Bayerische Hypo-Und Vereinsbank AG v HSBC Bank USA, N.A.
2015 NY Slip Op 31270(U)
July 15, 2015
Supreme Court, New York County
Docket Number: 602761/2009
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

BAYERISCHE HYPO-UND VEREINSBANK AG,

Plaintiff,

– against –

HSBC BANK USA, N.A., and DEUTSCHE BANK AG

Defendants, and

TROWERS & HAMLINS as the External Administrator of THE INTERNATIONAL BANKING CORPORATION, B.S.C.,

Intervenor Defendant.

Index No.: 602761/2009

DECISION/ORDER

Seq. Nos.: 002, 003, 004, 005

This action arises out of two erroneous wire transfers, of approximately $9 million, by plaintiff Bayerische Hypo-Und Vereinsbank AG (HVB) to the account of The International Banking Corporation, B.S.C. (TIBC) at HSBC Bank USA, N.A. (HSBC). Plaintiff seeks recovery of the transferred sum, alleging that title was never conferred on TIBC, which is now in bankruptcy.[1] Plaintiff further alleges that defendant HSBC set off funds in the TIBC account to satisfy a debt allegedly owed to it, thereby converting over $6 million in the account, and that defendant Deutsche Bank AG (Deutsche Bank), another creditor of TIBC, wrongfully attached other funds in the TIBC account. Plaintiff moves, and each defendant separately moves, for summary judgment, pursuant to CPLR 3212. This decision resolves all pending motions.

[1] TIBC and intervenor defendant Trowers & Hamlins, as the External Administrator of The International Banking Corporation, B.S.C., will be collectively referred to as TIBC.

Background

The following material facts are undisputed. On May 19, 2009, plaintiff HVB initiated two electronic wire transfers of $8,961,000 and $9,707.75, totaling $8,970,707.75. (Joint Statement of Undisputed Facts [Joint Statement] ¶ 26.) This sum was transferred from HVB's account at JPMorganChase Bank (JPMorgan), with instructions that these amounts be credited to TIBC's account at HSBC's New York branch. (Id.) On May 20, 2009, HSBC accepted the funds from the electronic transfers and credited them to TIBC's account. (Id. ¶ 28.) On May 21, 2009, HVB notified HSBC that the wire transfers were made in error and instructed that the funds be returned. (Id. ¶ 32, Ex. 15.) The same day, JPMorgan also sent a message to HSBC requesting cancellation and return of the funds to its customer, HVB. (Id. ¶ 33, Ex. 16.)

Prior to the date of the wire transfers, TIBC began to suffer financial stress, and was unable to make timely payments to numerous creditors. (Id. ¶ 17, Ex. 6.) On May 13, 2009, TIBC's regulator, the Central Bank of Bahrain, restricted TIBC from transferring more than $25,000 from any of its accounts without prior authorization. (Id. ¶¶ 1, 16.) Both HSBC and HVB were notified of this restriction. (Id. ¶ 17.)

Deutsche Bank and HSBC were among TIBC's creditors. On May 13, 2009, Deutsche Bank commenced a separate action in this Court seeking a judgment of $74,232,440, and moved for a pre-judgment order of attachment on TIBC's New York assets. (Id. ¶ 54.) This Court (Fried, J.) granted Deutsche Bank a temporary restraining order against TIBC's property, which was served on HSBC on May 13, 2009. (Id. ¶¶ 55-57, Ex. 28.) On May 28, 2009, Justice Fried signed an order of attachment against TIBC's property within New York, which remains in effect. (Id. ¶ 58, Ex. 29.)

As of May 19, 2009, TIBC's account with HSBC's New York branch, which had been

restrained pursuant to Justice Fried's temporary restraining order, was in overdraft in the amount of $6,606,416.95. (Id. ¶¶13, 27.) Although the date of the set-off is disputed, it is undisputed that after the funds at issue in this action were transferred into the account, HSBC set off the overdraft, crediting itself $6,606,416.95. The remainder of the funds in TIBC's HSBC account continue to be subject to this Court's order of attachment, and have not been returned to HVB. (Id. ¶ 61.)

TIBC also had outstanding debts to HVB, including $8,961,000 under an unpaid letter of credit which came due on May 7, 2009. (Id. ¶¶ 6, 18, Ex. 5.) On May 13, HVB sent a letter to TIBC demanding repayment, and notifying it that the account TIBC maintained with HVB's Munich branch, which had a balance of €10,232,331, would be frozen. (Id. ¶¶ 12, 15, Ex. 5.) The letter further stated that if the debt was not repaid by May 18, HVB would enforce a lien on the Munich account to cover the unpaid letter of credit. (Id.)

