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SHORT FORM ORDER

INDEX NO.: 901-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 3-14-13
SUBMITTED: 6-20-13
MOTION NO.: 001-MOT D
002-MG

MARIA CARDINO,

Plaintiff,

-against-

J.P. MORGAN CHASE BANK, N.A., J.P. MORGAN CHASE & CO. and DAVE BADEU,

Defendants.

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Bay Shore, New York 11706

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Upon the following papers numbered 1-12 read on this motion to amend and cross-motion to dismiss ; Notice of Motion and supporting papers 1-4 ; Notice of Cross Motion and supporting papers 5-9 ; Answering Affidavits and supporting papers 10-11 ; Replying Affidavits and supporting papers 12 ; it is,

ORDERED that the motion by the plaintiff for an order amending the complaint is granted insofar as the plaintiff seeks to add a cause of action for breach of contract; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the cross motion by the defendants J.P. Morgan Chase Bank, N.A., and J.P. Morgan Chase & Co. for an order dismissing the original complaint insofar as it is asserted against them is granted; and it is further

ORDERED that the plaintiff is directed to serve and file an amended complaint within 30 days after service of a copy of this order with notice of entry.

The plaintiff is a shareholder and director of Sax and Sounds Productions, LLC, as is nonparty Laurie Schneider. The plaintiff maintained personal accounts at the defendant J.P. Morgan Chase Bank ("Chase"). The defendant Dave Badeu was employed Chase. The plaintiff alleges that Schneider opened two corporate accounts at Chase and, with Badeu's assistance, transferred funds from the plaintiff's personal accounts to her corporate accounts without the plaintiff's permission, approval, or consent. The plaintiff also alleges that Chase allowed credit cards to be opened in her name and allowed charges to be made thereon without her permission, approval, or consent, injuring her credit rating. The plaintiff commenced this action against Chase and Badeu to recover for five allegedly unauthorized transactions in the total amount of $430,000: $50,000 on July 2, 2007; $200,000 on November 7, 2007; $60,000 on November 21, 2007; $20,000 on December 12, 2007; and $100,000 on December 19, 2007.

The original complaint contains six causes of action for unspecified violations of the New York State Banking Law and articles 4 and 4A of the Uniform Commercial Code. The plaintiff moves for leave to amend the complaint to add causes of action for breach of fiduciary duty, breach of contract, constructive fraud, conversion, fraud, violations of General Business Law §§ 349 and 380-s, and to recover punitive damages. The Chase defendants oppose the plaintiff's motion and cross move to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

While leave to amend a pleading should be freely given (*see*, CPLR 3025 [b]), the decision whether to grant such leave is within the court's sound discretion, to be determined on a case-by-case basis (*see*, **Lane v Beard**, 265 AD2d 382, 383). Leave should be granted unless the amendment is palpably improper, insufficient as a matter of law, or prejudice results directly from a delay in seeking the amendment (**Danica Plumbing & Heating LLC v Amoco Constr. Corp.**, 18 Misc 3d 1137[A] at *2 [and cases cited therein]).

The first cause of action in the amended complaint is for breach of fiduciary duty. In general, the relationship between a bank and its customer is that of a debtor and creditor and, without more, is not a fiduciary relationship, even if the parties are familiar or friendly (**Call v Ellenville Natl. Bank,** 5 AD3d 521, 523). The court finds that the plaintiff's allegations are insufficient to establish that the plaintiff's relationship with the defendants was anything more than that of a debtor and creditor or that there was a fiduciary relationship between them. Accordingly, the plaintiff's motion is denied insofar as it seeks to add a cause of action for breach of fiduciary duty.

