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JOHN ESPOSITO, Plaintiff, v. JPMORGAN CHASE BANK, N.A., SHAREN ESPOSITO, JOHN OR JANE DOE 1 THROUGH 100, fictitious names being natural persons at present unidentified, XYZ CORPORATIONS 1 THROUGH 100, fictitious names being corporations at present unidentified, ABC ENTITIES 1 THROUGH 100, fictitious names being commercial entities at present unidentified, Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-3294-20** Civil Action **OPINION**

Argued: September 11, 2020
Decided: October 21, 2020

HONORABLE ROBERT C. WILSON, J.S.C.

Margaret T. Korgul, Esq. appearing on behalf of plaintiff John Esposito (from MARKORLAW, LLC)

Anthony J. Sylvester, Esq., Anthony C. Valenziano, Esq., appearing on behalf of defendant JPMorgan Chase Bank, N.A. (from Sherman Wells Sylvester & Stamelman, LLP)

PROCEDURAL HISTORY

THIS MATER initially began on June 8, 2020, when the Plaintiff commenced this action. Defendant JPMorgan Chase Bank now seeks dismissal.

FACTUAL BACKGROUND

THIS MATTER arises out of John Esposito's ("Plaintiff") several causes of action against JPMorgan Chase Bank ("Chase"), whom Plaintiff alleges failed to remove his ex-wife, Defendant Sharen Esposito, from his account. Plaintiff and Defendant, Sharen Esposito, divorced on January 12, 2015. Following the divorce, Plaintiff presented a judgment of divorce

and an executed Property Settlement Agreement to a Chase branch in Saddle Brook, New Jersey, requesting the Defendant Sharen Esposito be taken off his personal banking account ("Chase Account"). The Chase Account was previously a joint account. Chase issued Plaintiff a book of checks in his name alone, and sent forms with only Plaintiff's name, social security number, and address.

In October 2018, Defendant Sharen Esposito commenced a post-judgment motion against Plaintiff under docket number FM-02-1226-13 (the "Family Action"). Defendant Sharen Esposito attached Plaintiff's Chase Account activity from 2015 to 2017 in the Family Action. Chase never informed Plaintiff post-2015 that Defendant Sharen Esposito continued to have access to the Chase Account information. Plaintiff claims to have been unaware of the continued linked nature of the Chase Account and did not realize such until April 27, 2020 in connection with the Family Action. While Plaintiff confirms that Defendant Sharen Esposito did not post any transactions to the Chase Account and did not in fact use the debit or credit cards associated with the Account, he alleges that Defendant Sharen Esposito disseminated information she obtained from the Account to unspecified third parties. Plaintiff claims to have never seen or signed the 2015 Account Agreement.

Based on the above facts, Plaintiff asserted nine causes of action against both Chase and Defendant Sharen Esposito, jointly and severally: negligence and/or recklessness; invasion of privacy; breach of the duty of confidentiality; fraud; violation of the Consumer Fraud Act; breach of contract; violation of the New Jersey Computer Related Offenses Act; civil conspiracy; and promissory estoppel.

For the reasons set forth below, Chase's Motion to Dismiss is hereby **GRANTED**.

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id. It is simply not enough for a party to file mere conclusory allegations as the basis of its complaint. See Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012); see also Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dept. of Envtl. Prot., 320 N.J. Super 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULES OF LAW AND DECISION

Plaintiff's various claims against Chase arise out of his banking relationship with Chase, which was expressly governed by the Deposit Account Agreement and Privacy Notice, which required Plaintiff to bring any lawsuit or arbitration against Chase within two years after the cause of action arose. All of Plaintiffs' claims filed initially on June 15, 2020, over five years since the relevant events occurred, are thus time barred. Furthermore, Plaintiff's claims fail on the merits. Plaintiff's claims, on the basis of tort liability, are barred by the economic loss doctrine. Plaintiff's claims for negligence, recklessness, breach of the duty of confidentiality, invasion of privacy, and fraud all fail as matter of law. Plaintiff's claims for common law fraud, consumer fraud, and the New Jersey Consumer Fraud Act fail to meet the requirements of a fraud claim, fail to state an ascertainable loss, and fail to show an "unlawful practice" as required under the New Jersey Consumer Fraud Act. Finally, Plaintiff's claims of breach of contract, promissory estoppel, and violation of the New Jersey Computer Related Offenses Act, have nothing to do with Chase, and fail to state a claim as a matter of law. For those reasons the Plaintiff's claims against Chase are dismissed.