HVB asserts that on May 18, 2009 it enforced a lien on the Munich account, by taking ownership of sufficient funds to satisfy the unpaid letter of credit. (P.'s Memo. In Support at 2-3.)[2] The following day, May 19, 2009, HVB initiated the two foreign exchange transactions at issue, for the purchase of dollars with Euros from the Munich account. The transfers were equal to the amount of the letter of credit and interest ($8,961,000 and $9,707.75). (Joint Statement ¶ 24.) HVB maintains that its purpose was to carry out an internal currency conversion, necessary

[2] Although the parties dispute whether HVB properly took ownership of the Munich funds, the parties agree that the dispute is not material to the outcome of these motions. Defendants argue that regardless of whether HVB or TIBC owned the funds prior to the transfers, on acceptance of the wire transfers, the funds became the property of TIBC. (Deutsche Bank's Memo. In Support at 6; TIBC's Memo. In Opp. at 3.) HVB argues that the issue is not determinative because the transferred dollars were actually sent from HVB's own account at JPMorgan, and therefore indisputably belonged to HVB prior to transfer. (P.'s Memo. In Support at 17-18.)

to reconcile its accounting of the letter of credit, denominated in dollars.[3] (Affidavit of Jake Shields [HVB's attorney] ¶ 13; Dep. of Brian Lawrence [a director in HVB's Middle East financial institutions group] at 93-95 [Joint Statement, Ex. 31].)

When TIBC opened the Munich account, it provided HVB with standard settlement instructions for foreign exchange transactions involving the purchase of dollars, under which the dollars were to be deposited in TIBC's account at HSBC in New York. (Joint Statement ¶¶ 21-22, Ex. 9.) These standard settlement instructions were applied to the wire transfers at issue. (Id. ¶ 26.)

HVB maintains that its employees erroneously used the standard settlement instructions in directing the wire transfers, and that the bank's intention was for the transfer to be internal. (Aff. of Jake Shields ¶¶ 16, 18; Lawrence Dep. at 214, 216; Dep. of Justin Powell [a director of foreign exchange, money market, and derivatives at HVB] at 111 [Joint Statement, Ex. 32].) Brian Lawrence, HVB's director responsible for ensuring that TIBC's letter of credit was satisfied, had opened an account at HVB's London branch with a negative balance in the amount owed on the letter of credit, which was set up to reflect the debt. (Joint Statement ¶¶ 7, 9, 20; Lawrence Dep. at 86-87.) Mr. Lawrence stated that in directing that the foreign exchange transactions be carried out, he intended that the funds would be deposited to "clear" the London account; but the transfers were instead "paid externally by mistake." (Lawrence Dep. at 299, 303.) Recorded conversations among HVB employees, Mr. Lawrence, Justin Powell, Claudia Birke (a "credit officer") and Rene Ziegler (a "back office" employee) document miscommunications concerning the transfers. (Exs. 8, 41, 43 to Joint Statement.) In one phone

[3] The Euro side of the transaction was not completed simultaneously, and the designated funds (€6,606,458.27 and €7,157.00) were not transferred out of the Munich account until May 27, 2009. (Joint Statement ¶¶ 29, 44.) Plaintiff attributes the delay in completing the foreign exchange to its investigation into the erroneous transfers. (P.'s Memo. In Support at 11.)

call, on May 19, 2009, although Powell noted that the transfers were to be "across account" or internal, and Ziegler stated that there were "external payment instructions," the employees ignored the inconsistency and the transactions proceeded. (Ex. 43 to Joint Statement; Powell Dep. at 125-126, 132.)

Regardless of the intent of the various HVB employees involved in originating the transfers, it is undisputed that HVB's wire transfer instructions directed that the funds be deposited in TIBC's account. Any error, as HVB concedes, was on HVB's part in giving the instructions, and no error was made in carrying out the transfer in accordance with the instructions. (P.'s Memo. In Support at 6, 7 n 4; Ex. 39 to Joint Statement [HVB internal report].)

