34 Misc.3d 1209(A), 943 N.Y.S.2d 792, 2011 WL 6989895 (N.Y.Sup.), 2011 N.Y. Slip Op. 52461(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 34 Misc.3d 1209(A), 2011 WL 6989895 (N.Y.Sup.))

Oct. 28, 2011.

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(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Queens County, New York.
KEVIN KERVENG TUNG, P.C., Plaintiff(s)
v.
JP MORGAN CHASE & CO. and JP Morgan Chase Bank., N.A., Defendant(s).

No. 11885/2011.

Kevin K. Tung.

Stagg Terenzi.

MARGUERITE A. GRAYS, J.

***1** The following papers numbered 1 to *8* read on this motion by defendants JPMorgan Chase & Co., sued herein as JP Morgan Chase & Co ., and JPMorgan Chase Bank, N.A. for an order pursuant to CPLR 3211(a)(7), dismissing the complaint for failure to state a cause of action.

Papers	*Numbered*
Notice of Motion–Affirmation–Exhibits(A–D)	1–3
Other Affirmation	4
Opposing Affirmation	5–6
Memorandum of Law	
Reply Memorandum of Law and Affidavit	7
Other Affidavit	8

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff Kevin Kerving Tung, P.C., a law firm located in Flushing, New York alleges in its complaint that on January 6, 2011 it received a Chase cashier's check in the sum of $295,500.00 from a third party, which it deposited in its IOLA Attorney Trust Account it maintains with Citibank. On January 7, 2011 plaintiff wire-transferred the sum of $275,250.00 from its IOLA Attorney Trust Account to the third-party. Plaintiff alleges that on January 9, 2011, it discovered “by chance” that there was a possible fraud and contacted Chase by telephone to verify the cashier's check which it had deposited in its Citibank IOLA account. Plaintiff alleges that Chase informed it that the cashier's check was a forged or counterfeit instrument, and that it would contact the plaintiff regarding further investigation and resolution of the matter. On January 12, 2011 Chase dishonored payment of said cashier's check, marked it “Return Reason(s)Refer to Maker”, and returned the check to the plaintiff. On January 18, 2011, plaintiff received official notice from Citibank that the cashier's check had “bounced”, although the wire-transfer amount had been processed.

Plaintiff's first cause of action alleges, that upon information and belief, the subject cashier's check, along with other Chase instruments were missing or stolen due to the failure to implement effective mechanisms to monitor the whereabouts and status of its instruments, or criminal acts of its employees; that “Chase enabled, contributed to, or caused the usage by a third party of a missing or stolen Chase Cashier's Check which the plaintiff deposited into

its IOLA account at Cibibank", causing plaintiff to sustain damages in the sum of $295,500.00, plus interest and costs.

The second cause of action alleges that plaintiff is a holder in due course of an instrument, the Chase cashier's check which was counterfeit or stolen, and its signature within forged; that Chase negligently caused or substantially contributed to the making of an unauthorized signature on a forged Chase cashier's check and cites to UCC § 3–406. It is alleged that prior to presentation of the subject check, Chase was aware that a third party was unlawfully signing, making or forging Chase instruments; and that Chase failed to adopt procedures for protecting plaintiff or the public for the missing check or its lack of authenticity. Plaintiff alleges that Chase breached its duty to the public, who are prospective depositors of Chase instruments, and that as a result of Chase's negligence plaintiff sustained damages in the sum of $295,500.00, plus interest and costs.

***2** The third cause of action alleges that Chase failed to investigate the matter after discovery that plaintiff deposited a forged or counterfeit cashier's check, thereby failing to assist in recovery or to mitigate the amount of plaintiff's loss. Plaintiff alleges that as a result of Chase's negligence, it sustained damages in the sum of $295,500.00, plus interest and costs.

The fourth cause of action alleges that Chase had knowledge of multiple instances of forged or counterfeit instruments and intentionally concealed such information from the public in order to maintain a positive corporate image, causing plaintiff to suffer damages in the sum of $295,500.00, plus interest and costs. Defendants move to dismiss the complaint on the ground that it fails to state a cause of action, pursuant to CPLR 3211(a)(7), and assert that with respect to the claims for negligence and negligent supervision, the bank owes no duty to plaintiff a non-customer third-party. It is also asserted that the complaint fails to properly allege the elements of a cause of action for negligent supervision.

Defendants assert that UCC 3–406 is meant to be asserted as a defense and does not give rise to an affirmative claim. In addition, defendants assert that plaintiff has neither properly alleged, nor can it establish, its status as a holder in due course. Defendants argue that as plaintiff concedes that the purported counterfeit check was not issued by Chase, the instrument is void, and plaintiff cannot be a holder in due course.

