

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

LEONARD T. GOLDHAMMER	:	
	:	
v.	:	CIVIL NO. CCB-08-3405
	:	
SCHARMA LOUISE HAYES, <i>et al.</i>	:	
	:	
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MEMORANDUM

Now pending before the court are motions to dismiss filed by defendants SunTrust Bank (“SunTrust”), and Emigrant Bank and Emigrant Bancorp, Inc. (together “Emigrant”) against the plaintiff, Leonard Goldhammer (“Mr. Goldhammer”). The issues have been fully briefed and the parties have been heard. For the following reasons, SunTrust’s motion will be denied and Emigrant’s motion will be granted.

BACKGROUND

In May 2007, Mr. Goldhammer, then nearly 90 years of age, suffered a fall in his residence that required he spend several months convalescing first in a local hospital and then in a local nursing home. Mr. Goldhammer alleges that, during this time and beyond, Scharma Hayes (“Ms. Hayes”), an acquaintance of approximately twenty years and a close family friend, stole large sums of money from him. Prior to this alleged theft, Mr. Goldhammer provided financial assistance to Ms. Hayes over the years and allowed her access to his residence in Ocean City, Maryland.

According to the plaintiff, Ms. Hayes forged or fraudulently obtained his signature on a series of checks from his Merrill Lynch, Pierce, Fenner & Smith, Inc. (“Merrill Lynch”) account,

payable to herself, her family members, or her creditors, in amounts totaling over \$84,000. Ms. Hayes deposited or cashed many of these checks at SunTrust or United Bank (“United”). She also sold and liquidated shares of the plaintiff’s stock held in his Merrill Lynch account worth approximately \$100,000 and took the proceeds without the plaintiff’s knowledge or permission.

Mr. Goldhammer further alleges that Ms. Hayes stole money from his SunTrust account. In early May 2007, prior to his fall, “an electronic transfer was made from Plaintiff’s Emigrant account to Plaintiff’s SunTrust account in the amount of \$25,000. Such transfer was made on Plaintiff’s behalf, with his knowledge.” (Compl. ¶ 17.) These funds “were paid to [Ms.] Hayes by Plaintiff, with his knowledge and consent” to pay for a down payment on a house. (*Id.*) After his fall, in July 2007, without the plaintiff’s knowledge or consent, another electronic fund transfer was made in the same amount, \$25,000, from Mr. Goldhammer’s Emigrant account to his SunTrust account. Ms. Hayes then allegedly wrote a series of checks out of his SunTrust account payable to her in amounts totaling approximately \$25,000.

In February 2008, Mr. Goldhammer’s estate planning attorney alerted him to Ms. Hayes’s alleged theft. In addition to alerting law enforcement officials, Mr. Goldhammer filed a complaint in state court suing Ms. Hayes, Merrill Lynch, SunTrust, United, and Emigrant. Mr. Goldhammer seeks compensatory and punitive damages for alleged acts of statutory and common law conversion, negligence, breach of contract, and breach of bailment.¹ The case was

¹Count I of the complaint is a common law conversion claim against Ms. Hayes; Count II is a breach of bailment claim against Merrill Lynch, SunTrust, and Emigrant; Count III is a breach of contract claim against Merrill Lynch, SunTrust, and Emigrant; Count IV is a negligence claim against Merrill Lynch, SunTrust, Emigrant, and United; Count V seeks an accounting from Merrill Lynch, SunTrust, and Emigrant; Count VI is a tortious aiding and abetting claim against Merrill Lynch, SunTrust, Emigrant, and United; and Count VII is a statutory conversion claim under Code § 3-420 against Merrill Lynch, SunTrust, Emigrant, and

removed to this court based on the parties' complete diversity. SunTrust has moved to dismiss the plaintiff's claims for bailment and negligence, and Emigrant has moved to dismiss all counts against it. A hearing on the motions was held on May 19, 2009.²

ANALYSIS

“The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint; importantly, a Rule 12(b)(6) motion does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (internal quotation marks and alterations omitted). When ruling on such a motion, the court must “accept the well-pled allegations of the complaint as true,” and “construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff.” *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). Following the Supreme Court’s ruling in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007), “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” Moreover, the “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65. However, “[o]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 1969 (quoted in *Goodman v. Praxair*, 494 F.3d 458, 466 (4th Cir. 2007)).

United.

²United had filed a motion to dismiss but advised the court of settlement at the May 19 hearing. Accordingly, that motion will be denied as moot.

A. SunTrust

SunTrust seeks dismissal of the plaintiff's breach of bailment and negligence claims, contending that these causes of action have been supplanted by Maryland's Uniform Commercial Code ("Code") conversion cause of action, Md. Code, Com'l Law § 3-420.³ The Code controls both where it explicitly contradicts pre-existing common law and where the common law would be "plainly inconsistent" with the legislature's intent in enacting the statute. *See Hartford Fire Ins. Co. v. Maryland Nat. Bank, N.A.*, 671 A.2d 22, 32 (Md. 1996); *see also Equitable Life Assur. Soc. of the United States v. Okey*, 812 F.2d 906, 909 (1987) (holding that South Carolina's Commercial Code conversion action subsumed a common law negligence claim because of the overlapping nature of the claims and the conflicting burdens of proof under the Code and common law). When there is no statutory remedy available, however, the Code's loss allocation rules do not apply. *Chicago Title Ins. Co. v. Allfirst Bank*, 905 A.2d 366, 377 (Md. 2005).