Plaintiff's complaint pleads four causes of action. The first cause of action seeks a declaration that the $8,970,707.75 at issue belongs to HVB, because the funds were "inadvertently transferred" to TIBC's account at HSBC. (Compl. ¶¶ 42, 45.) The second cause of action alleges that defendants were unjustly enriched by the transfers, and seeks restitution of the funds. (Id. ¶¶ 52-53.) The third cause of action seeks a determination that the funds at issue are the property of HVB and are not subject to the order of attachment in favor of Deutsche Bank attaching TIBC's New York assets. (Id. ¶¶ 55, 58.) The final cause of action alleges conversion against HSBC, based on its set-off of the overdraft amount. (Id. ¶¶ 60-68.)

Analysis

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless

of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b].)" (Zuckerman, 49 NY2d at 562.)

Defendants contend that they are entitled to summary judgment because all of HVB's claims are based on its continued ownership interest in the funds, which HVB cannot establish. They contend that pursuant to Article 4-A of New York's Uniform Commercial Code (UCC), which governs wire transfers, ownership of the funds transferred to TIBC when HSBC accepted the payment orders. (Deutsche Bank's Memo. In Support at 1-2, 7-9; HSBC's Memo. In Support at 2.) Defendants further contend that HVB's attempt to cancel the wire transfers was ineffective under UCC § 4-A, and that the transfers could only be cancelled with the consent of HSBC and TIBC. (Deutsche Bank's Memo. In Support at 8; HSBC's Memo. In Opp. at 25, 29.) Finally, HSBC and Deutsche Bank argue that under these circumstances, UCC Article 4-A precludes any equitable causes of action against HSBC as TIBC's bank, or against TIBC's creditors. (Deutsche Bank's Memo. In Support at 12; HSBC's Memo. In Opp. at 24.)[4] Consequently, defendants argue that HVB's only remedy is an unsecured claim against TIBC. (Deutsche Bank's Memo. In Support at 1, 9; HSBC's Memo. In Support at 24.)[5]

In response, HVB contends that Article 4-A lacks a controlling provision specifically addressing the transfer of title where a sender errs in directing funds. (P.'s Memo. In Opp. at 8 n

[4] Deutsche Bank emphasizes that UCC Article 4-A is determinative of HVB's claims in this action. In its briefing, HSBC emphasizes that it is entitled to retain the transferred funds under the equitable discharge-for-value rule. (See HSBC Memo. In Support at 14-18.) At the oral argument, however, HSBC acknowledged that "Article 4-A controls the outcome of this case." (Oral Argument Tr. at 16.) HSBC also stated that if the motions are decided based on Article 4-A, the court need not reach the discharge-for-value rule. (Id. at 23.)

[5] HVB has asserted such a claim in TIBC's bankruptcy proceeding. (Ex. 27 to Joint Statement.)

4.) HVB further contends that New York courts have applied equitable principles in reversing mistaken wire transfers, and that this court should therefore find that under the "mistake of fact" doctrine HVB could not have unintentionally transferred title to the funds. (Id. at 1-2, 7-8.)

Article 4-A of the UCC was enacted by the legislature to serve as the exclusive mechanism for defining the rights of parties involved in funds transfers, also referred to as wire transfers, where the dispute at issue is contemplated by the statute. As stated in the Official Comment to UCC § 4-A-102:

> "Funds transfers involve competing interests--those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article."

The Official Comment to § 4-A-102 emphasizes the need for predictability and finality in the regulation of wire transfers:

> "In the drafting of Article 4A, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment. A deliberate decision was also made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This consideration is particularly important given the very large amounts of money that are involved in funds transfers."

As the Court of Appeals has observed, in the enactment of Article 4-A,"[e]stablishing

finality in electronic fund transfers was considered a singularly important policy goal. Payments made by electronic funds transfers . . . are to be the equivalent of cash payments, irrevocable except to the extent provided for in article 4A." (Banque Worms v BankAmerica Intl., 77 NY2d 362, 372 [1991] [internal citations omitted].)[6] Although "banks executing wire transfers often risk significant liability as a result of losses occasioned by mistakes and errors, the most common of which involve the payment of funds to the wrong beneficiary or in an incorrect amount," the transfers are performed at low cost. (Id. at 370.) The drafters sought to preserve a low cost price structure while bringing certainty and uniformity to the allocation of risk. (See id. at 370, 372.)[7]

In setting forth a comprehensive framework defining the rights and liabilities of parties involved in wire transfers, Article 4-A explicitly contemplates the application of common law remedies in limited specified circumstances. In circumstances involving cancellation or erroneous execution of a payment order, equitable relief is specifically provided for in the statute. (See e.g. UCC § 4-A-211 [3] [b] providing: "If the payment order is cancelled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution"; § 4-A-303 [1] providing that where execution errors occur, "[t]he bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution." See also § 4-A-303 [3]; Banque Worms v BankAmerica Intl., 77 NY2d 362, supra [in a case not subject to but "informed by" Article 4-A, the Court held that

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[6] Banque Worms involved a wire transfer made in 1989, prior to the January 1, 1991 effective date of Article 4-A. Although the statute was not retroactive, the Court of Appeals held that "the policy considerations addressed by this legislation [] can appropriately inform our decision . . . ." (77 NY2d at 371.)

