Kafati v Wells Fargo Bank
2018 NY Slip Op 31744(U)
February 23, 2018
Supreme Court, New York County
Docket Number: 152064/2015
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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KAMEL KAFATI KAFATI,

Plaintiff,

–against–

WELLS FARGO BANK,

Defendant.

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Index No. 152064/2015
Motion Seq. Nos. 004

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

Plaintiff Kamel Kafati Kafati moves, pursuant to CPLR 3212, for summary judgment as to liability on his UCC § 4-A-204 (1) claim against defendant Wells Fargo Bank (Wells Fargo). Defendant cross-moves for summary judgment dismissing the complaint.

BACKGROUND

This case arises from plaintiff's attempt to purchase used printing presses through E-Bay. Plaintiff corresponded with a party identifying itself as "Stephen Morin" ("Morin"). Following "Morin's" instructions, plaintiff, on September 2, 2014, initiated a wire transfer for $40,015 to be deposited in an account belonging to "Esdras Devalon LLC," and registered to an address at 30 Pulpit Road, Pelham, NH, under account number 8807537892. Plaintiff initiated the wire transfer through Banco Financiera Comercial Honduren A.S.A. (Banco Fichosa), and the transaction passed through Citibank N.A. (Citibank), as an intermediary. Defendant Wells Fargo was the receiving bank and the transaction was processed through the Federal Reserve's "Fedwire Funds Transfer System" (Fedwire).

The bank account number provided corresponded to an account registered with Wells Fargo under an individual's name, Esdras Devalon, rather than the eponymous business entity

listed by plaintiff on the transfer. Additionally, the Esdras Devalon account that received the funds had an address corresponding to it in West Palm Beach, Florida, rather than the New Hampshire address listed on the transfer. The seller, Morin/Esdras Devalon, never shipped the printers to plaintiff. Accordingly, on September 16, 2014, plaintiff requested that Citibank recall the transaction. On September 19, 2014, Wells Fargo's wire investigations department received a request from Citibank for a return of the $40,015, but Wells Fargo declined, as the money had already been withdrawn from the Esdras Devalon account.

Initially, plaintiff filed a summons with notice on March 2, 2015, in which Wells Fargo was provided notice that plaintiff was seeking return of the $40,015 under a theory of "negligent refusal to return." Then, in December 2015, plaintiff filed a complaint which simply sought a declaration that the funds were deposited in a Wells Fargo account in the name of Esdras Devalon LLC. In September 2017, plaintiff filed an amended complaint, which detailed the investigation that led to the amendments:

> On October 29, 2014, Mr. Robert Spellman, a detective from the fraud division of the city of Bloomfield's (Connecticut) police department, met with representatives of Defendant's investigative division at the Bloomfield, Connecticut branch. According to Detective Spellman's report of the meeting, Defendant's representatives were unable to locate any records of money being wired to any businesses, addresses, or individual names provided by the detective. Defendant's representatives were only able to confirm the routing number ... which matches Plaintiff's wiring confirmation of the $40,015 wired to Edras Devalon, LLC. Subsequently, through the parties' exchange of discovery, Plaintiff has found that the funds were indeed received by Defendant. The funds were credited incorrectly and not in accordance with specified instructions attached to the wire transfer ...

(amended complaint, ¶¶ 7-9).

These departures from the specified instructions are the basis for the allegation that plaintiff "acted in contravention of standard banking protocol that requires Defendant to return

the funds to the sender of the wire transfer in case of incongruent account information between the wire instructions provided by the Plaintiff and the Defendant's bank account records" (*id.*, ¶ 11). Thus, plaintiff alleges that Wells Fargo did not have appropriate authorization to "credit a party different from the party specified on the wire instructions provided in writing by Plaintiff to Defendant" (*id.*, ¶ 13). Plaintiff does not make mention of any specific UCC provision in its amended complaint, although in this motion, he seeks summary judgment under UCC § 4-A-204 (1). Instead, the amended complaint seeks "a declaratory judgment that deposit of the Wired Funds was made at the Defendant bank branch and Plaintiff must be credited for these funds" (*id.*, ¶ 14).

While plaintiff argues that Wells Fargo was never authorized to accept the wire transfer for Esdras Devalon, of Florida, rather than Esdras Devalon LLC, of New Hampshire, Wells Fargo argues that these discrepancies are immaterial, and plaintiff authorized the transfer by indicating that the funds were to be transferred to the account number that the funds that, in fact, received the funds.

DISCUSSION

The proponent of the motion for summary judgment must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC,* 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]). This standard requires that the movant make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]). Thus, the

motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]).

The party opposing summary judgment "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]; *see Machado v Henry*, 96 AD3d 437, 945 NYS2d 552 [1st Dept 2012]; *Garber v Stevens*, 94 AD3d 426, 941 NYS2d 127 [1st Dept 2012], *citing Pippo v City of New York*, 43 AD3d 303, 304, 842 NYS2d 367 [1dt Dept 2007] ["(a) party's affidavit that contradicts (his or) her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Siegel v City of New York*, 86 AD3d 452, 928 NYS2d 1 [1st Dept

2011] *citing Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]).

