

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice.

CAROLE RUSSO,

Plaintiff,

-against-

**CHASE MANHATTAN BANK and
ARTI MAJITHIA,**

Defendants.

**TRIAL/IAS PART 2
NASSAU COUNTY**

**ORIGINAL RETURN DATE: 01/05/11
SUBMISSION DATE: 02/14/11
Index No. 4175/10**

MOTION SEQUENCE #3

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Defendants' Memorandum of Law.....	3
Defendants' Reply Memorandum of Law.....	4

Motion by defendants for an order, pursuant to CPLR 3212, awarding defendants summary judgment dismissing the complaint is granted.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.*, 68 NY2d at 324).

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Plaintiff commenced this action to recover damages based upon negligence, breach of contract, fraud and breach of fiduciary duty.

The record reveals that plaintiff was an in-trust-for ("ITF") beneficiary on her father Salvatore Pergola's revocable Totten Trust account. On or about September 10, 2008, plaintiff gained power of attorney ("POA") status over her father's accounts. As POA, plaintiff was authorized to write checks and make withdrawals from the savings and checking accounts in which she signed checks as "Carole Russo POA."

Plaintiff alleges that her ITF status under the savings account was removed in November 2008 without either the consent of the account holder (plaintiff's father) or the consent of plaintiff. After discovering the removal, plaintiff made several visits from December 2008 through February 2009 to the branch office requesting that she be reinstated as an ITF beneficiary on the account. Defendant Arti Majithia, the branch manager, asserts that plaintiff was repeatedly advised that it was bank policy that she could not be given ITF status while she was a POA on the account. In an allegation contradicting the position of plaintiff, defendants assert that at no point during the visits to the branch did the plaintiff attempt to remove herself as POA and reinstate her status as a ITF beneficiary on the account.

Plaintiff's father died on February 20, 2009. There was \$52,153.67 in the savings account at the time of her father's death that went to the estate of the deceased (the decedent) rather than vest in plaintiff. On or about April 18, 2009, plaintiff withdrew all monies from the account. On October 14, 2009, the Nassau County Department of Social Services filed a claim (Nassau County Surrogate File No. 355446) against decedent's estate for unpaid nursing home bills. Plaintiff voluntarily paid \$50,831.02 to the Nassau County Department of Social Services for the decedent's unpaid medical bills.

Plaintiff alleges that defendant improperly removed plaintiff as an ITF beneficiary from the account. As a result of the removal, plaintiff lost her ITF status, thereby depriving plaintiff of the account funds that went to the estate of her father upon his death, rather than directly to plaintiff.

It is defendants' position that even if plaintiff had always remained a beneficiary on the account, any interest she would have had in the account's funds would have been subordinate to the Department of Social Services lien on those funds. *In re LaPine*, 18 AD3d 552; *In re Halbauer's Estate*, 34 Misc2d 458 [Surr. Ct. Suffolk Co. 1962], *aff'd* 18 AD2d 966 [1963]. Plaintiff does not refute defendants' argument that the beneficiary's interest in the funds of a Totten Trust account are subordinate to the interest of creditors if the estate's other assets are exhausted. Nor does she contradict the assertion that the estate lacked any other assets.

Defendants argue that even if plaintiff had never obtained power of attorney for the decedent and had always remained a beneficiary on the account, she would not be entitled to the funds because the Department of Social Services' superior right to them extinguished any interest

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plaintiff had in them. The Nassau County Department of Social Services is a "preferred creditor" with priority to enforce a lien for medical assistance against the decedent's property in which the decedent "maintained control over the property and did not own sufficient assets passing under his estate to satisfy his lawful obligations." N.Y. Soc. Serv. § 104[1]; *see In re Robinson*, 194 Misc2d 695, 699 [Surr. Ct. Nassau Co. 2003] (one-half interest in house deemed part of estate to which DSS was entitled as a preferred creditor); *see also, Matter of Swingearn*, 59 AD3d 556; *In re Albasi*, 196 Misc2d 314, 316 [Surr. Ct. Bronx Co. 2003] ("[i]t would fly in the face of clear legislative intent to construe Social Services Law Section 369 as barring recovery by DDS on the ground that the appointed property should not be deemed part of the decedent's estate in view of the legislative mandates that DSS is a preferred creditor"). *See also, In re LaPine, supra.*

Defendants submit that plaintiff has not satisfied the damages element of any of her causes of action. Moreover, it is submitted that any relationship between plaintiff and defendant Chase is governed by a contract theory and her negligence claim must, therefore, fail. Additionally, it is submitted that Chase does not owe a fiduciary duty to its customer, concluding that plaintiff cannot maintain her action for breach of fiduciary duty.

With regard to plaintiff's fraud claims, it is asserted that plaintiff failed to plead the elements of fraud with the particularity required by CPLR 3016(b). Lastly, Chase contends that plaintiff cannot support her breach of contract claim because she fails to cite to any provision in the contract relating to the removal of an ITF beneficiary.

It is alleged that defendant Majithia's actions were undertaken in the scope of her employment. Inasmuch as there are no allegations to the contrary, defendants submit that Majithia cannot be held personally liable.

Defendants have demonstrated their prima facie entitlement to summary judgment as a matter of law. The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact. Plaintiff's proof, consisting of her attorney's affirmation based upon unsubstantiated suppositions, is insufficient to defeat the motion for summary judgment (*Marietta v. Scelzo*, 29 A.D.3d 539, 540 [2d Dept. 2006]).

Accordingly, the complaint is dismissed without costs.

This decision constitutes the order of the court.

Dated: 4-5-11


THOMAS P. PHELAN, J.S.C.

ENTERED

APR 06 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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