In view of the foregoing, the third cause of action in the amended complaint for constructive fraud also fails. In the absence of a fiduciary or confidential relationship, the plaintiff may not maintain a cause of action for constructive fraud (*see*, **Levin v Kitsis,** 82 AD3d 1051, 1054). Moreover, the plaintiff merely alleges that the defendants falsely represented to her that they would not transfer her funds or permit any withdrawals without her consent. A cause of action sounding in fraud may not be based on statements that were promissory in nature at the time they were made and that related to future actions or conduct (*see*, **Rand v Laico**, 282 AD2d

444; **Brown v Lockwood**, 76 AD2d 721, 731). Mere unfulfilled promissory statements as to what will be done in the future are not actionable as fraud (**Id.**). Accordingly, the plaintiff's motion is denied insofar as it seeks to add a cause of action for constructive fraud.

The second cause of action in the amended complaint is for breach of contract. As previously noted, the relation between a bank and its depositor is that of a debtor and creditor (**Call v Ellenville Natl. Bank**, *supra*; *see also*, **Kings Premium Serv. Corp. v Manufacturers Hanover Trust Co.**, 115 AD2d 707, 708). The money deposited becomes part of the bank's general funds, and the bank impliedly contracts to pay the depositor's checks to the amount of her credit (**Id.** at 708-709). When, as here, the bank charges its customer's account without authorization, the depositor has a cause of action against the drawee bank which improperly charged her account (**Id.**).

Contrary to the contention of the Chase defendants, the plaintiff's common law claims are not pre-empted by UCC article 4-A. **Fischer & Mandell, LLP v Citibank N.A.** (632 Fed 3d 793, 798 [2nd Cir]), upon which they rely does not so hold. In fact, it holds that a common-law breach of contract claim is not pre-empted by UCC article 4-A, as long as it does not create rights or obligations inconsistent with those stated in article 4-A. Moreover, the law is well settled in New York that the UCC does not displace common-law causes of action unless the particular code provision expressly so provides (**Hechter v New York Life Ins. Co.**, 46 NY2d 34, 39; **Bank of Hawaii Intl. Corp. v Marco Trading Corp.**, 261 AD2d 333). There is nothing in UCC article 4-A that explicitly displaces other available common-law remedies, nor is a common-law breach-of-contract claim inconsistent with its provisions. Accordingly, the plaintiff's motion to amend the complaint is granted insofar as the plaintiff seeks to add a cause of action for breach of contract.

The fourth cause of action in the amended complaint is for conversion. A cause of action for conversion may not be maintained when, as here, damages are being sought for breach of contract and no wrong independent of the contract claim has been demonstrated (**Hassett-Belfer Senior Housing, LLC v Town of North Hempstead**, 270 AD2d 306; **Wolf v National Council of Young Israel**, 264 AD2d 416). Moreover, conversion is governed by a three-year statute of limitations (CPLR 214 [3]), which accrues when the alleged conversion takes place (**Grunfeld v Kasnett**, 18 Misc 3d 1143[A] at *3 [and cases cited therein]). The alleged conversion in this case occurred in late 2007, and this action was commenced in February 2011, more than three years later. Accordingly, plaintiff's motion is denied insofar as it seeks to add a cause of action for conversion.

The fifth cause of action in the amended complaint is for fraud. To plead a viable cause of action for fraud, the plaintiff must allege that the defendant made a misrepresentation or omission of a material existing fact, which was false and known to be false by the defendant when made, for the purpose of inducing the plaintiff's reliance thereon, that the plaintiff justifiably relied on such misrepresentation or omission, and that the plaintiff was injured thereby (*see*, **Lama Holding Co. v Smith Barney**, 88 NY2d 413, 421; **New York Univ. v Continental**

Ins. Co., 87 NY2d 308, 318; **Friedman v Anderson**, 23 AD3d 163, 166). In addition, CPLR 3016(b) requires that the misconduct complained of be set forth in sufficient detail to clearly inform the defendant of his role in such misconduct (*see*, **P.T. Bank Central Asia v ABN AMRO Bank**, 301 AD2d 373, 377; **Williams v Sidley Austin Brown & Wood**, 11 Misc3d 1064[A], *affd* 38 AD3d 219). A mere recitation of the elements of fraud is insufficient to state a cause of action (*see*, **Friedman v Anderson**, *supra* at 166; **Williams v Sidley Austin Brown & Wood**, *supra* at *4). The plaintiff is required to set forth specific and detailed factual allegations that the defendant personally participated in or had knowledge of the alleged fraud (*see*, **Friedman v Anderson,** *supra* at 166; **Handel v Bruder**, 209 AD2d 282, 282-283).

