

Lane's Floor Coverings & Interiors, Inc. v Dilalla
2018 NY Slip Op 33355(U)
December 6, 2018
Supreme Court, New York County
Docket Number: 157933/2016
Judge: Arlene P. Bluth
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 157933/2016

LANE'S FLOOR COVERINGS & INTERIORS, INC.,

MOTION DATE 11/30/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

ANTHONY DILALLA, VALLEY NATIONAL BANK

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for

AMEND CAPTION/PLEADINGS

The motion by plaintiff to amend its complaint, to compel defendants to produce certain responsive documents and for sanctions is denied. The cross-motion by defendants to compel plaintiff to respond to defendant's interrogatories dated June 1, 2016 is granted in part and denied in part.

Background

This case is about a controller who had too much control. Howard Smith used to work for plaintiff and managed plaintiff's finances. Unfortunately, Mr. Smith used that access to steal from plaintiff in a variety of ways. Mr. Smith increased his pay without permission and diverted funds from certain accounts held by plaintiff's president. Mr. Smith was prosecuted and eventually pled guilty to grand larceny.

This matter concerns plaintiff's contention that defendants Valley National Bank and DiLalla (a bank manager) assisted Smith with a scheme designed to steal from plaintiff. Plaintiff

theorizes that Smith would take checks made out to American Express, take them to defendants and cash them. Plaintiff asserts that American Express never received payments. In its complaint, plaintiff identifies five checks that were part of this alleged scheme. Now plaintiff moves to amend to add additional checks that were compromised by Smith. Plaintiff also seeks discovery related to these additional checks.

In opposition and in support of its cross-motion, defendants argue that the proposed amended complaint fails to state a cause of action. Defendants argue that plaintiff failed to provide timely written notice pursuant to the agreement covering plaintiff's bank accounts. Under this agreement, plaintiff had to inform defendants about any checks bearing unauthorized or missing indorsements within 90 days. Defendants argue that because plaintiff raises concerns about these checks now, years after they were cashed, plaintiffs have missed their chance to hold defendants responsible for these checks.

Discussion

"Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise, although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-55, 797 NYS2d 434 [1st Dept 2005] [internal quotations and citations omitted]).

Here, plaintiff's proposed amended complaint fails to state a cause of action and the motion for leave to amend is denied. Plaintiff did not inform defendants within 90 days that these checks were suspicious. Although plaintiff correctly points out that the signature card for the relevant account (which was opened in 2005) does not refer to defendants' Account

Disclosures and Rules, it is undisputed that plaintiff had multiple accounts with Valley National Bank. The signature cards on subsequent accounts expressly required plaintiff to “acknowledge receipt of Valley’s Account Disclosures and Rules. I (we) acknowledge that we have read and agree to be bound by the Account Disclosures and rules. I (we) further acknowledge that the Account Disclosures and Rules may be amended by Valley from time to time and that my (our) continued use of the account after such amendment constitutes my (our) agreement to be bound by the amended terms of the Account Disclosures and Rules” (NYSCEF Doc. No. 49; *see also* NYSCEF Doc. No. 48).

The Account Disclosures and Rules state that “this brochure outlines the terms and conditions of your *accounts* and is part of your legal agreement with Valley National Bank” (NYSCEF Doc. No. 50 at 1 [emphasis added]). Plaintiff decided to open other accounts with defendants and those other accounts required plaintiff to abide by the Account Disclosures and Rules for *all* of plaintiff’s accounts. It does not matter that the account at issue (opened in 2005) did not have the signature card referencing the terms and conditions. The other accounts made clear that the terms and conditions, including the 90-day notice requirement, applied to all accounts.

“Regardless of care of lack of care on the part of the Bank, the Bank will not be liable for any loss you sustain if you do not report, in writing, any forgeries, errors or any of the other discrepancies listed above within a 90 day period after your statement is mailed to you. A 90 day notification will also apply if the error is in regard to an electronic transfer” (*id.* at 8).

There is no question that plaintiff failed to give defendants proper notice within the 90 day window about the checks plaintiff seeks to add in the proposed amended complaint. Therefore, plaintiff does not state a cause of action for the additional checks and its motion is

denied (*Gluck v JPMorgan Chase Bank*, 12 AD3d 305, 785 NYS2d 77 [1st Dept 2004] [granting defendant's motion for summary judgment with respect to many of the forged checks at issue because plaintiff failed to give the bank notice within 60 days after receiving the monthly statement]). At oral argument, counsel for defendants asserted that the five checks referenced in the complaint were timely identified by plaintiff.

