

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

RIGOBERTO TEJADA, a/k/a RIGOBERTO
FRANCISCO TEJADA,

Index No. 304556/12

Plaintiff,

DECISION/ORDER

-against-

Present:

HON. KENNETH L. THOMPSON, Jr.

MARIA OLIVA, a/k/a MARIA I. OLIVO and JPMORGAN
CHASE & CO., d/b/a JPMORGAN CHASE BANK, N.A.,

Defendants.

The following papers numbered 1 to 6 read on this motion, to dismiss

	PAPERS NUMBERED
No On Calendar of 01/31/13	
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1
Answering Affidavit and Exhibits-----	3,4
Replying Affidavit and Exhibits-----	5
Affidavit-----	
Memorandum Of Law-----	2,6
Stipulation -- Referee's Report --Minutes-----	
Filed papers-----	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, JPMorgan Chase & Co., d/b/a JPMorgan Chase Bank, N.A., (Chase), moves pursuant to CPLR 3211 to dismiss plaintiff's complaint against Chase in its entirety. Plaintiff alleges that co-defendant, Maria Olivio, a/k/a Maria I. Olivio, (Olivio), who is plaintiff's mother, made three deposits of \$50,000 each, of plaintiff's annuity checks, into a NYS Uniform Transfers to Minors Act, (UTMA), account in which Olivio was the custodian and plaintiff the beneficiary. Plaintiff alleges that the signatures on those checks were forged, and he never received those checks. This is an action for the recovery of monies awarded to plaintiff from a personal injury action that were allegedly stolen from him by his mother with the alleged complicity and/or due to the negligence of Chase.

Plaintiff argues that this motion must be denied as under CPLR 3211(d), on grounds that there are facts unavailable to plaintiff for his opposition due to Chase's incomplete provision of discovery pursuant to a so-ordered stipulation dated June 11, 2012. Said stipulation provides for

a full accounting in the account ending in 6406, the subject custodial account. While Chase has provided extensive discovery including account statements and a single page document that was completed in opening the subject account, the transfers out of the account indicated the last four digits of the account that received funds from the 6404 account, rather than the full account number. Chase has indicated in its motion papers that it needed a court order to provide information about any other account other than 6406. Accordingly, Chase is directed to provide the full account numbers and the name(s) of the person or entity who holds said account(s). Additionally, Chase is to provide any additional documents used in opening the 6404 account, if any, and provide an affidavit stating that whatever has been produced with respect to the opening of the account is all of the documents available to Chase. With respect to the CPLR 3211(d) application it is denied as there is an absence of even a plausible argument that production of the above stated discovery, would alter the facts alleged by plaintiff. This disclosure is an extension of the disclosure required under the so-ordered stipulation in which the payment of fees for the disclosure was not provided. Therefore, no fees are to be charged for this follow-up disclosure.

An accounting of Olivio's account(s) is not ordered as there is no motion before the Court requesting such relief, nor is an accounting of Olivio's account(s) the subject of the so-ordered stipulation dated June 11, 2012.

In general, on a CPLR 3211 motion to dismiss, the pleading should be construed liberally, and the facts as alleged in the complaint are presumed to be true and are accorded the benefit of every possible favorable inference (CPLR 3026; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970). Where documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inferences is rebutted (*Ullmann v. Norma Kamali, Inc.*, 207 A.D.2d 691, 692, 616 N.Y.S.2d 583). The applicable standard for determining a CPLR 3211(a)(7) motion is whether, within the four corners of the complaint, any cognizable cause of action has been stated (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Morone v. Morone*, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d one, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154). The test on a CPLR

3211(a)(1) motion is whether the documentary evidence submitted “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *IMO Indus., Inc. v. Anderson Kill & Olick, P.C.*, 267 A.D.2d 10, 11, 699 N.Y.S.2d 43).

Scott v. Bell Atlantic Corp., 282 AD.2d 180, 183 (1st Dept 2001).

Plaintiff alleges five causes of action as against Chase beginning with the fifth cause of action. The fifth cause of action lies in negligence. However, “the underlying relationship between a bank and its depositor is [a] **contractual** one of debtor and creditor.” (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chemical Bank*, 57 N.Y.2d 439, 444 [1982]). (emphasis added). “Torts have been defined generally as ‘wrongs independent of contract’ and ‘wholly irrespective of contract’. 62 C.J., Torts, § 3–b; 85 C.J.S., Torts, § 3. ‘To constitute a tort, the act or commission must be entirely independent of contract right.’ *Clark v. Gates*, 84 Minn. 381, 383, 87 N.W. 941, 942.” (*Stella Flour & Feed Corp. v. National City Bank of New York*, 285 AD182, 187 [1st Dept 1954]).

The complaint alleges that Chase negligently permitted Olivio to open an account when plaintiff had attained the age of 18. It should be noted that pursuant to CPLR 3211(1), there is conclusive documentary evidence that the custodial account in question was opened when plaintiff was 16, and not after plaintiff had reached 18 as alleged in the complaint. Even if, *arguendo*, the account had been opened after plaintiff reached the age of 18, UTMA applies to minors up to the age of 21 under UTMA. (EPTL 7-6.1(k)). There is no evidence Chase was presented with the infant compromise order that provided that plaintiff would receive his funds in the UTMA account at 18 rather than 21 years of age. Moreover, plaintiff’s claims of negligence are conclusory.

Accordingly, plaintiff’s fifth cause of action is dismissed.

Plaintiff's sixth cause of action is for breach of fiduciary duty. The case of *Pike v. New York Life Ins. Co.*, 72 A.D.3d 1043, 1049 [2 Dept 2010], is instructive as to whom plaintiff owed a duty. Pike was the custodial parent of insurance policies for the benefit of the minor children, and the issue was whether the children had standing to bring suit under the policies.

The plaintiffs argue that they had standing to sue based on these policies because Kathleen Pike was a custodian of the policies for the minor children plaintiffs under the Uniform Transfer to Minors Act (hereinafter UTMA), and, pursuant to that statute, the property was "indefeasibly vested in the minor" (EPTL 7-6.11[b]). This contention is without merit. EPTL 7-6.11(b) states that "the custodian has all the rights, powers, duties, and authority provided in this part, and neither the minor nor the minor's legal representative has any right, power, duty, or authority with respect to the custodial property except as provided in this part." Accordingly, the minor plaintiffs had no standing under UTMA to bring suit based on these policies.

(*Pike v. New York Life Ins. Co.*, 72 A.D.3d 1043, 1049 [2 Dept 2010]).

Accordingly, plaintiff's sixth cause of action is dismissed.

Plaintiff's seventh cause of action alleges violation of Banking Law §676. Banking Law §676 concerns "unauthorized withdrawals." Olivio, as a custodian of the subject UTMA account was authorized to withdraw the funds. EPTL 7-6.11(b).

Accordingly plaintiff's seventh cause of action is dismissed.

Plaintiff's eighth cause of action is for violation of Article 3 of the NYC Uniform Commercial Code. UCC 3-419 (1)(c) provides that "an instrument is converted when it is paid on a forged indorsement." With respect to the conversion, "a bank, having actual notice or knowledge that a fiduciary is misappropriating trust funds on deposit with it, cooperates in the diversion, it may be held liable as a participant in the wrongdoing." (*Heffernan v. Marine Midland Bank, N.A.*, 267 A.D.2d 83, 84 [1 Dept., 1999]). In this action there are no pleadings nor evidence that the bank had notice or knowledge of the conversion.

Moreover, as plaintiff never had possession of the three checks, UCC 3-419 (1)(c), is unavailable to plaintiff for the relief he seeks against Chase.

[M]ost courts and commentators have concluded that either actual or constructive delivery to the payee is a necessary prerequisite to a conversion action under section 3-419 (1) (c) (see, *Papex Intl. Brokers v Chase Manhattan Bank, supra*; *Lincoln Natl. Bank & Trust Co. v Bank of Commerce*, 764 F2d 392 [5th Cir]; *Winn v First Bank*, 581 SW2d 21 [Ky App 1978]; *Caviness v Andes & Roberts Bros. Constr. Co.*, 508 SW2d 253 [Mo App 1974]; 1 White & Summers, Uniform Commercial Code § 15-5, at 757 [Practitioner's-3d ed 1988] ["court(s) should not recognize a conversion cause of action for one who, though a payee on a check, has never received actual or constructive possession of that check"]; Bailey, Brady on Bank Checks, op. cit., § 27.8, at 27-23 [payee who has not received delivery of check cannot sue depository bank for converting it because "only a person with rights in the instrument may claim conversion"]).

(*State of New York v Barclays Bank of N.Y.*, 76 N.Y.2d 533, 537 [1990]).

In *Barclay's*, the Court of Appeals distinguishes the case cited by plaintiff, *Lund's Inc. v Chemical Bank*, 870 F2d 840 [2nd Cir 1989], stating in footnote three that:

Lund's involved three checks, two of which were indorsed and delivered to coindorsees of plaintiff, thus, giving plaintiff sufficient possession to maintain a conversion action with respect to those checks under UCC 3-419 (1) (c). A third check indorsed solely to Lund's, Inc. was determined on remand not to have been constructively delivered to plaintiff Lund. As to that check, the action was dismissed in reliance upon the Appellate Division's decision in this case (see, *Lund v Chemical Bank*, 1990 WL 17711 [SD NY]).

(*State of New York v Barclays Bank of N.Y.*, 76 N.Y.2d 533, 538 n 3 [1990]).

Plaintiff alleges he never received the subject three checks, and his mother forged his signature on the checks. Plaintiff's argument that plaintiff's mother was plaintiff's agent is unfounded. "The existence of a parent-child relationship is insufficient to establish an agency relationship" (*Struebel v. Fludd*, 75 A.D.3d 1164, 1165 [4 Dept 2010]). (Citations omitted).

Under these facts, plaintiff never had actual or constructive possession of the checks. Accordingly, plaintiff's eighth cause of action is dismissed.

Plaintiff's ninth cause of action seeks an accounting from Chase and Olivio. However, "in the absence of a confidential or fiduciary relationship, plaintiffs have no cause of action for an accounting (see *Palazzo v. Palazzo*, 121 A.D.2d 261, 265, 503 N.Y.S.2d 381 [1986])" (*Saunders v. AOL Time Warner, Inc.*, 18 A.D.3d 216, 217 [1 Dept 2005]). Olivio as the custodian has the relationship with Chase, not the minor. *Pike v. New York Life Ins. Co.*, 72 A.D.3d 1043, 1049 [2 Dept 2010]).

Accordingly, plaintiff's ninth cause of action is dismissed as against Chase only.

CONCLUSION

Defendant, Chase's motion pursuant to CPLR 3211 to dismiss the complaint is granted, and the complaint is hereby dismissed as against defendant, JPMorgan Chase & Co., d/b/a JPMorgan Chase Bank, N.A. Chase is directed to provide the full account numbers and the name(s) of the person or entity who holds said account(s). Additionally, Chase is to provide any additional documents used in opening the 6404 account, if any, and provide an affidavit stating that whatever has been produced with respect to the opening of the account is all of the documents available to Chase.

The foregoing shall constitute the decision and order of this Court.

Dated: FEB 11 2013



J.S.C.
KENNETH L. THOMPSON, JR.