[7] As of 1991, the year Article 4-A became effective, approximately one trillion dollars was transferred by wire each day. (Banque Worms, 77 NY2d at 370.)

the originator's bank, which executed a payment order erroneously, was not entitled to recover from the beneficiary in whose account the funds were deposited, because the beneficiary was entitled to retain the payment under the discharge-for-value rule].)

Equitable principles also remain applicable in resolving wire transfer disputes in situations that are not covered by Article 4-A. (Sheerbonnet, Ltd. v American Express Bank, Ltd., 951 F Supp 403, 408-410 [SD NY 1995] [holding that "[c]ommon law and equitable principles, where they compliment [sic] the important policy considerations of the Article and are not inconsistent with any of its specific provisions, can and should be used to resolve conflicts between parties to this type of transaction"].)

As a threshold matter, the court rejects HVB's contention that there is no provision of Article 4-A that governs this case, and that HVB may therefore invoke equitable doctrines. It is undisputed that the payment orders from HVB were accepted by HSBC on May 20, 2009. (Joint Statement ¶ 28.) This acceptance was an acceptance within the meaning of Article 4-A. UCC § 4-A-209 (2) provides that "a beneficiary's bank accepts a payment order at the earliest of the following times: (a) when the bank (i) pays the beneficiary . . . , or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order . . . ." UCC § 4-A-404 (1) further provides: "A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order." Consistent with these provisions, New York law recognizes that at the time payment orders are accepted, title to the funds passes to the recipient of a wire transfer. (Bank of New York v Norilsk Nickel, 14 AD3d 140, 145 [2004], lv dismissed 4 NY 3d 843 [2005]; United States v BCCI Holdings (Luxembourg), S.A., 980 F Supp 522, 527 [Dist Columbia 1997] [in case involving erroneous execution of payment order, court held that under New York UCC §

4-A-209, the beneficiary bank accepted the funds and "[a]s a matter of law, title to the funds passed to BCCI [the beneficiary] when the funds transfer was completed"].)

Under Article 4-A, title to the funds at issue thus passed to TIBC on acceptance of the payment order by its bank, HSBC. Moreover, HVB's attempt to cancel the payment order was ineffective. UCC § 4-A-211, entitled "Cancellation and Amendment of Payment Order," specifies the circumstances under which a sender may cancel a transfer made to an unintended beneficiary as a result of its own error. Under UCC § 4-A-211(2), a cancellation is not unilaterally effective unless it is sent prior to acceptance of the payment order. Here, the notice from HVB to HSBC stating that the transfers were made in error and requesting that they be remitted was sent too late, the day after acceptance. (Aleo Intl. Ltd. v Citibank, 160 Misc2d 950, 952 [1994] [where bank originating a wire transfer sent a stop transfer order approximately five hours after the receiving bank accepted the payment order, the cancellation was found to be ineffective under UCC § 4-A-211(2)].)

The statute further provides that after acceptance, payment orders may be cancelled only in limited circumstances, and only if the receiving bank consents to the cancellation. UCC § 4-A-211 (3) thus expressly states that "[a]fter a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank." Moreover, the beneficiary's bank is authorized to agree to cancellation after acceptance only in the circumstances that are specifically enumerated in Article 4-A-211 (3) (b):

> "(b) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders

> payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is cancelled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution."

Here, HVB was both originator and sender. Its mistake as sender resulted in a payment order "that order[ed] payment to a beneficiary not entitled to receive payment from the originator." (UCC § 4-A-211[3][b][ii].) HSBC was therefore authorized to agree to cancellation of the payment order, but did not do so.[8] As HVB correctly argues, UCC § 4-A-211 (3) empowers HSBC, as the beneficiary's bank, to cancel the transfers. HVB fails, however, to acknowledge that the statute does not require HSBC to agree to cancellation. (P.'s Memo. In Support at 27.)

