

105 A.D.3d 709, 963 N.Y.S.2d 145, 2013 N.Y. Slip Op. 02223
(Cite as: 105 A.D.3d 709, 963 N.Y.S.2d 145)

H

Supreme Court, Appellate Division, Second Department, New York.

KEVIN KERVENG TUNG, P.C., appellant,

v.

JP MORGAN CHASE & CO., et al., respondents.

April 3, 2013.

Background: Depositor of cashier's **check** that was dishonored by **bank** brought action against payor **bank**, alleging, among other things, that the **bank** was negligent in failing to safeguard its cashier's **checks**, in failing to inform the public that **forged** or counterfeit **checks** bearing the **bank's** name were being circulated throughout the banking system, and in failing to investigate the matter after receiving the subject cashier's **check** for deposit. The Supreme Court, Queens County, Grays, J., 34 Misc.3d 1209(A), 943 N.Y.S.2d 792, 2011 WL 6989895 dismissed the action, and denied plaintiff's motion for reconsideration, 2012 WL 6220838. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) trial court erred in considering affidavit from **bank** employee which was submitted for first time in reply papers;
- (2) duty owed by **bank** to depositor was to pay the **check**, return the **check**, or send notice of dishonor; and
- (3) plaintiff did not state claim against **bank** for fraudulent concealment.

Affirmed.

West Headnotes

11 Pretrial Procedure 307A 624

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)4 Pleading, Defects In, in General

307Ak623 Clear and Certain Nature of Insufficiency

307Ak624 k. Availability of relief under any state of facts provable. [Most Cited Cases](#)

Pretrial Procedure 307A 679

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak679 k. Construction of pleadings. [Most Cited Cases](#)

Pretrial Procedure 307A 683

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak682 Evidence

307Ak683 k. Presumptions and burden of proof. [Most Cited Cases](#)

A court deciding a motion to dismiss for failure to state a cause of action must 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. [McKinney's CPLR 3211\(a\)\(7\)](#).

105 A.D.3d 709, 963 N.Y.S.2d 145, 2013 N.Y. Slip Op. 02223
(Cite as: 105 A.D.3d 709, 963 N.Y.S.2d 145)

[2] Pretrial Procedure 307A  **682.1**

[307A](#) Pretrial Procedure

[307AIII](#) Dismissal

[307AIII\(B\)](#) Involuntary Dismissal

[307AIII\(B\)6](#) Proceedings and Effect

[307Ak682](#) Evidence

[307Ak682.1](#) k. In general. [Most Cited](#)

[Cases](#)

A court deciding a motion to dismiss for failure to state a cause of action may consider evidentiary material submitted by a defendant. [McKinney's CPLR 3211\(a\)\(7\)](#).

[3] Pretrial Procedure 307A  **685**

[307A](#) Pretrial Procedure

[307AIII](#) Dismissal

[307AIII\(B\)](#) Involuntary Dismissal

[307AIII\(B\)6](#) Proceedings and Effect

[307Ak685](#) k. Affidavits or other showing of merit. [Most Cited Cases](#)

[Cases](#)

Trial court deciding a motion to dismiss for failure to state a cause of action erred in considering affidavit from **bank** employee stating that cashier's check was counterfeit, rather than stolen, in action brought against payor **bank** that dishonored cashier's check, where the affidavit was improperly submitted for the first time in **bank's** reply papers. [McKinney's CPLR 3211\(a\)\(7\)](#).

[4] Negligence 272  **202**

[272](#) Negligence

[272I](#) In General

[272k202](#) k. Elements in general. [Most Cited](#)

[Cases](#)

To establish a cause of action sounding in negli-

gence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty, and damages.

[5] Banks and Banking 52  **189**

[52](#) Banks and Banking

[52III](#) Functions and Dealings

[52III\(F\)](#) Exchange, Money, Securities, and Investments

[52k189](#) k. Issue and payment of drafts. [Most Cited Cases](#)

The only duty which payor **bank** owed to a noncustomer depositor of a cashier's check was to pay the check, return the check, or send notice of dishonor. [McKinney's Uniform Commercial Code §§ 4-301, 4-302](#).

[6] Fraud 184  **17**

[184](#) Fraud

[184I](#) Deception Constituting Fraud, and Liability Therefor

[184k15](#) Fraudulent Concealment

[184k17](#) k. Duty to disclose facts. [Most Cited Cases](#)

A cause of action to recover damages for fraudulent concealment requires, in addition to scienter, reliance, and damages, a showing that there was a fiduciary or confidential relationship between the parties which would impose a duty upon the defendant to disclose material information and that the defendant failed to do so.