I. Plaintiffs' Claims are Time Barred Per the Account Agreement

Plaintiff's allegations plainly reveal a banking relationship with Chase, and the Account Agreement is the document that governs that relationship. The Account Agreement is integral to Plaintiff's pleaded banking relationship with Chase and is integral to Plaintiff's amended complaint. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) ("In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'") (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n. 3 (3d Cir. 2004)).

The Account Agreement's "Permitted Time for Filing a Lawsuit" provision is clear: "you must file any lawsuit or arbitration against us within 2 years after the cause of action arises, unless state law or an applicable agreement provides for a shorter time." Contractual statutes of limitations are routinely upheld, if reasonable. Eagle Fire Prot. Corp. v. First Indem. Of Am. Ins. Co., 145 N.J. 345, 354 (1996). In New Jersey, statute of limitations laws only provide that suit cannot be instituted after a certain period of time; they do not make it unlawful for parties to agree by contract that suits must be brought in a shorter period. Id. at 355. One-year statute of limitations have been upheld in similar cases, where each was found "reasonable." See Id. and A.J. Tenwood Assocs. v. Orange Senior Citizens Hous. Co., 200 N.J. Super. 515, 523 (App. Div. 1985).

In fact, Plaintiff's central theory to the case as to Chase—that Chase improperly disclosed his personal financial information to his ex-wife—is squarely addressed by the terms of the Account Agreement, which states: "Information about your account or the transfers you made will be disclosed to third parties: as necessary to complete transactions; in connection with the investigation of any claim you initiate; to comply with government agency, arbitration or court orders; with your written permission; as permitted by our privacy notice."

Plaintiff's assertion that he did not sign the Account Agreement in 2015 is of no real significance. Plaintiff acknowledged that he utilized the Account and, by doing so, Plaintiff assented to the terms set forth in the Account Agreement. This Account Agreement was provided to Plaintiff after he executed the signature card for the Account.

In Kilberg v. Discover Fin. Servs., the District Court specifically found as follows: "[a]ccording to Defendant, '[p]ursuant to the "Changes To Your Agreement" provision in the Cardmember Agreement…Plaintiff was afforded the opportunity to reject any changes and close the Credit Card Account.' Defendant submits that Plaintiff did not reject any of the changes and

continued to use his credit card after he received such notification…. Based on the parties' submissions, the Court finds that a valid contract was formed between the parties at this time, making the Cardmember Agreement, and thus the provision, valid." 2017 WL 3528005, at *4 (D.N.J. Aug. 16, 2017). Indeed, Page 2 of the controlling Account Agreement expressly addresses Plaintiff's assent to its terms by utilizing the Account. Plaintiff's contention that he has never seen the Account Agreement, alongside his consistent use of the account, is meritless as a matter of law. See Brandywine Prof'l Servs., LLC v. Quigley, 2015 WL 6598537, at *4 (E.D. Pa. Oct. 30, 2015); 2 Williston on Contracts § 6:44 (4th ed.) ("Depositors at common law are generally held bound by references on signature cards and in passbooks to the conditions and limitations contained in a bank's bylaws, regardless of whether the customer has read the signature card or passbook in which reference is contained.").

The contractual shortening of the statute of limitations also applies to the one statutory claim that Plaintiff brings against Chase pursuant to the Consumer Fraud Act. See Ryan v. Liberty Mut. Fire Ins. Co., 234 F. Supp. 3d 612, 618 (D.N.J. 2017). Plaintiff's Consumer Fraud Act claim relates directly to Chase's provision of banking services to Plaintiff—services that are governed by the Account Agreement that contains the two-year statute of limitations. The Account Agreement thus bars Plaintiff's Consumer Fraud Act cause of action as untimely as well.