Defendants further assert that the claim for fraudulent concealment must be dismissed, as no contractual or fiduciary relationship is alleged nor does such a relationship exist. It is further asserted that as the subject cashier's check was the result of a counterfeit scam, defendants cannot be liable for the criminal acts of third parties. Finally, it is asserted that the bank does not have a duty to warn the plaintiff or the public that it may encounter counterfeit checks. Defendants, however, have submitted information that was posted on the web sites of both the American Bar Association and the New York State Bar Association warning attorneys of scams involving counterfeit checks and the need to exercise caution when writing checks or transferring funds from their trust accounts.

Defendants' counsel asserts in his memorandum of law that plaintiff was contacted by BNC Electronics, a entity purportedly based in the United Kingdom, to collect funds allegedly owed to it by Allied Electronic Inc. Counsel asserts that although plaintiff did not meet personally with any representative of BNC Electronics, it accepted for deposit a cashier's check bearing number 9789349457, dated January 5, 2011, in the amount of $295,500.00, made payable to plaintiff, allegedly drawn on an account maintained by Allied Electronic, Inc. Plaintiff deposited said cashier's check in its Citibank IOLA Attorney Trust Account on January 6, 2011, and on January 7, 2011 transferred the sum of $275,250.00 to a third party via a wire transfer. Counsel further asserts that as of the date of the wire transfer, the purported cashier's check had not been presented to Chase for payment and the proceeds had not cleared the Citibank account, and that upon presentment for payment, Chase determined that the purported cashier's check was counterfeit, and accordingly

dishonored it and returned it to Citibank.

***3** In support of its motion to dismiss, defendants have submitted a copy of the purported cashier's check and an affidavit from Dawn Goff, a supervisor of the Reconciliation Services Department of JPMorgan Chase Bank, N.A., who states that the purported cashier's check has artistic features that are different in location, pattern, size and format from an official Chase cashier's check; that the purported cashier's check does not include Chase's telephone number; that the purported cashier's check does not include a printed audit number to indicate its validity; and that the purported cashier's check has security language on the back of the check that is different from the language printed on an official cashier's check issued by Chase.

Plaintiff in opposition, asserts that defendants owe a duty to it and to the public; that the holder or drawee is protected by the estoppel provisions of UCC 3–406; that the facts presented herein are similar to those presented in *Michaeli v. The Greater New York Savings Bank*, 121 Misc.2d 840[1983], *affirmed* 129 Misc.2d 1096[1985], and *Savemart Inc. v. Bowery Savings Bank*, 111 Misc.2d 1071[1982], *affirmed* 117 Misc.2d 947 [1982]), and therefore dismissal of the complaint is not warranted; and that triable issues of fact exist.

It is well settled that "[i]n considering a motion to dismiss for failure to state a cause of action (*see* CPLR 3211[a][7]), the pleadings must be liberally construed (*see* CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v. Martinez*, 84 N.Y.2d 83, 87–88 [1994]; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *Rochdale Vil. v. Zimmerman*, 2 AD3d 827 [2003]; *see also Bovino v. Village of Wappingers Falls*, 215 A.D.2d 619 [1995]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v. Morone*, 50 N.Y.2d 481 [1980]; *Gertler v. Goodgold*, 107 A.D.2d 481 [1985], *affirmed* 66 N.Y.2d 946 [1985]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v. Ginzburg*, *supra* at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see Guggenheimer v. Ginzburg*, *supra* at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v. Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v. Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v. N. Bellmore Union Free Sch. Dist.*, 304 A.D.2d 551, 551–552 [2003]; *Mohan v. Hollander*, 303 A.D.2d 473, 474 [2003]; *Doria v. Masucci*, 230 A.D.2d 764, 765 [1996]; *Rattenni v. Cerreta* 285 A.D.2d 636, 637 [2001]; *Kantrowitz & Goldhamer v. Geller*, 265 A.D.2d 529 [1999]; *Mayer v.. Sanders*, 264 A.D.2d 827, 828 [1999]; *Sotomayor v. Kaufman, Malchman, Kirby & Squire*, 252 A.D.2d 554 [1998]).

***4** Plaintiff appears to confuse the defendants' pre-answer motion to dismiss pursuant to CPLR 3211(a)(7), with a motion for summary judgment. Since issue has not yet been joined, the court need not determine whether any triable issues of fact exist.

To establish a cause of action for negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages (*see Greenberg, Trager & Herbst, LLP v. HBSC Bank USA and Citibank, N.A.*, NY3d, 2011 N.Y. Slip Op 7144; 2011 N.Y. Lexis 3027[October 13, 2011]; *Akins v. Glens Falls city School Dist.*, 53 N.Y.2d 325, 333 [1981]). Plaintiff's first three causes of action against Chase sound in negligence, and allege, among other things, that Chase owed it a duty to have procedures in place to detect counterfeit or forged checks, and to prevent against the theft of its cashier's checks.

