc.2d 564, 468 N.Y.S.2d 306 (Sup. Ct., Special Term, Queens County, 1983), *aff'd*, 109 A.D.2d 723 [2d Dept. 1985]), the court held that a bank could rely on the terms and conditions printed on applications for the opening of "time deposit accounts" that the plaintiff had signed because "[t]he agreements opening plaintiff's time deposit accounts do not involve consumer transactions within the meaning of CPLR 4544".

Here, while Galitsa argues that the Signature Card is less than the 8 point type, the relevant provisions which Chase relies upon to demonstrate that its conduct was permitted is contained in the Deposit Account Agreements, not the Signature Card. Galitsa makes no argument that the print of the Deposit Account Agreements is less than 8 point type. Furthermore, based on *Ayala*, the Agreements to open the accounts "do not involve customer consumer transactions within the meaning of CPLR 4544".

Galitsa further argues that the "the language in the two deposit agreements violate the public policy of the State of New York in that they exculpate Chase from any negligence whatsoever." "New York law generally enforces contractual provisions absolving a party from its own negligence." (*Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821, 823 ([1993]). "Public policy, however, forbids a party's attempt to escape liability, through a contractual clause, for damages occasioned by "grossly negligent conduct." (*Colnaghi*, 81 N.Y.2d at 823). "Used in this context, 'gross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing." (*Id.* at 823-24). Here, Galitsa's allegations do not meet this standard.

Galitsa further argues that the correct standard that should be applied in analyzing his claim against Chase is set forth in Article 3 and 4 of the Uniform Commercial Code, which deals with shifting burdens and risk of loss with respect to forged instruments. Galitsa argues that applying the appropriate standard, Chase failed to exercise ordinary care by comparing the signatures on the subject check with the signature cards of Galitsa and Berkley.

"The manner in which checks are processed by banks is governed by the Uniform Commercial Code." *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 575 [2011]. As set forth in *Greenberg*:

> The manner in which checks are processed by banks is governed by the Uniform Commercial Code. The UCC defines a "Depositary Bank" as "the first bank to which an item is transferred for collection" (UCC 4-105 [a]). A "Collecting Bank" is defined as "any bank handling the item for collection except the payor bank" (UCC 4-105 [d]). A "Payor Bank" is defined as "a bank by which an item is payable as drawn or accepted" (UCC 4-105 [b]). An "Intermediary Bank" is defined as "any bank to which an item is transferred in course of collection except the depositary or payor bank" (UCC 4-105 [c]).
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> The UCC prescribes the duties the various banks owe to a depositor. A collecting bank must use ordinary care in presenting a check or sending a check for presentment, sending notice of dishonor or nonpayment or returning a check, and settling the check when the collecting bank receives final settlement from the payor bank (*see* UCC 4-202 [1]). A collecting bank has until midnight of the next banking day (its "midnight deadline" [UCC 4-104 (h)]) to take the above actions when receiving a check, notice of dishonor or final settlement of the check (*see* UCC 4-202 [2]). In other words, whenever a collecting bank receives a check from a depositor or notice or settlement from the payor bank it must act on it by midnight the next banking day.

(*Greenberg*, 17 N.Y.3d 565, 575 [2011]).

"Articles 3 and 4 of the UCC envision a series of shifting burdens of risk of loss with respect to forged checks. Initially, the law places the risk of forgeries on the bank." (*Putnam Rolling Ladder Co., Inc. v Manufacturers Hanover Trust Co.*, 74 NY2d 340, 345 [1989]). "A forged signature is 'wholly inoperative as that of the person whose name is signed' (UCC 3–404[1]), and therefore is not 'properly payable', and the bank cannot debit the depositor's account (UCC 4–401[1])." (*Putnam Rolling Ladder*, 74 N.Y.3d at 345). "The UCC imposes strict liability on a bank that charges against a customer's account any item not properly payable, such

as a check bearing a forgery of the customer's signature" unless a bank "demonstrates that the customer's negligence substantially contributed to the forgery and that the bank acted in good faith and in accordance with reasonable commercial standard" (*Proactive Dealer Services, Inc. v TD Bank*, 131 A.D. 3d 1216, 1217 [2d Dept 2015]). Here, however, Galitsa is not claiming that Chase paid a forged check out of his account, and accordingly, his reliance on Articles 3 and 4 of UCC as they relate to forged instruments is misplaced. Furthermore, even accepting Galitsa's allegations as true, Galitsa has failed to demonstrate that Chase failed to exercise ordinary care in its decision to reverse payment on the eight checks after Berkley's representations of forgery.

The Court notes that Chase further argues that Galitsa's complaint should be also be dismissed because it improperly names J.P. Morgan Chase & Co., Chase's parent company, as the defendant, and there is no basis to impose liability upon that entity for any conduct by Chase. Plaintiff, in turn, seeks leave to amend the Complaint and add Chase as the defendant. However, in light of this Court's decision dismissing the Complaint as against Chase based upon the language of the Deposit Agreements, this issue concerning substitution of the defendant is moot.

Wherefore it is hereby,

ORDERED that defendant, JP Morgan Chase Bank NA, incorrectly sued here as JP Morgan Chase & Company's, motion to dismiss the fourth cause of action asserted against it is granted and the action is dismissed as against defendant, JP Morgan Chase Bank NA, incorrectly sued here as JP Morgan Chase & Company, in its entirety, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: DECEMBER 16, 2016

DEC 16 2016

EILEEN A. RAKOWER, J.S.C.