Lastly, Plaintiff asserts protection through New Jersey's Discovery Rule, to toll the running of the statute of limitations. The Discovery Rule is an equitable principle by which the accrual of a cause of action is delayed until the injured party discovers or should have discovered that he may have the basis for an actionable claim. See Vispisiano v. Ashland Chemical Co., 107 N.J. 416, 419 (1987). Under New Jersey law, Plaintiff must plead "specific facts to

demonstrate that the statute of limitations was, in fact, tolled[.]" Sterling Grace 1992 Ltd. P'ship v. Eckert, No. A-5221-08T3, 2011 WL 2371186, at *9 (App. Div. May 2011).

Here, Plaintiff does not satisfy the Discovery Rule as there is nothing in the amended complaint concerning whether Plaintiff even timely reviewed his monthly statements for the Account which would have revealed that Chase had not removed Defendant Sharen Esposito's name. Under New Jersey's Uniform Commercial Code, a depositor must timely review his monthly statements for, among other things, errors, omissions, and unauthorized items. See N.J.S.A. 12A:4-406(c) ("If a bank sends or makes available a statement of account or items pursuant to subsection a. of this section, the customer must exercise reasonable promptness in examining the statement or the items to be to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized."). Thus, Plaintiff is required to allege that, upon exercising reasonable diligence by reviewing his monthly statements as required under N.J.S.A. 12A4-406(c), he could not have become aware of the basis for his claims against Chase within the two year statute of limitations set forth in the Account Agreement. Plaintiff has not made such allegations and, accordingly, the Amended Complaint must be dismissed as time barred as to Chase.

In sum, the relationship between Chase and Plaintiff is contractual, and that contractual relationship is set forth in the Account Agreement, including the "Permitted Time for Filing a Lawsuit" provision.

II. Plaintiffs' Tort Claims are Barred by the Economic Loss Doctrine and Covered by the Uniform Commercial Code

a. Plaintiffs' Tort Claims are Barred by the Economic Loss Doctrine

Plaintiff's common law causes of action for negligence or recklessness, invasion of privacy, breach of the duty of confidentiality, and fraud are barred by the Economic Loss Doctrine. The Economic Loss Doctrine "defines the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort[.]" Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 244 (3d Cir. 2010); see also Salriel v. GSI Consultants, Inc., 170 N.J. 297, 317 (2002) ("a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law."). The relationship between a bank and its depositor is one of creditor and debtor. See T&C Leasing, Inc. v. Wachovia Bank, N.A., 421 N.J. Super. 221 (App. Div. 2011). In New Jersey, there is a general presumption that "the relationship between lenders and borrowers is conducted at arms-length, and the parties are each acting in their own interest." United Jersey Bank v. Kensey, 306 N.J. Super 540, 553 (App. Div. 1997) (internal citations and quotations omitted). Furthermore, where an Account Agreement is silent on the issue, there is no suggested duty on the part of a bank to supervise, control, or monitor the financial activity of its debtor-depositor, and a bank is not liable to its depositor in negligence, even for failing to uncover a major theft. ADS Assocs. Grp., Inc. v. Oritani Sav. Bank, 219 N.J. 496, 523 (2014).

Here, Plaintiff has failed to show an independent duty outside the Account Agreement, and therefore Plaintiff's claims in negligence, invasion of privacy, and duty of confidentiality are barred by the Economic Loss Doctrine. Contract law applies and the Account Agreement governs the relationship between Chase and the Plaintiff in the absence of an independent duty.

The Economic Loss Doctrine also reaches the Plaintiff's common law fraud claim. A fraud claim may proceed alongside a contractual relationship only when the fraud is extrinsic to the contractual obligations. See State Capital Title & Abstract Co. v. Pappas Bus. Servs., LLC,

646 F.Supp. 2d 668, 677 (D.N.J. 2009). Here, Plaintiff's fraud case is based on the allegation that Plaintiff relied on Chase's representations that it would take Defendant Sharen Esposito's name off his Chase Account. That allegation arises out of the performance of Chase's obligations in connection with the Account Agreement and there is no alleged fraud that is separate and distinct from the performance of the contract.

b. Plaintiff's Case is Governed by the Uniform Commercial Code

The relationship between a bank and its customer with respect to negotiable instruments, including checks, is governed by the UCC. See Travelers Indemnity Ins. Co. v. Good, 325 N.J. Super. 16, 21 (App. Div. 1999); see also ADS Associates Group, Inc. v. Oritani Sav. Bank, 219 N.J. 496, 516 (2014) (rejecting common law negligence claim against bank under UCC where the common law remedies contravene the remedies afforded under the UCC).