Discovery

Because the Court denies plaintiff's motion to amend, this case is about those five checks. Accordingly, the branch of plaintiff's motion concerning discovery is denied because it seeks information about other checks. Of course, plaintiff may serve additional requests that are consistent with this Court's decision, but the Court declines to redraft plaintiff's discovery requests. If there are further issues regarding these additional requests, then the Court will address it at a future discovery conference.

Defendants' cross-motion to compel discovery is resolved as follows:

Interrogatory 6 provides, "If Plaintiff does not have written procedures for issuing checks, described in detail Plaintiff's procedures for issuing checks" (NYSCEF Doc. No. 32). The Court finds that plaintiff's response is acceptable (*see* NYSCF Doc. No. 33). Defendants claim that plaintiff should have produced American Express invoices to be paid by the checks at issue in this case as a response to this interrogatory. That is not an obvious response to this interrogatory. Although defendants insist that they have stated what they are looking for in subsequent letters, that does not require plaintiff to provide specific documents in response to this interrogatory. Defendants can, of course, make a request for these specific documents.

Interrogatory 12 seeks "all written communications between Plaintiff, or its employees or agents and Defendants concerning the subject matter of this action, and attach copies" (*id.*).

Defendants seek clearly relevant information about what plaintiff told defendants about the checks at issue. Plaintiff must supply relevant, non-privileged documents on or before February 5, 2019 about the subject matter of this action (i.e., the five checks at issue).

Interrogatory 13 seeks “all written communications between Plaintiff, or its employees or agents, and Howard Smith concerning the subject matter of this action, and attach copies” (*id.*). Defendants claim they only received an unsigned letter and demand the original; if the original was sent to Howard Smith, plaintiff must respond accordingly on or before February 5, 2019.

Interrogatory 14 seeks “all written communications between Plaintiff, or its employees or agents, and any law enforcement agency concerning the subject matter of this action, and attach copies” (*id.*). Plaintiff must respond to this inquiry on or before February 5, 2019.

Interrogatory 21 asks plaintiff to “Identify the ‘customary and ordinary rules and regulations applicable to banking institutions’ referenced in paragraph 16 of the Complaint, and attach copies” (*id.*). Plaintiff must respond to this interrogatory—it is clearly relevant to the case and plaintiff cannot decline to identify the rules it claims defendants violated. Contrary to plaintiff’s objection, this interrogatory does not require plaintiff to reveal its legal theory of the case. The response is due by February 5, 2019.

For the same reason, plaintiff must respond by February 5, 2019 to Interrogatory 25, which directs plaintiff to “Identify the ‘reasonable commercial standards prevailing in the banking industry’ referenced in paragraph 30 of the complaint” (*id.*). Defendants are entitled to probe this vague assertion.

Finally, Interrogatory 27 asks plaintiff to “State whether Plaintiff filed a claim or gave notice, whether written or oral, to any fidelity, surety or bonding company, or other insurance company, or a representative, agent or broker for any such company, with respect to the damages

alleged in the Complaint, and, if so, identify each such communication and document concerning: (a) the alleged loss; (b) any investigation of the facts and circumstances of the alleged loss, including discovery thereof; (c) acceptance or rejection of the claim; (d) payment of any sum for or upon the claim or settlement of the claim; and (e) attach copies of all identified documents" (*id.*).

Plaintiff acknowledged that it submitted a claim to an insurance company and produced a copy of its accounts receivable report reflecting the \$10,000 check it received from the insurance company to defendants.

Defendants assert that plaintiff has not produced all documents related to the insurance claims it filed and points to obvious discrepancies in the documents plaintiff produced. For instance, plaintiff produced a deposit slip with a \$10,000 entry in 2014 from the Hartford Insurance Company and a claim seeking \$1,472,000 from Harleysville Insurance Company dated 2016.

Obviously, as defendants point out, these are two different insurance companies and it appears to reflect claims made in separate years (2014 and 2016). Plaintiff must produce all relevant, non-privileged documents related to the claims it filed in connection with the five checks at issue on or before February 5, 2019. At this time, the Court does not find it appropriate to order plaintiff to identify its insurance broker.

Summary

The purpose of the 90-day notice in defendants' terms and conditions is clear. Banks can help stop fraud discovered by customers, but that fraud must be timely identified. Here, plaintiff is seeking recovery based on checks that were issued more than five years ago. That is not the bank's role. A bank is *not* a guarantor for losses arising out of an employee's misdeeds.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for leave to amend and for discovery is denied; and it is further

ORDERED that the cross-motion by defendants to compel discovery is granted in part and denied in part.

The parties are directed to appear for a conference on ^{February 19,} ~~February 19,~~ 2019 at 2:15 p.m.

12/6/18

DATE

Arlene P. Bluth

ARLENE P. BLUTH, J.S.C.

NON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

APPLICATION:

GRANTED

DENIED

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE