

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III

PART 56

Index Number : 602773/2005

PUNK ZIEGEL & CO.

vs

ENERGY PARTNERS, LTD.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

FILED

FEB 02 2006

COURT CLERK'S OFFICE
NEW YORK

Dated: 1/24/2006

RICHARD B. LOWE III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
PUNK ZIEGEL & CO., L.P.,

Plaintiff,

Index No. 602773/05

- against -

**DECISION
AND ORDER**

ENERGY PARTNERS, LTD., APACHE
CORPORATION, BANK OF AMERICA, CITIBANK,
N.A., STEVEN JONES, and JOHN DOES 1-5,
Defendants.
-----X

RICHARD B. LOWE, III, J.:

Defendant Bank of America (“BOA”) moves to dismiss the Complaint against it pursuant to CPLR 3211(a)(7) for failure to state a cause of action, failure to assert a justicible controversy, and on the doctrine of equitable estoppel.

BACKGROUND

A check by Apache Corporation (Apache) made payable to Energy Partners, Ltd. (Energy Partners) for \$197,254.54 was stolen and subsequently deposited in a brokerage account opened with Plaintiff Punk Ziegel & Co., L.P. (Punk Ziegel), by Steven Jones (Jones). Jones, claiming to be an officer of Energy Partners, opened the brokerage account with the plaintiff. However, both Energy Partners and Apache deny any knowledge of Jones.

The check was deposited with Punk Ziegel and cleared the banking system, and is believed to have passed through Fidelity Securities and JP Morgan Chase Bank as intermediaries, and was charged against the Apache account at Citibank, N.A. (Citibank). These funds were transferred from the Apache account at Citibank to the Energy Partners accounts at Punk Ziegel in November 2004

without question.

Funds were later transferred in December 2004 and January 2005 to accounts at Citibank and BOA. Citibank received two transfers from the Energy Partners' Punk Ziegel account in the amounts of \$95,000 and \$45,500 for deposit. Citibank later wired the monies from these Citibank accounts to an account placed on a "Nigerian Watch List." The money is now missing.

BOA received a wire transfer request from the Energy Partners' Punk Ziegel account in the amount of \$55,000 for deposit, authorized by defendant Jones (*see* White Aff., Ex. 1). This wire transfer relocated funds from the Energy Partners' Punk Ziegel account to an Energy Partners BOA account. However, the account is allegedly not controlled, maintained, or owned by Energy Partners. The plaintiff alleges that BOA permitted some unauthorized individual to open the BOA account for a fictitious entity and so received stolen money. The money in the BOA account is also missing.¹

Punk Ziegel brought action by Summons and Complaint on July 28, 2005 against the various defendants for a declaratory judgment resolving and apportioning the respective rights, obligations, and responsibilities of the institutional defendants among themselves and with the plaintiff, and apportioning the losses and liability under the Uniform Commercial Code (UCC) as well as a negligence claim against BOA.

DISCUSSION

In a motion to dismiss pursuant to CPLR 3211(a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non-movant

¹While the plaintiff summarily alleges that the money is missing, the plaintiff fails to provide any details or any suggestion as to its alleged whereabouts.

(see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). Here, defendant BOA argues that the check was never presented to BOA for payment or presentment and, as such, there was no duty on the part of BOA to the plaintiff. Further, the defendant argues that there is no controversy because the loss of the money is hypothetical. In addition, the defendant avers that the doctrine of equitable estoppel applies, arguing that the plaintiff was in the best position to prevent the alleged loss, not BOA. Finally, the defendant argues that because defendant Jones asked Punk Ziegel to initiate the \$55,000 wire transfer to Energy Partners' account at BOA and that Punk Ziegel acted on that request, the plaintiff cannot now assert a cause of action against BOA under UCC Article 4-A. The court need not deal with the arguments presented by BOA, as upon review the court finds that there is no cause of action under UCC Article 4-A.

Article 4-A of the UCC covers "funds transfers," which means "a series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order." This includes "any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order" (*id.*). The Official Comment to UCC 4-A-102 provides that the rules "are intended to be the *exclusive means* of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article" (emphasis added).

Here, there is no dispute that the funds were properly credited by BOA to Energy Partner's BOA account. There is also no dispute that the account number Punk Ziegel provided to BOA was provided by Punk Ziegel itself, as supplied by Jones. In addition, there is no question that the plaintiff authorized the transfer at Jones' request. Finally, there is nothing to indicate that BOA did

not follow requisite procedures in transferring the money as demanded by Jones and as approved by Punk Ziegel. Under UCC 4-A-202 (2), “if a bank accepts a payment order that purports to be that of its customer after verifying its authenticity through an agreed upon security procedure, the customer is bound to pay the order even if the payment order was not authorized” (*Banque Worms v BankAmerica Int'l*, 77 NY2d 362, 375 [1991]). “If the bank accepts an unauthorized payment order without verifying it in compliance with a security procedure, the loss will fall on the bank” (*id.*). Here, the obligation of BOA was only to transfer the money as requested by Jones and authorized by Punk Ziegel. The wire transfer was completed according to the terms of UCC 4-A-202. There is nothing in the record to indicate that the bank did not verify according to its procedures. As such, there is no cause of action against BOA for declaratory judgment.

The plaintiff alleges a negligence cause of action against BOA. Inasmuch as a negligence claim would “hold that banks owe a duty to their depositors’ creditors to monitor the depositors’ financial activities [in this manner] would be to unreasonably expand banks’ orbit of duty” (*Century Bus. Credit Corp. v North Fork Bank*, 246 AD2d 395, 396 [1st Dept 1998]), the plaintiff cannot claim a cause of action for negligence unless such conduct was not in conformity with Article 4-A (accord *Aleo Int'l, Ltd. v Citibank, N.A.*, 160 Misc 2d 950 (Sup Ct 1994)). There is no dispute that the defendant complied with the provisions of Article 4-A. While the plaintiff argues that BOA should have had or maintained a so-called “watch list” similar to Citibank’s “Nigerian Watch List” as well as should have taken “affirmative steps to investigate the person who opened the account,” this is outside the rubric of Article 4-A, as such, is inapposite to this motion where procedures were duly and appropriately followed in this wire transfer.

Accordingly, the motion of BOA to dismiss the complaint is granted.

CONCLUSION

For the foregoing reasons, it is hereby

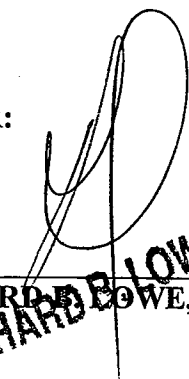
ORDERED that the motion by Defendant Bank of America to dismiss the Complaint is dismissed; it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 24, 2006

ENTER:



RICHARD B. LOWE III
RICHARD B. LOWE, III, J.S.C.

FILED
FEB 02 2006
COUNTY CLERK OF SENeca COUNTY
NEW YORK