The plaintiff alleges that, in January 2009, she inquired about the transfers that are the subject of this action and that the defendants represented to her that she had made the transfers, that such representation was false, that she relied on it, and that she was injured thereby. The court finds that the plaintiff's allegations are insufficient to establish both scienter and reliance. The plaintiff does not allege that the defendants knew the misrepresentation was false and that they made it to induce her reliance thereon (i.e., scienter), nor does she allege how she relied on the misrepresentation, except to say that she was precluded from commencing an action within the statute of limitations. The plaintiff cannot claim reliance on the alleged misrepresentation because she could have discovered the truth with due diligence (**KNK Enter., Inc. v Harriman Enter., Inc.**, 33 AD3d 872). Whether the plaintiff made the transfers was not a matter within the peculiar knowledge of the defendants and could have been discovered by her through the exercise of due diligence (**Cohen v Cerier**, 243 AD2d 670, 672). In fact, the plaintiff acknowledges that she conducted an investigation and determined that she had not made the transfers that are the subject of this action. Accordingly, plaintiff's motion is denied insofar as it seeks to add a cause of action for fraud.

The sixth cause of action in the amended complaint alleges that the defendants violated General Business Law § 349 when they falsely represented to her in January 2009 that she had made the transfers that are the subject of this action. General Business Law § 349 makes unlawful deceptive acts or practices in conducting a business or furnishing a service. Parties claiming the benefit of the section must, at the threshold, charge conduct that has a broad impact on consumers at large (*see*, **NY Univ. v Continental Ins. Co.**, 87 NY2d at 320). Private contract disputes unique to the parties do not fall within the ambit of the statute (**Id.**), which was not intended to turn a simple breach of contract into a tort or to become an adjunct to ordinary commercial litigation (*see*, **Teller v Bill Hayes, Ltd.**, 213 AD2d 141, 148). The court finds that the plaintiff's allegations are insufficient to establish that the conduct in question has a broad impact on consumers at large and that it is not a private dispute unique to the parties. Accordingly, the plaintiff's motion is denied insofar as it seeks to add a cause of action under General Business Law § 349.

The seventh cause of action in the amended complaint alleges that the defendants violated General Business Law § 380-s, New York's identify-theft statute, by failing to take any action to prevent, terminate, or correct the transfers that are the subject of this action. The court

finds that this cause of action is time-barred. General Business Law § 380-s is governed by the three-year statute of limitations applicable to statutory causes of action under CPLR 214 (2), which accrues when the plaintiff has been injured. The unauthorized withdrawals from the plaintiff's personal accounts occurred in late 2007, more than three years before this action was commenced in February 2011. Accordingly, the plaintiff's motion is denied insofar as it seeks to add a cause of action under General Business Law § 380-s.

Turning to the motion to dismiss, the first cause of action in the original complaint seeks to recover for damage to the plaintiff's credit rating pursuant to unspecified provisions of the New York State Banking Law and Uniform Commercial Code. The plaintiff alleges that the defendants allowed credit cards to be opened in her name; that they allowed charges to be made on those cards without her permission, approval, or consent; and that they reported her delinquency to credit-reporting agencies, injuring her credit rating. The Chase defendants seek dismissal of this cause of action on the grounds that the exclusive remedy for damages arising from information contained in a credit report is found in the Federal Fair Credit Reporting Act (15 USC § 1681 *et seq.*) and that the plaintiff has failed to state a cause of action thereunder. The plaintiff presents no arguments in opposition or in response thereto. Accordingly, the first cause of action is dismissed.

