

**Gaughan v Russo**

2020 NY Slip Op 33952(U)

November 30, 2020

Supreme Court, New York County

Docket Number: 101600/2017

Judge: Anthony Cannataro

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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. ANTHONY CANNATARO PART IAS MOTION 41EFM**

*Justice*

-----X

AYLIN GAUGHAN,

Plaintiff,

- v -

MICHAEL RUSSO, SAL MONACO, INDIVIDUALLY AND IN  
HIS PROFESSIONAL CAPACITY, SIGNATURE BANK

Defendant.

-----X

INDEX NO. 101600/2017  
MOTION DATE 03/04/2020  
MOTION SEQ. NO. 006

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for DISMISSAL.

In this action for fraud, originally filed against defendant Michael Russo, the recently added defendants Sal Monaco and Signature Bank move, pursuant to CPLR 3211(a)(7), to dismiss the complaint against them based on its failure to state a cause of action.

All claims against Monaco and Signature Bank arise from plaintiff's contention that they acted in concert with defendant Russo by helping him defraud plaintiff out of bank funds. Plaintiff alleges that defendant Michael Russo defrauded her into believing that he had established a joint bank account for the two of them, when he had instead deposited three checks endorsed by plaintiff, totaling approximately \$60,862.96, directly into his own account at Signature Bank. Defendant Russo maintained his own bank account with defendant Signature Bank where defendant Sal Monaco is employed.

Defendants Monaco and Signature Bank argue that plaintiff asserts no basis for the claim that they acted improperly in allowing her endorsed checks to be deposited into Russo's account. Monaco and Signature Bank assert there is no allegation that the

endorsements on the checks were forged or improper. Further, they assert that there is no legal or factual link between them and plaintiff.

On a motion to dismiss pursuant to CPLR 3211 courts afford pleadings a “liberal construction” and “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

A cause of action for aiding and abetting requires factual allegations that “give rise to a strong inference that the defendant actually knew of the underlying harm or was willfully blind to it, and rendered substantial assistance, including concealing, or failing to act when required to do so, enabling the harm to proceed” (*Sayles v Ferone*, 137 AD3d 486 [1st Dept 2016], citing *Pomerance v McGrath*, 124 AD3d 481, 484-485 [1st Dept 2015]). Here, defendant Russo deposited a check with Signature Bank which was either specially endorsed by plaintiff or endorsed in blank and given to Russo. There are no facts asserted that would indicate defendants Monaco or Signature Bank had knowledge or were willfully blind to any conversion by defendant Russo. Further, merely depositing properly endorsed checks does not amount to substantial assistance in conversion. Thus, plaintiff’s cause of action against defendants Monaco and Signature bank for aiding and abetting conversion are dismissed for failure to state a cause of action.

On a claim for unjust enrichment, plaintiff must demonstrate that “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [brackets and internal quotation marks omitted]). For an unjust enrichment claim to succeed, the connection between the parties cannot

be too attenuated. Rather, there must be a sufficiently close relationship, one that could have caused reliance or inducement (*see id.*; *see also Sperry v Crompton Corp.*, 8 NY3d 205, 215-216 [2007]). Here, plaintiff had no direct contact with defendants Monaco or Signature Bank and plaintiff was not a customer of the bank. While Monaco and Signature Bank may have been aware that the checks bore plaintiff's name, the checks were properly endorsed either to Russo or in blank, and so depositing the check was a transaction between Russo and the bank that did not create a relationship with plaintiff. Accordingly, plaintiff has failed to state a cause of action for unjust enrichment.

A claim based in fraud requires "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). On a claim for constructive fraud, the *scienter* element is replaced with the requirement that there exist a fiduciary or confidential relationship between the parties (*see Levin v Kitsis*, 82 AD3d 1051, 1054 [2d Dept 2011]). Here, any alleged misrepresentations or omissions would have been made to plaintiff by defendant Russo and could only be known to be false by him, not defendants Monaco or Signature Bank. In fact, there was no communication or relationship whatsoever between plaintiff and defendants Monaco or Signature Bank. Accordingly, plaintiff's claims sounding in fraud are dismissed.

"In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007], *citing Ozelkan v Tyree Bros. Envtl. Servs. Inc.*, 29 AD3d 877, 879 [2006]). Further, the relationship between a bank and its customer is one of debtor and creditor and without more, even where one is a customer of several years or is

acquainted with a bank officer or employee, does not create a fiduciary or special relationship (*see Bennice v Lakeshore Sav. & Loan Ass'n*, 254 AD2d 731, 732 [4th Dept 1998]). Here, plaintiff is not even a customer of the bank, so no fiduciary or special relationship exists and thus no duty to plaintiff has been breached.

Finally, the remainder of plaintiff's claims against defendants Monaco and Signature Bank are without merit and as such are dismissed. Plaintiff's claim for criminal misrepresentation is not validly brought before this Court. Her breach of contract claim fails as there is no contract between plaintiff and defendants Monaco and Signature Bank. The claims raised in plaintiff's papers for equitable estoppel and various banking law violations were not asserted as causes of action in plaintiff's amended complaint.

Accordingly, it is

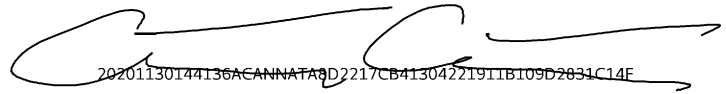
**ORDERED** that the motion by defendants Sal Monaco, individually, and in his professional capacity, and Signature Bank to dismiss the complaint against them is granted and the complaint is dismissed in its entirety as against those defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

**ORDERED** that the action is severed and continued against the remaining defendant; and it is further

**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).



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11/30/2020

DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE