SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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EUROPEAN AMERICAN BANK,

Plaintiff, Index 601986/98

-against-

CHASE BANK f/k/a CHASE MANHATTAN BANK
f/k/a/ CHEMICAL BANK, IRA LAPES, et al.,

Defendants.

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Beatrice Shainswit, J.,

This is an action for monetary and equitable relief based on the defendants" alleged conversion and failure to comply with the orders and judgment of this court arising in a prior action, European American Bank v. Ira Lapes, Ira Lapes Brokerage, Inc. and Supreme Credit Corp., New York County Supreme Court Index No. 601982/96.

The Verified Complaint alleges four causes of action against defendant Chase Manhattan Bank ("Chase"). The First Cause of Action alleges that Chase converted certain checks by accepting them for deposit and/or paying out on them based on forged or missing endorsements. The Second Cause of Action alleges that Chase converted the checks by accepting them for deposit and/or paying out on them in knowing violation of an "Order of Attachment and Order and Judgment Granting Preliminary and Permanent Injunction Enjoining Defendants From Using, Removing, or Transferring Certain Property", which was served upon it on June 25, 1996. The Third Cause of Action alleges that, despite plaintiff's demand, Chase has failed to account for any and all monies received. The Eleventh Cause of Action seeks attorneys' fees from all defendants,

including Chase, pursuant to Debtor and Creditor Law Sections 276-a and 278, and of CPLR Section 5225(b).

Chase moves to dismiss the Verified Complaint against it pursuant to CPLR 3211(a)(1),(3),(5) and (7), and to strike plaintiff's demand for attorneys' fees.. In seeking dismissal of the First and Second Causes of Action, Chase argues that plaintiff's conversion claims against it must be dismissed because

1. the endorsements on the checks at issue were authorized or ratified by the payee.

2. plaintiff lacks standing to assert the claims because it is not the true owner of the checks at issue.

3. the violation of a court order does not give rise to a claim for conversion.

4. Chase did not violate any court orders.

It also argues that the Third Cause of Action for an accounting must fail because it had no fiduciary relationship with plaintiff, and that the Fourth Cause of Action for statutory attorneys' fees must fail because the conclusory allegations of the complaint fail to establish the requisite "actual intent" of Chase to hinder, delay or defraud plaintiff.

Conversion.

UCC 3-419(1)(c) provides that "[a]n instrument is converted when . . . it is paid on [a] forged endorsement".

For purposes of this motion, the following allegations of the complaint are taken to be true. The checks at issue were payable to judgment debtor Supreme Credit Corp. Defendant Chase is a garnishee and was on notice that all of the accounts of Supreme Credit Corp. had been assigned to plaintiff. Plaintiff obtained a judgment against Supreme Credit Corp. and other defendants and served upon Chase copies of the court order of attachment of Supreme Credit Corp's accounts at Chase and the sheriff's levy on those accounts. Despite its notice, Chase allowed the deposit of checks naming the

judgment debtor as payee and without proper endorsement into another entity's account, to the detriment of plaintiff as judgment creditor and as the true owner of the proceeds.

A bank's acceptance of drafts for deposit without endorsement is commercially unreasonable as a matter of law and gives rise to liability under UCC 3-419 as though the instrument was forged. Home Insurance Co. v. Manufacturer's Hanover Trust Co., 203 AD2d 125, (1st Dep't 1994). Here, Chase argues that it cannot be held liable for this conversion because "the endorsements on the checks at issue were authorized and/or ratified by Supreme Credit as payee." (Memorandum, pp.2-3). However, it is undisputed that the subject checks carried no endorsement or were simply endorsed "for deposit only." While a check need not carry an endorsement in order to be negotiated, here there was no endorsement at all and thus there was nothing to authorize. Chase also argues that, because Chase allowed the checks to be deposited into another entity's account and because that entity ultimately distributed the proceeds to Supreme Credit Corp., the named payee received the funds, thus ratifying the transaction and negating any possible conversion by Chase. This argument disengenuously ignores Chase's own failure in facilitating the conversion by accepting unendorsed checks payable to a judgment debtor whose accounts were restrained and then depositing them in another entity's account. Italso ignores the allegation, taken as true on this motion, that it was on actual notice that plaintiff was the true owner of all checks payable to Supreme Credit Corp. Chase's reliance on the holding in Stratton v. Equitable Bank, N.A., 104 B.R. 713 (D. Md. 1989), aff'd 912 F.2d 464 (4th Cir. 1990) is unwarranted. There, the district court held that a trustee in bankruptcy could not recover against a bank that previously had been authorized by the bankrupt to negotiate checks payable to it without endorsement and to deposit them in another entity's account. That simply is not the case here. In Stratton, there is no showing that the accounts had been restrained or that the bank was on notice of the actual owner of the proceeds. Moreover, there is no showing here that there was any authorization from Supreme Credit Corp. for Chase to process the checks in that

manner, which authorization, in any event, should not have been followed once Chase was on notice that the accounts had been restrained.

2. Accounting.

The sine qua non of a cause of action for an accounting is the existence of a fiduciary relationship between the claimant and the party from whom the accounting is sought. Absent such a relationship, no duty to account exists. Charles Hyman, Inc. v. Olsen Indus, Inc., 227 AD2d 270 (1st Dep't 1996). Even as a secured party in any action against Supreme Credit Corp., plaintiff has no greater right against Chase than would Supreme Credit. Here, that status is no more than any other bank depositor, i.e., it stands in a debtor-creditor relationship with Chase, and no more. ADT Operations v. Chase Manhattan Bank, N.A., 173 Mis.2d 959 (Sup. Ct. 1997). Thus, no right to an accounting exists.

3. Attorneys' Fees.

Plaintiff's recovery of attorneys' fees from Chase necessarily must be premised on the allegation that Chase's actions were taken with actual intent to hinder, delay or defraud plaintiff. Sections 276-a, 278 of the Debtor and Creditor Law. However, even if all the factual allegations in the Verified Complaint are taken as true, no facts are pleaded against Chase to support this allegation. The mere conclusory allegation, on information and belief, contained in Paragraph 103 of the complaint is insufficient for this purpose. In the absence of factual support, the claim must fail.

Accordingly, the motion to dismiss is granted to the extent of dismissing the Third and Eleventh Causes of Action for failure to state a cause of action, and otherwise it is denied.

This constitutes the decision and order of the Court.