



## **Morris et al v. Bank of America, N.A.**

2019 | Cited 0 times | W.D. North Carolina | January 8, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION LISA MORRIS, MICHAEL BUI, and TUMIKA WILLIAMS on behalf of themselves and all others similarly situated, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.

CASE NO. 3:18-cv-157-RJC-DSC

MEMORANDUM AND RECOMMENDATION THIS MATTER is before the Court on Motion to Dismiss Plaintiff Second Amended briefs and exhibits.

This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1), and this Motion is now ripe for consideration.

Having fully considered the arguments, the record, and the applicable authority, the undersigned respectfully recommends that Defendant s Motion to Dismiss be granted in part and denied in part, as discussed below.

**I. PROCEDURAL AND FACTUAL BACKGROUND** Taking the facts of the Second Amended Complaint as true, Plaintiffs maintain checking and/or savings accounts with Defendant through banking centers in Oklahoma, California, and Georgia. Plaintiffs contend that Defendant improperly assessed fees on their accounts by (i) charging multiple non- for the same transaction, 1

(ii) charging NSF/OD fees on payments from one Defendant account to another, (iii) prematurely deducting NSF/OD fees, and (iv) assessing monthly account service fees , Plaintiffs allege that The essence of Plaintiffs allegations is that Defendant breached the express terms of the relevant contractual provisions as well as its duty to exercise good faith in applying them when determining the number of times it would submit items for payment, the timing of those submissions, and whether to charge NSF/OD/MSAS fees. Plaintiffs allege that Defendant structured these submissions in a such a way as to to maximize fees paid by them.

On March 29, 2018, Plaintiffs filed this action on behalf of themselves and all others similarly situated. The Second Amended Complaint alleges claims for breach of contract, breach of the covenant of good faith and fair dealing, conversion, unjust enrichment, and unfair and deceptive trade practices in violation Practices Act ( N.C. Gen. Stat. § 75.1.-1, Oklahoma Consumer Protection



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( Okla. Stat. tit. 15 § § 752(13), 753(20), , California Business and Professions Code section 17200, et. seq. Consumer -1-390 et. seq.

Defendant has moved to dismiss the Second Amended Complaint.

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NSF Fees are assessed when the bank rejects an attempted transaction as the bank authorizes a transaction even though there are insufficient funds in the account.

II. DISCUSSION A. Standard of Review -pleaded Mylan Labs., Inc. v. Matkari enough to raise a right to relief above the spec Bell Atlantic Corp. v. Twombly, 550

Id. at 563. A complaint attacked

by a Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly,

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct Id.

In Iqbal, the Supreme Court articulated a two-step process for determining whether a complaint meets this plausibility standard. First, the court identifies allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Id. of the elem Id.

(citing Twombly, 550 U.S. at 555) (allegation that government officials adopted challenged policy nd not assumed to be true). mark[] a notable and generous departure from the hyper-technical, code-pleading regime of a prior

era ... it does not unlock the doors of discovery for a plaintiff armed with nothing more than Id. at 678-79.

Second, to the extent there are well-pleaded factual allegations, the court should assume their truth and then determine whether they plausibly give rise to an entitlement to relief. Id. at -specific task that requires the reviewing court to draw on its judicial

Id. -pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not - Id. (quoting Fed. R. Civ. P. 8(a)(2)).

B. Breach of Contract Plaintiffs base their breach of contract claim on both express breach and



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breach of the implied covenant of good faith and fair dealing. See, e.g., *In re HSBC Bank*, 1 F. Supp. 3d 34, 54 (E.D.N.Y. 2014) (allowing authority to post debit transactions from high to low); *Gutierrez v. Wells Fargo*, 622 F. Supp. 2d

946, 954 (N.D. Cal. 2009) (allowing c that it had contractual authority to post items to checking account in any order the bank chose); *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1363 (N.D. Ga. 2008) (declining to dismiss ir dealing at the motion to dismiss maximize overdraft fees); *Hunting Aircraft, Inc. v. Peachtree City Airport Auth.*, 281 Ga. App.

450, 453 ; *Beshara v. Southern*

, 928 P.2d 280, 288 (Okla. 1996) *Trust Co. of Vinita v. Kisse*, 859 P.2d 502, 509 (Okla. 1993) (contract contains implied covenant requiring parties not to injure the interests of the other to receive the benefits of the contract).

Applying these precedents to the facts alleged here, Plaintiffs have sufficiently alleged a breach of contract claim under both theories. For those reasons, the undersigned respectfully recommends that Defendant s Motion to Dismiss Plaintiffs breach of contract claim be denied.

C. Breach of Implied Covenant of Good Faith and Fair Dealing In their , Plaintiffs state that allegations of breach of the covenant of good faith and fair dealing are not pled as a separate tort claim but rather as incident to their breach of contract claim. See Document #26 at 14-15. For this reason and the other Motion to Dismiss be granted as to any separate claim for breach of the implied covenant of good

faith and fair dealing.