[7] Banks and Banking 52  **189**

[52](#) Banks and Banking

[52III](#) Functions and Dealings

[52III\(F\)](#) Exchange, Money, Securities, and

105 A.D.3d 709, 963 N.Y.S.2d 145, 2013 N.Y. Slip Op. 02223
(Cite as: 105 A.D.3d 709, 963 N.Y.S.2d 145)

Investments

[52k189](#) k. Issue and payment of drafts. [Most Cited Cases](#)

Noncustomer depositor of cashier's check did not state cause of action against payor **bank** for fraudulent concealment, absent allegation of the existence of a fiduciary or confidential relationship between the depositor and the **bank**.

****146** Kevin Kerveng Tung, P.C., Flushing, N.Y. ([Kevin K. Tung](#) and [Kenji Fukuda](#) of counsel), appellant pro se.

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City, N.Y. ([Thomas E. Stagg](#) and [Jessica M. Prunell](#) of counsel), for respondents.

[PETER B. SKELOS](#), J.P., [JOHN M. LEVENTHAL](#), [L. PRISCILLA HALL](#), and [SANDRA L. SGROI](#), JJ.

***709** In an action to recover damages for negligence and fraudulent concealment, the plaintiff appeals (1) from an order of the Supreme Court, Queens County (Grays, J.), entered November 10, 2011, which granted the defendants' motion to dismiss the complaint pursuant to [CPLR 3211\(a\)\(7\)](#), and (2), as limited by its brief, from so much of an order of the same court entered April 17, 2012, as denied that branch of its motion which was for leave to renew its opposition to the defendants' motion to dismiss the complaint pursuant to [CPLR 3211\(a\)\(7\)](#).

ORDERED that the order entered November 10, 2011, is affirmed; and it is further,

ORDERED that the order entered April 17, 2012, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

On January 6, 2011, the plaintiff allegedly received a cashier's **check** from a third ****147** party in the amount of \$295,500, and deposited that **check** into its Interest On Lawyer Account Fund (hereinafter IOLA) **bank** account at Citibank. The cashier's **check** purportedly was drawn on the defendant JP Morgan Chase **Bank**, N.A., a subsidiary of the defendant JP Morgan Chase & Co. Relying on the validity of the cashier's **check**, the plaintiff transferred the sum of \$272,250 from its IOLA account to another third party on January 7, 2011. On January 12, 2011, the defendants allegedly dishonored payment on the cashier's **check**. The plaintiff commenced this action against the defendants to recover damages for negligence and fraudulent concealment, alleging, among other things, that the defendants were ***710** negligent in failing to safeguard their cashier's **checks**, in failing to inform the public that **forged** or counterfeit **checks** bearing the defendants' names were being circulated throughout the banking system, and in failing to investigate the matter after receiving the subject cashier's **check** for deposit.

The Supreme Court granted the defendants' motion to dismiss the complaint pursuant to [CPLR 3211\(a\)\(7\)](#) for failure to state a cause of action. Thereafter, as relevant to this appeal, the Supreme Court denied the plaintiff's motion for leave to renew its opposition to the defendants' motion.

[1] On a motion pursuant to [CPLR 3211\(a\)\(7\)](#), a court must "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 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511; see [AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.](#), 5 N.Y.3d 582, 591, 808 N.Y.S.2d 573, 842 N.E.2d 471; [Paramount Transp. Sys., Inc. v. Lasertone Corp.](#), 76 A.D.3d 519, 520, 907 N.Y.S.2d 498; [JP Morgan Chase v. J.H. Elec. of N.Y., Inc.](#), 69 A.D.3d 802, 803,

105 A.D.3d 709, 963 N.Y.S.2d 145, 2013 N.Y. Slip Op. 02223
(Cite as: 105 A.D.3d 709, 963 N.Y.S.2d 145)

[893 N.Y.S.2d 237](#)).

[2][3] Although a court may “consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to [CPLR 3211\(a\)\(7\)](#)” ([Sokol v. Leader](#), 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153), the plaintiff correctly contends that the Supreme Court should not have considered an affidavit which was submitted to establish that the subject cashier's check was counterfeit, rather than stolen, since that evidence was improperly submitted by defendants for the first time in their reply papers (*see* [Cotter v. Brookhaven Mem. Hosp. Med. Ctr., Inc.](#), 97 A.D.3d 524, 525, 947 N.Y.S.2d 608; [David v. Bryon](#), 56 A.D.3d 413, 414, 867 N.Y.S.2d 136; [Barrera v. MTA Long Is. Bus.](#) 52 A.D.3d 446, 859 N.Y.S.2d 483; [Hoyte v. Epstein](#), 12 A.D.3d 487, 784 N.Y.S.2d 613; [Voytek Tech. v. Rapid Access Consulting](#), 279 A.D.2d 470, 471, 719 N.Y.S.2d 112). Nonetheless, even without considering this affidavit, the defendants were entitled to dismissal of the complaint for failure to state a cause of action.