If the bank were to agree to reverse the transfer, it would do so at its peril – unless the beneficiary were also willing to consent. (See Middle East Banking Co. v State Street Bank Int'l., 821 F2d 897, 902 [2d Cir 1987].) Where, as here, the receiving bank is also the beneficiary's bank, on acceptance of the order the bank is liable to the beneficiary for the amount of the order. (UCC § 4-A-404[1] ["if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order"].) In agreeing to cancel based on the perhaps limited information available to it, the beneficiary's bank risks incurring liability, and risks alienating its customer, the beneficiary. (UCC § 4-A-211, Comment 5, see

[8] In response to HVB's demand for return of the funds, HSBC did contact TIBC to inform it that HVB reported it had made the transfers in error. (Ex. 17 to Joint Statement.) HSBC further sought its customer TIBC's authorization to remit the funds. (Id.) TIBC never gave such authorization (Joint Statement ¶ 37), and HSBC never agreed to cancellation. Both were constrained in their ability to give such consent – TIBC by the restrictions of the Central Bank of Bahrain, and HSBC by the temporary restraining order on the account.

also 3 James J. White et al., Uniform Commercial Code § 23.16 [6th ed. 2014] [predicting "few agreements by beneficiaries' banks to cancel" under § 4-A-211, as it "certain to anger its customer" and likely to lead to involvement in a lawsuit].)[9]

In light of the risks in agreeing to cancellation, "[u]nless constrained by a funds transfer system rule, a receiving bank may agree to cancellation or amendment of the payment order under [subsection 3] but is not required to do so regardless of the circumstances." (UCC § 4-A-211, Comment 5.) Courts applying the statute have held that it is in the receiving bank's sole discretion whether to agree to cancellation after acceptance. (Grain Traders, Inc. v Citibank, N.A., 160 F3d 97, 104 [2d Cir 1998] [holding that common law claims against the receiving bank were precluded by § 4-A-211 because, after accepting the payment order, the bank did not have any obligation to agree to cancellation or issue a refund]; Cumis Ins. Socy., Inc v Citibank, N.A., 921 F Supp 1100, 1105 [SD NY 1996] [holding that under § 4-A-211, the decision whether to agree to return funds after acceptance was in the "sole discretion" of the receiving bank, even where the bank had stated that it would put a hold on the beneficiary's account after an unauthorized transfer].)

The limitations on cancellation are illustrated in UCC § 4-A-211, Comment 4, Case #3, with an example of a situation similar to that at issue. Case #3 contemplates a sender who, although "intending" to pay X a certain sum of money, instead ordered payment to Y. The beneficiary's bank accepted and released the funds to Y. In this example, the originator may cancel the payment order only if both its own bank (which initially received and transmitted the

[9] Where the beneficiary's bank does consent to cancel an erroneous transfer after acceptance, the statute continues to place liability on the sender by requiring that the sender indemnify the bank against losses incurred if the beneficiary's bank cannot recover from the beneficiary. (UCC § 4-A-211 [6].)

order) and the beneficiary's bank consents. However, if it agrees to cancel, the beneficiary's bank can recover the amount paid to beneficiary Y except to the extent that Y is permitted to retain some or all of the amount paid under the law of mistake and restitution. (Id.)

HVB unpersuasively argues that the equitable mistake of fact doctrine is applicable notwithstanding the provisions of Article 4-A. Under this doctrine, money paid under a mistake of fact may be recovered back. (See Banque Worms, 77 NY2d at 366.) As discussed above (supra at 9), title to the transferred funds passes under Article 4-A at the time of acceptance of the transfer. The cancellation provision expressly recognizes that transfers may be unintended but authorizes cancellation only under the limited circumstances enumerated in § 4-A-211 (3) (b). Cancellation pursuant to the terms of the statute was not effected here.

In claiming that it is entitled to equitable remedies against HSBC, HVB relies primarily on cases arising out of transactions prior to the January 1, 1991 effective date of Article 4-A. (P.'s Omnibus Memo. In Opp. at 1-2, 8-9; see e.g. Manufacturers Hanover Trust Co. v Chemical Bank, 160 AD2d 113 [1st Dept 1990], lv denied 77 NY2d 803 [1991] [wire transfer took place in 1983]; A.I. Trade Finance, Inc. v Petra Bank, 1997 WL 291841 [SD NY June 2, 1997] [wire transfer took place in 1990].)