D. Conversion In order to prevail on their conversion claim, Plaintiffs must show that under applicable state law Defendant unlawfully withheld a check (Oklahoma), took money through the use of forged or unauthorized documents (California) or retained a specific identifiable fund (Georgia). See, e.g., *Childs v. Unified Life Ins. Co.*, 781 F.Supp.2d 1240, 1249 (N.D. Okla. 2011) (money is intangible personal property and cannot be converted); *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1492, 49 Cal. Rptr. 3d 227 (2006) (overcharge cannot give rise to conversion claim); *Taylor v. Powertel, Inc.* But see *Fong v. E. W. Bank*, 227 Cal. Rptr. 3d 838, 844 (Ct. App. 2018) (Plaintiff alleged conversion of deposited funds as a result of forged documents authorizing the transfers); *Steenbergen v. First Fed. Sav. & Loan*, 753 P.2d 1330, 1332 (Okla. 1987) (withheld check is exception to general rule in Oklahoma that only tangible personal property may be converted).

Plaintiffs have not sufficiently pled a cause of action under the applicable state laws. granted

E. Unjust Enrichment Plaintiffs argue that they have pled their unjust enrichment claim in the



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alternative to their contract claim. But the record is clear that this dispute is governed by one if not several valid contracts between the parties. *Sisemore v. Dolgencorp, LLC*, 212 F.Supp.3d 1106, 1112 (N.D. Okla. 2016) (holding that a claim for unjust enrichment is not viable when an enforceable contract *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 203, 51 Cal. Rptr. 2d 622 (1996) (same); *Bogard v. Inter State Assurance Co.*, 263 Ga. App. 767, 589 S.E.2d 317, 319 (2003) ( Accordingly, the undersigned respectfully recommends

granted

F. Unfair and Deceptive Trade Practices Claims The parties dispute law applies here. A choice of law inquiry may be very fact intensive and more appropriately undertaken after the record is sufficiently developed. *Terry v. Swift Transportation*, No. 1:16cv256, 2017 WL 1013074, at \*7 (M.D.N.C. March 14, 2017) (citing *Graboff v. The Collern Firm*, Civ. Action No. 10 1710, 2010 analysis, when confronted with a choice of law issue at the motion to dismiss stage, courts have

lacks necessary facts for the [c]ourt to conduct the fact-intensive, context- . See also *Beritelli v. Wells Fargo Bank, N.A.*, No. 1:11-CV-000179-MR, 2013 WL 5460179, at \*13 (W.D.N.C. Sept. etermination of the choice of law issue at this time The parties may revisit the choice of law issue at the summary judgment stage, at which time the Court *Clean Earth of Md., Inc. v. Total Safety, Inc.*, No. 2:10 cv 119, 2011 WL 1627995, at \*4 (N.D. W. Va. Apr. 28, 2011) parties have developed the factual evidence through the process o

Since Plaintiffs pled their unfair and deceptive trade practices claims under both North Carolina law and the law of their states of residence, the Court finds that it is premature to determine choice of law at this stage of the proceedings.

The elements of a claim for UDTP in North Carolina an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce,

and (3) the act proximately caused injury to the pl *Bumpers v. Cmty. Bank of N. Va.*, 747 S.E.2d 220, 226 (N.C. established public policy as well as when the practice is immoral, unethical, oppressive,

unscrupulous, or substantia *Walker v. Fleetwood Homes of N.C., Inc. Id.* (alteration in original) (internal quotation marks omitted). The elements of unfair and deceptive trade practices claims under California, Georgia and Oklahoma law are similar. See Okla. Stat. tit. 15 § § 752(13), 753(20), California Business and Professions Code section 17200, et. seq., and O.C.G.A. Sections 10-1-390 et. seq.

Defendant arguments as to are more appropriately considered at summary judgment and following completion of discovery. Plaintiffs have alleged facts that would permit, but not require, a reasonable jury to conclude that Defendant did not act in good faith in performing its contractual duties.



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Consequently, the undersigned respectfully recommends that Defendant Motion to Dismiss Plaintiff claims under the North Carolina Unfair and Deceptive Trade Practices Act, Oklahoma Consumer Protection Act, California Unfair Competition Law, and Georgia Consumer Protection Act be denied.

III. RECOMMENDATION FOR THE FOREGOING REASONS, the undersigned respectfully recommends that (document #22) be GRANTED IN PART and DENIED IN PART, specifically, GRANTED as

to Plaintiff claims for conversion, unjust enrichment, and breach of implied covenant of good faith and fair dealing, and that those claims be DISMISSED WITH PREJUDICE, and DENIED in all other respects..

IV. NOTICE OF APPEAL RIGHTS The parties are hereby advised that, pursuant to 28 U.S.C. §636(b)(1)(c), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within fourteen days after service of same. Failure to file objections to this Memorandum with the District Court constitutes a waiver of the right to de novo review by the District Judge. *Diamond v. Colonial Life*, 416 F.3d 310, 315-16 (4th Cir. 2005); *Wells v. Shriners Hosp.*, 109 F.3d 198, 201 (4th Cir. 1997); *Snyder v. Ridenour*, 889 F.2d 1363, 1365 (4th Cir. 1989). Moreover, failure to file timely objections will also preclude the parties from raising such objections on appeal. *Thomas v. Arn*, 474 U.S. 140, 147 (1985); *Diamond*, 416 F.3d at 316; *Page v. Lee*, 337 F.3d 411, 416 n.3 (4th Cir. 2003); *Wells*, 109 F.3d at 201; *Wright v. Collins*, 766 F.2d 841, 845-46 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to counsel for the parties and to the Honorable Robert J. Conrad, Jr.

SO RECOMMENDED AND ORDERED.

Signed: January 7, 2019