Here, it must first be said that plaintiff's motion is not accompanied by an affidavit by someone with knowledge of the facts and must be denied for that for that reason alone. However, defendant's cross motion for summary judgment is not technically deficient and the substantive issues raised by the parties must be confronted.

UCC § 4-A-204 (1)

UCC section 4-A-204 is entitled "Refund of Payment and Duty of Customer to Report With Respect to Unauthorized Payment Order" and its first subdivision provides:

> "(1) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (a) not authorized and not effective as the order of the customer under Section 4-A-202, or (b) not enforceable, in whole or in part, against the customer under Section 4-A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding ninety days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section."

The Court of Appeals has held that this section "requires the bank to send the customer notice of an unauthorized transfer in order to trigger the running of a 'reasonable time'" within the meaning of the section (*Regatos v North Fork Bank*, 5 NY3d 395, 399 [2005]). However, here we are presented with the more basic question of whether the subject wire transfer was authorized.

Plaintiff argues that, as he directed payment for an LLC in New Hampshire, rather than a person in Florida, he did not authorize the wire transfer. Defendant, on the other hand, argues that the transfer was authorized, as plaintiff directed the wire transfer to be received by the bank account number that ultimately received it. UCC § 4-A-204 (1) specifically refers the question of whether a payment is authorized and effective to UCC § 4-A-202, which is entitled "Authorized and Verified Payment Orders" and its second subdivision provides:

> If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (a) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (b) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

Wells Fargo argues that both UCC § 4-A-204 (1) and UCC § 4-A-202 are inapplicable, as both explicitly apply to "customers" and plaintiff was not a customer of Wells Fargo. Plaintiff fails to provide any precedent suggesting that his having initiated a wire transfer that was received by Wells Fargo somehow makes him a customer of Wells Fargo. Thus, neither UCC § 4-A-204 (1), nor UCC § 4-A-202 is applicable. For the same reason, plaintiff's reliance on *Patco Const. Co., Inc. v People's United Bank*, 684 F3d 197 (1st Cir 2012 [involving a series of fraudulent transactions and a bank-customer relationship]) is misplaced.

UCC § 4-A-207

Defendants argue that banks generally do not owe non-customers a duty of care, citing to *Century Bus. Credit Corp. v North Fork Bank* (246 AD2d 395 [1st Dept 1998] [holding that the

defendant bank did not owe a duty of care to the plaintiff, a creditor of its customer]) and *Tzaras v Evergreen International Spot Trading, Inc.* (2003 WL 470611 [SDNY 2003] [holding that, "as a general rule, a bank has no duty to monitor even a fiduciary account under New York law"] [internal quotation marks and citation omitted]). Defendants are correct that the question of whether a receiving bank may be subject to liability in the context of a wire transfer is governed by UCC § 4A-207, "Misdescription of Beneficiary," whose second subdivision provides:

> "(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply: (1) Except as otherwise provided in subsection (c),[1] if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person."

(UCC § 4A-207 [b] [1]).

Courts have interpreted this provision to mean that "liability of a beneficiary's bank is dependent on whether the bank, with actual knowledge of the conflict, paid the order to a person not entitled to receive the funds" (*First Sec. Bank v Pan Am. Bank*, 215 F3d 1147, 1152 [10th Cir 2000]). The practical application of this interpretation is that receiving banks may rely on the bank account number provided to them, unless they actually know that the name on the transfer does not correspond with the bank account number. This is explicitly articulated in the commentary to Regulation J of the UCC: "Section 4A–207 provides that a beneficiary's bank, such as the Federal Reserve Bank, may rely on the number identifying a beneficiary, such as the beneficiary's account number, specified in a payment order as identifying the appropriate beneficiary, even if the payment order identifies another beneficiary by name, provided that the

[1] Subsection (c) contemplates the circumstances in which an initiating bank may be liable, and is inapplicable here.

beneficiary's bank does not know of the inconsistency" (12 CFR, pt 210, subpart B, appen A, § 210.27).

Here, plaintiff cannot show that Wells Fargo had actual knowledge of the inconsistency because the wire transfer was executed electronically through Fedwire. Even if that were not the case, court have held that small discrepancies, such as the one between Esdras Devalon LLC and Esdras Devalon, are not sufficient to warrant liability under UCC § 4A-207 (see *TME Enterprises, Inc. v. Norwest Corp.*, 124 Cal. App. 4th 1021 [2004]). Thus, as plaintiff cannot show that Wells Fargo had actual knowledge of any inconsistency, plaintiff's complaint must be dismissed as there is basis for liability. To rule otherwise would be to find that the Fedwire system is defective and that is a policy decision this court is not well situated to make.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross motion for summary judgment is granted and the amended complaint is dismissed; and it is

ORDERED that the Clerk is directed to enter judgment accordingly.

DATE: 2/23/18

Hon. Carol Robinson Edmead, JSC
HON. CAROL R. EDMEAD
J.S.C.