Plaintiff's reliance upon *Michaeli* and *Savemart* is unavailing. Those cases involved teller's checks stolen in

blank from defendant banks. They were signed by persons who forged the bank's authorized signatures before negotiating the checks to the plaintiffs. Here, defendants have submitted evidence which is sufficient to establish that the subject cashier's check is counterfeit, rather than stolen and forged. Plaintiff, in opposition, has failed to present any evidence to the contrary.

Plaintiff's reliance on UCC 3–406 is also unavailing, this provides a negligence defense to a payor, under certain circumstances, where payment is made on an altered or forged instrument. (*see Tonelli v. Chase Manhattan Bank,* 41 N.Y.2d 667, 671 [1977]; *Norman Goldstein Assocs. v. Bank of New York,* 204 A.D.2d 288, 289 [1994]). Here, Chase made no payment on the subject check. Furthermore, as stated in comment 5 to section 3–406: "This section does not make the negligent party liable in tort for damages resulting from the alteration." (*see Girard Bank v. Mt. Holly State Bank,* 474 F. Supp 1225, 1238–1239 [1979]).

The duty of a payor bank(in this case Chase) to a non-customer depositor of a check is derived solely from UCC 4–301 and 4–302. UCC 4–301 provides in pertinent part:

> "(1)Where an authorized settlement for a demand item ... received by a payor bank ... has been made before midnight of the banking day of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment ... and before its midnight deadline it (a) returns the item; or (b)sends written notice of dishonor or nonpayment if the item is held for protest or is otherwise unavailable for return".

UCC 4–302(a) provides that a payor bank is liable for an item received by the payor bank if it "does not pay or return the item or send notice of dishonor until after its midnight deadline".

In this case, it is uncontroverted that Chase marked the check "Return Reason(s) Refer to Maker" and returned it to Citibank on January 12, 2011. Although plaintiff alleges that it had a telephone conversation with Chase on January 9, 2011, and that Chase informed plaintiff that it was a forged or counterfeit instrument, plaintiff does not state when Chase actually was in receipt of the subject check. Plaintiff's allegations, thus, are insufficient to maintain a claim for negligence, as it does not allege that Chase received the subject check prior to January 12, 2011 and failed to act before the midnight deadline.

***5** The fourth cause of action appears to allege a claim for fraudulent concealment. In addition to the traditional elements of misrepresentation, scienter, reliance, and damages, a plaintiff alleging fraud based upon fraudulent concealment must allege a duty to disclose material information (*P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.,* 301 A.D.2d 373 [2003]). The duty must be based upon some special relationship between the parties (*see, National Union Fire Ins. Co. of Pittsburgh, Pa. v. Red Apple Group,* 273 A.D.2d 140 [2000]). "In the absence of a contractual relationship or a confidential or fiduciary relationship, a party may not recover for fraudulent concealment of fact, since absent such a relationship, there is no duty to disclose" (*900 Unlimited, Inc. v. MCI Telecom. Corp.,* 215 A.D.2d 227, 227 [1995]; *see, Auchincloss v. Allen,* 211 A.D.2d 417 [1995]; *Albion Alliance Mezzanine Fund, L.P. v. State St. Bank & Trust Co.,* 8 Misc.3d 264 [2003]).

The relationship between a bank and its depositor is that of debtor and creditor (*see, Greenberg, Trager & Herbst, LLP v. HBSC Bank USA and Citibank, N.A., supra; Merrill Lynch, Pierce, Fenner & Smith v. Chemical Bank,* 57 N.Y.2d 439, 444 [1982]; *Brigham v. McCabe,* 20 N.Y.2d 525 [1967]), which, without more, is not a fiduciary or special relationship (*see, Bennice v. Lakeshore S & L Ass'n,* 254 A.D.2d 731, 732 [1998]; *Marine Midland Bank v. Hallman's Budget Rent–A–Car,* 204 A.D.2d 1007, 1008 [1994]; *Bank Leumi Trust Co. v. Block 3102 Corp.,* 180 A.D.2d 588, 589 [1992], *leave denied* 80 N.Y.2d 754 [1992]). Here, plaintiff does not allege a contractual, confidential or fiduciary relationship existed between itself

and the defendants.

Furthermore, contrary to plaintiff's assertion, defendants had no duty to disclose to plaintiff that it may encounter counterfeit cashier checks. Plaintiff was in the best position to protect itself from a fraudulent check cashing scheme, by knowing its “client”, and exercising caution before wiring funds from its IOLA Attorney Trust Account. Plaintiff may not shift the losses it incurred as a result of said scheme onto the defendants.

Accordingly, defendants' motion to dismiss the complaint is granted in its entirety.

N.Y.Sup.,2011.
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