Under N.J.S.A. 12A:4-406, banks are afforded a safe harbor with respect to fraudulent items payed out by the bank, if they supply customer with a monthly account statement. N.J.S.A. 12A:4-406. Specifically, the bank can make available "a statement of account showing payment of items for the account" with sufficient information such that customers can reasonably identify the items paid. N.J.S.A. 12A:4-406(a). If the bank does so, the customer must "exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized[,]" and the customer must then promptly notify the bank of the relevant facts. N.J.S.A. 12A:4-406(c). A time limit of one year is generally imposed on customers to report discrepancies on their account statements, "[w]ithout regard to care or lack of care of either the customer or the bank." N.J.S.A. 12A:4-406(f). Lastly, the existence of an account agreement may serve to shorten certain obligations. N.J.S.A. 12A:4-103(a) ("The effect of the provisions of this chapter may be varied by agreement,

but parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure.").

Here, the allegation was not that the bank allowed a fraudulent transfer, but rather that the bank's alleged mismanagement of Plaintiff's account caused Plaintiff's ex-wife to have continued access to Plaintiff's financial information. Since the UCC governs on issues between banks and their customers, we must look to what, if any, protections and or duties exist for the Plaintiff under the UCC. The UCC presumes that a customer receiving a statement of account is notified of the account activity and places the responsibility on the customer to police his account. Thus, Plaintiff is required to allege that, even exercising reasonable diligence, which would certainly include reviewing his monthly statements as required under N.J.S.A. 12A4-406(c), he could not have become aware of the basis for his claims against Chase within the two year statute of limitations set forth in the Account Agreement. It is common practice to set a time limit for customers to report discrepancies and the UCC explicitly allows parties to alter these terms via their agreement. In the case at bar, Plaintiff failed to raise any issue on his Account until 5 years after requesting to have Defendant Sharen Esposito removed. Furthermore, as stated above, the action is time barred by the agreement and the valid statute of limitations provision.

III. Plaintiff's Common Law Fraud Claim Fails as a Matter of Law

Even if not barred by the Economic Loss Doctrine, Plaintiff's common law fraud claim fails as a matter of law. Common law fraud has three elements: a Plaintiff must show that "(1) defendant made material misrepresentation or omission of fact; (2) knowing the misrepresentation to be false or the omission to be material, and intending the other party to rely on it; and (3) the other party did in fact rely on the misrepresentation or omission to its

detriment." Zorba Contractors, Inc. v. Housing Auth., City of Newark, 362 N.J. Super. 124, 139 (App. Div. 2003).

For common law fraud based on material misrepresentation, contingent events, or expectations, do not constitute material misrepresentations even if such statements may turn out to be wrong. Anderson v. Modica, 4 N.J. 383, 391-92 (1950). Plaintiff's common law fraud claim against Chase is based on the alleged misrepresentation that Chase would take Defendant Sharen Esposito off of his Chase account, but this does not amount to a material misrepresentation of an *existing fact*. Plaintiff's allegations instead merely concern a statement about future contingent events—that Chase "would" remove Ms. Esposito from the account.

Moreover, Plaintiff cannot maintain a claim of fraud premised on this allegation of misrepresentation absent a demonstration of scienter. Jewish Center of Sussex Cty. v. Whale, 86 N.J. 619, 625 (1981). Here, there is no allegation that Chase made a purported statement that Defendant Sharen Esposito was taken off the Account with the intent to deceive Plaintiff or that Chase was seeking to obtain an undue advantage therefrom.