The second through sixth causes of action in the original complaint seek to recover for the five purportedly unauthorized withdrawals from the plaintiff's personal accounts in late 2007. They allege unspecified violations of the New York State Banking Law and articles 4 and 4A of the Uniform Commercial Code, which are governed by the three-year statute of limitations found in CPLR 214 (2) (*see*, **Friedman v JP Morgan Chase Manhattan Bank**, 20 Misc 3d 1125 [A] *2; *see also*, **Banca Commerciale Italiana, New York Branch v Northern Trust Intl. Banking Corp.**, 160 F3d 90, 94-95 [2nd Cir]; **Nigerian Natl. Petroleum Corp. v Citibank**, N.A., US Dist Ct [SDNY], July 30, 1999, Mukasey, J. [1999 WL 558141]). The unauthorized withdrawals from the plaintiff's personal accounts occurred more than three years before this action was commenced in February 2011. Accordingly, the second through sixth causes of action in the original complaint are time-barred.

The plaintiff argues that the Chase defendants should be estopped from raising the statute of limitations because she was induced to refrain from filing a timely action by the defendants' purported misrepresentation in January 2009 that she had made the withdrawals.

New York courts have long had the power to preclude a defendant from using the statute of limitations as a defense when the defendant's affirmative wrongdoing has produced a long delay between the accrual of the cause of action and the institution of the legal proceeding (**Costello v Verizon, N.Y., Inc.**, 77 AD3d 344, 367, *affd as mod* 18 NY3d 777). A defendant may be estopped from pleading the statute of limitations when the plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action (**Id.**). However, equitable estoppel will not toll a limitations statute when the plaintiff possesses timely knowledge sufficient to place her under a duty to make inquiry and to ascertain all the relevant facts prior to

the expiration of the applicable statute of limitations (**Gleason v Spota**, 194 AD2d 764, 765). Moreover, the plaintiff must demonstrate reliance on the alleged misrepresentation for the court to find that she falls within the protection of the rule of equitable estoppel (*see*, **Zumpano v Quinn**, 6 NY3d 666, 683).

The plaintiff inquired about the withdrawals in January 2009, well before the statute of limitations expired at the end of 2010. Moreover, the plaintiff acknowledges that she conducted an investigation and determined that she had not made the withdrawals. Thus, the record reflects that the plaintiff possessed timely knowledge of the withdrawals. The record also reflects that the plaintiff cannot demonstrate reliance on the alleged misrepresentation. As previously discussed, whether the plaintiff made the withdrawals was not a matter within the peculiar knowledge of the defendants. In fact, the plaintiff discovered that she had made the withdrawals through the exercise of due diligence. Accordingly, the court declines to estop the Chase defendants from raising the statute of limitations as a defense to the second through sixth causes of action, and they are dismissed.

Finally, the plaintiff seeks to amend the complaint to add a claim for punitive damages. The only remaining cause of action is for breach of contract. In order to obtain punitive damages in a contract matter, the defendant's conduct must be actionable as an independent tort, the tortious conduct must be of an egregious nature, the egregious conduct must be directed at the plaintiff, and it must be part of a pattern directed at the public generally (**New York Univ. v Continental Ins. Co.**, 87 NY2d at 316). In the absence of a cognizable tort arising out of her contractual relationship with Chase, the plaintiff is unable to demonstrate that the wrong to her rose to the level of such wanton dishonesty as to imply a criminal indifference to civil obligations and that it was part of a pattern of similar conduct directed at the public generally (*see*, **Raconova v Equitable Life Assur. Socy. of U.S.**, 83 NY2d 603, 614; *see also*, **Rivas v AmeriMed USA**, 34 AD3d 250, 251). Accordingly, the plaintiff's motion is denied insofar as it seeks to add a claim for punitive damages.

HON. ELIZABETH HAZLITT EMERSON

Dated: August 16, 2013

J.S.C.