HVB's post-Article 4-A authority for the applicability of equitable doctrines is equally inapposite. HSBC Bank USA, N.A. v A.T.A. Constr. Corp. (2009 WL 1456529, * 3 [ED NY May 26, 2009]), is a case involving erroneous execution of payment orders by a receiving bank – in particular, issuance of a duplicate payment to the beneficiary – rather than erroneous instructions issued by the sender, as here. The Court held that UCC § 4-A-303, governing execution errors, provided for the receiving bank to recover in restitution from the beneficiary who was not entitled to the funds. Sheerbonnet (951 F Supp 403, supra) is a case that also did

not involve a mistaken payment order. There, the payment order accurately directed payment to the beneficiary's bank at BCCI in London. American Express Bank, the intermediary bank in New York, accepted a transfer to a BCCI account in New York, knowing that BCCI's accounts were suspended worldwide, and that the funds would not ultimately be transferred to the beneficiary's London BCCI account. The intermediary bank then set off the accepted funds to satisfy a debt owed to it by BCCI. The Court noted that the intermediary bank's right of set-off was provided for by New York UCC § 4-502 (3) (a). However, the Court applied equitable principles, holding that the beneficiary raised an issue, not inconsistent with the UCC, as to whether the intermediary's decision to accept the funds and credit the BCCI London account was an abuse of discretion (id. at 411) or a "self-serving" tortious act by which the intermediary bank "unfairly capitalized on" the "unprecedented" global seizure of BCCI's accounts. (Id. at 412-413.)

The set-off in the instant case is distinguishable. The transfers were completed and paid to the account of TIBC, the beneficiary, as directed in the payment order. There is no claim either that the acceptance of the payment order was wrongful or that HSBC was not entitled to set off the funds pursuant to Article 4-A. (See § 4-A-502 [3], providing that "where a beneficiary's bank has received a payment order for payment to the beneficiary's account at the bank . . . [a] The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank. . . ."].) Moreover, as discussed above, Article 4-A specifically controls the right of cancellation where a payment order has been properly accepted, as here.

Application of equitable principles to permit HVB to recover from the beneficiary's bank, HSBC, would be plainly inconsistent with the statutory scheme, under which title to the

funds passed to TIBC upon acceptance of the payment order, and cancellation was permissible only with HSBC's consent, which was withheld when TIBC did not also consent. HVB unquestionably made a mistake in sending the payment order. The drafters of Article 4-A were, however, well aware that mistakes are commonly made in issuance of payment orders. After weighing the interests of the various participants, they made the "deliberate decision" to limit cancellation of accepted orders in order promote finality and predictability between banks that provide wire transfer services. (UCC § 4-A-102, Official Comment.) The result here is consistent with the overarching goals of the statute.

The court holds that HVB fails to raise a triable issue of fact as to its claim of ownership of the funds following acceptance of the wire transfer, when title passed to TIBC. The first and third causes of action, seeking a determination that the funds belong to HVB, will be dismissed. The second cause of action for money had and received, unjust enrichment, and restitution as against Deutsche Bank will similarly be dismissed, as these claims are also premised on HVB's interest in the funds. Finally, the fourth cause of action for conversion and the second cause of action as against HSBC will be dismissed, as these claims assert liability of the beneficiary's bank inconsistent with § 4-A-211. In light of this holding, the court need not reach HSBC's discharge-for-value arguments.[10]

It is accordingly hereby ORDERED that plaintiff HVB's motion for summary judgment is denied; and it is further

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[10] Defendants have resolved their claims, as between themselves, to entitlement to the transferred funds. At the oral argument, Deutsche Bank agreed that "HSBC's right of set off comes first." (OA Tr. at 11.) Deutsche Bank and TIBC's Administrator have entered into a court approved settlement in TIBC's bankruptcy proceeding, in which TIBC assigned to Deutsche Bank the $2.3 million in funds that have been restrained in a related action in this Court. (Deutsche Bank AG v The International Banking Corporation, B.S.C. (Sup Ct, NY County, Index No. 601471/09.) As confirmed by the parties, the settlement does not affect the merits of the instant action and, pending resolution of this action, Deutsche Bank has not discontinued the related action.

ORDERED that the motions of defendants HSBC, Deutsche Bank, and TIBC for summary judgment are granted, dismissing the action in its entirety with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
July 15, 2015

MARCY FRIEDMAN, J.S.C.