Lastly, Plaintiff's assertion that Chase's omission constitutes fraud does not save his fraud claim. A fraud claim premised on an omission can only exist where there is an obligation on the part of the defendant to disclose material information to the Plaintiff. See Berman v. Gurwicz, 189 N.J. Super. 89, 93 (Ch. Div. 1981). In this case, Chase had no such duty. Plaintiff misperceives the law as it pertains to the relationship between a bank and its depositor, claiming that a bank acts as a fiduciary to its depositors. In doing so, Plaintiff relies on Official Comm. Of Unsecured Creditors v. Donald, Lufkin & Jenrette Sec. Corp., 2002 WL 362794, at *2, 8-9 (S.D.N.Y. Mar. 6, 2002), which dealt with a bank acting as a financial advisor. Here, Chase was not acting as anything more than a depository bank, and Plaintiff was nothing more than a depositor. A creditor-debtor relationship does not generally give rise to a duty to disclose

information absent a fiduciary duty. See New Jersey Economic Development Authority v. Pavonia Restaurant, Inc., 319 N.J. Super. 435, 447 (App. Div. 1998).

IV. Plaintiff Does Not State a Claim under the Consumer Fraud Act

Plaintiff's Consumer Fraud Act claim also fails for two additional reasons; to state a claim under the Consumer Fraud Act, a party must establish: (1) unlawful conduct by the other party in connection with the sale or advertisement of a product; (2) an ascertainable loss on the part of the party asserting the claim; and (3) a causal relationship between the unlawful conduct and the ascertainable loss. Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105, 114-15 (App. Div. 2005). "Unlawful conduct" is either an affirmative act, knowing omission, or regulatory violation. See Thiedmann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 245 (2005). In order to prove an affirmative misrepresentation under that CFA, the Plaintiff must establish that the statement was: (1) material to the transaction; (2) a statement of fact; (3) found to be false; (4) and "made to induce the buyer to make purchase." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607 (1997).

Plaintiff's Amended Complaint is devoid of any particular allegations as to Plaintiff's ascertainable loss. Plaintiff's opposition papers attempt to state that his Counsel advised Chase's Counsel of the legal fees Plaintiff incurred in his separate matrimonial action as a loss to satisfy a claim of fraud in the present case. Besides being procedurally improper, this vague, unsupported statement does not satisfy Plaintiff's obligation to plead his "ascertainable loss" with the requisite particularity under R. 4:5-8. Because this Court finds no unlawful conduct—either in the affirmative form, or as a failure to comply with a pre-existing fiduciary duty—and Plaintiff has failed to plead an ascertainable loss, the Court dismisses the Plaintiff's claim under the CFA.

V. Plaintiff Cannot Plead Civil Conspiracy

In order to sustain a civil conspiracy claim, a Plaintiff must allege: (1) a combination of two or more persons; (2) acting in concert to commit an unlawful act or commit a lawful act by unlawful means; (3) an agreement between the parties to inflict a wrong against or injury upon another; and (4) an overt act resulting in damages. Banco Popular, 184 N.J. at 177. "Under New Jersey law, a claim for civil conspiracy cannot survive without a viable underlying tort…." Id. at 177-78. Here, there is no cognizable legal basis to sustain any of the intentional tort claims asserted by Plaintiff against Chase. Therefore, Plaintiff's Civil Conspiracy claim against Chase is dismissed.

VI. Several of Plaintiff's Causes of Action Contain No Allegations Against Chase

Each of Plaintiff's nine causes of action requests judgement against each Defendant individually, jointly, and/or severally. However, Plaintiff's claims for breach of contract, promissory estoppel and violation of the New Jersey Computer Related Offenses Act are not specifically aimed at Chase, but rather his ex-wife Defendant Sharen Esposito.

Plaintiff's breach of contract claim is based on a contract to which Chase is not a party. Plaintiff's promissory estoppel claim is also aimed at Defendant Sharen Esposito and her alleged promises to refrain from "using" the account. And lastly, Plaintiff's claim for a violation of the New Jersey Computer Related Offenses Act is based on allegations that Defendant Sharen Esposito accessed Plaintiff's computer system without his permission. These causes of action do not implicate Chase and are therefore dismissed.

CONCLUSION

For the aforementioned reasons, Defendant Chase's Motion to Dismiss is **GRANTED.**