[4][5] The plaintiff's first three causes of action were premised upon the theory that it suffered damages as a result of the defendants' negligence. “To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages” ([Greenberg, Trager & Herbst, LLP v. HSBC Bank USA](#), 17 N.Y.3d 565, 576, 934 N.Y.S.2d 43, 958 N.E.2d 77; *see* [Akins v. Glens Falls City School Dist.](#), 53 N.Y.2d 325, 441 N.Y.S.2d 644, 424 N.E.2d 531; [Stukas v. Streiter](#), 83 A.D.3d 18, 23, 918 N.Y.S.2d 176). As relevant here, “[t]he duty of a payor bank ... to a noncustomer depositor of a check is derived solely from [UCC 4-301](#) and [4-302](#)” ****148*711**([Greenberg, Trager & Herbst, LLP v. HSBC Bank USA](#), 17 N.Y.3d at 577, 934 N.Y.S.2d 43, 958 N.E.2d 77). In this case, where the defendants were together alleged to be the payor bank (*see* [UCC 4-105\[b\]](#)) that was not also the depository bank (*see* [UCC 4-105\[a\]](#)), they were accountable for paying the

amount of the cashier's check, whether properly payable or not, if they “retain[ed] the item beyond midnight of the banking day of receipt without settling for it” ([UCC 4-302\[a\]](#)), or, if after authorizing a timely provisional settlement, they failed to revoke such settlement prior to making final payment and before the “[m]idnight deadline” ([UCC 4-104\[1\]\[h\]](#)), by either returning the check, or sending written notice of dishonor or nonpayment (*see* [UCC 4-301](#), [4-302](#)). Thus, the only duty which the defendants owed to the plaintiff was to pay the check, return the check, or send notice of dishonor (*see* [Greenberg, Trager & Herbst, LLP v. HSBC Bank USA](#), 17 N.Y.3d at 577–578, 934 N.Y.S.2d 43, 958 N.E.2d 77). As the complaint failed to allege that, upon the defendants' failure to pay the check, they breached their duty to either return the check or send notice of dishonor, the Supreme Court properly granted those branches of the defendants' motion which were to dismiss the first three causes of action, all of which sounded in negligence.

[6] Furthermore, the Supreme Court properly granted that branch of the defendants' motion which was to dismiss the cause of action to recover damages for fraudulent concealment. “A cause of action to recover damages for fraudulent concealment requires, in addition to scienter, reliance, and damages, a showing that there was a fiduciary or confidential relationship between the parties which would impose a duty upon the defendant to disclose material information and that the defendant failed to do so” ([Consolidated Bus Tr., Inc. v. Treiber Group, LLC](#), 97 A.D.3d 778, 779, 948 N.Y.S.2d 679; *see* [High Tides, LLC v. DeMichele](#), 88 A.D.3d 954, 957, 931 N.Y.S.2d 377). Here, the Supreme Court properly held that the complaint failed to allege the existence of a fiduciary or confidential relationship between the parties (*see* [Merrill Lynch, Pierce, Fenner & Smith v. Chemical Bank](#), 57 N.Y.2d 439, 444, 456 N.Y.S.2d 742, 442 N.E.2d 1253; [Bennice v. Lakeshore Sav. & Loan Assn.](#), 254 A.D.2d 731, 677 N.Y.S.2d 842).

105 A.D.3d 709, 963 N.Y.S.2d 145, 2013 N.Y. Slip Op. 02223
(Cite as: 105 A.D.3d 709, 963 N.Y.S.2d 145)

[7] The Supreme Court properly denied that branch of the plaintiff's motion which was for leave to renew its opposition to the defendants' motion to dismiss the complaint pursuant to [CPLR 3211\(a\)\(7\)](#). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and ... shall contain reasonable justification for the failure to present such facts on the prior motion" (*712 [CPLR 2221 \[e\]\[2\],\[3\]](#)). Here, even if the plaintiff's excuse for failing to provide the newly submitted evidence in its original opposition papers constituted a reasonable justification, the facts derived from the evidence were insufficient to remedy the defects in the complaint (*see Leon v. Martinez*, 84 N.Y.2d at 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635–636, 389 N.Y.S.2d 314, 357 N.E.2d 970), such that there would be a change in the Supreme Court's determination upon the consideration of such evidence (*see generally Kranenberg v. TKRS Pub, Inc.*, 99 A.D.3d 769, 952 N.Y.S.2d 219; *see also Millan v. AMF Bowling Ctrs., Inc.*, 38 A.D.3d 860, 861, 833 N.Y.S.2d 173). Furthermore, the Supreme Court, in ruling upon that branch of the plaintiff's motion **149 which was for leave to renew, properly considered the Court of Appeals' determination in *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565, 934 N.Y.S.2d 43, 958 N.E.2d 77, which was decided after the submission of the original motion papers. Accordingly, leave to renew was properly denied.

N.Y.A.D. 2 Dept., 2013.

Kevin Kerveng Tung, P.C. v. JP Morgan Chase & Co.
105 A.D.3d 709, 963 N.Y.S.2d 145, 2013 N.Y. Slip Op. 02223

END OF DOCUMENT