As SunTrust does not seek to dismiss all counts against it, discovery on the facts related to SunTrust's conduct must proceed in any event. Thus, in the interest of efficiency, the motion will be denied to permit a more careful consideration of Mr. Goldhammer's claims, including whether a Code conversion action would apply to all of the checks at issue, at a later stage of

³Section 3-420 provides: "The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee." Md. Code, Com'l Law § 3-420(a).

litigation.⁴

B. Emigrant

i. Federal Preemption

Emigrant moves to dismiss all of the plaintiff's claims on the theory that they are preempted by the federal Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693 *et seq.* Specifically, Emigrant suggests that because EFTA applies but imposes no liability, permitting common law causes of action premised on the same conduct would be inconsistent with the federal statute. While Mr. Goldhammer did not allege any EFTA violations, there is little doubt, and it appears to be undisputed (*see* Pl.'s Emigrant Mem. at 12), that the electronic fund transfer at issue falls within EFTA's purview.⁵

EFTA imposes no liability on banking institutions when "a consumer furnishes an access device and grants authority to make transfers to a person (such as a family member or co-worker) who exceeds the authority given . . . unless the consumer has notified the financial institution that transfers by that person are no longer authorized." *See* 12 C.F.R. Pt. 205, Supp. I, Official Staff Interpretation § 205.2 para. 2(m).⁶ Emigrant suggests that this regulation, known as

⁴At the May 19 hearing, counsel for SunTrust suggested that whether Mr. Goldhammer can assert a Code conversion cause of action as to each check at issue may hinge on particular questions of fact.

⁵Md. Code, Coml. Law § 4A-108 expressly provides that state laws regulating fund transfers exclude electronic fund transfers that are covered by the EFTA.

⁶An access device is a "card, code, or other means of access to a consumer's account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers." 12 C.F.R. § 205.2(a)(1). Examples include "debit cards, personal identification numbers (PINs), telephone transfer and telephone bill payment codes, and other means that may be used by a consumer to initiate an electronic fund transfer ... to or from a consumer account." 12 C.F.R. Pt. 205, Supp. I § 205.2 para. 2(a)(1).

“Regulation E,” absolves it of all liability for the allegedly unauthorized transfer because the only logical inference that can be drawn from the plaintiff’s complaint is that Mr. Goldhammer gave Ms. Hayes the requisite access and authority to make the initial transfer.

Looking to the complaint, Mr. Goldhammer alleges that the initial transfer was made “on Plaintiff’s behalf, with his knowledge” and that the proceeds of that transfer were paid to Ms. Hayes. (Compl. ¶ 17.) The complaint also states that Mr. Goldhammer and Ms. Hayes were close family friends and that Ms. Hayes occasionally lived in Mr. Goldhammer’s residence. At the May 19 hearing, Mr. Goldhammer’s counsel further explained that, at times, Ms. Hayes assisted the plaintiff with bill paying and other financial matters. In light of the nature of the relationship at the time of the initial transfer and that the funds were paid to Ms. Hayes, the court is inclined to agree that the only logical inference from the sparsely alleged facts is that Mr. Goldhammer gave Ms. Hayes some method of access to make the initial authorized transfer. Moreover, within that month of May 2007, Mr. Goldhammer suffered the fall that required his extended hospitalization, suggesting that he did not, as Regulation E requires, notify Emigrant that Ms. Hayes was no longer authorized to make transfers. Notably, the plaintiff does not provide an alternative explanation.

In light of those logical inferences, then, Mr. Goldhammer has no remedy under EFTA. He contends, however, that EFTA does not preempt state laws that provide greater protections to consumers and, thus, his common law claims should proceed. *See* 15 U.S.C. § 1693q (providing that EFTA “does not annul . . . the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter A State

law is not inconsistent . . . if the protection such law affords any consumer is greater than the protection afforded by this subchapter”). Emigrant argues that to permit common law causes of action when Regulation E bars an EFTA claim would be in direct conflict and therefore inconsistent with the federal scheme. That issue need not be decided, however, because, as discussed below, none of Mr. Goldhammer’s common law claims otherwise survive the motion to dismiss.

ii. Failure to Plead Sufficient Facts

Count II: Bailment

Under Maryland law, where a bailment is occasioned for the mutual benefit of both parties, a plaintiff makes out a *prima facie* case of negligence by demonstrating that the subject of the bailment has not been returned. *John T. Handy Co., Inc. v. Carman*, 648 A.2d 1115, 1121-22 (Md. App. 1994). To the extent that Mr. Goldhammer’s deposits with Emigrant constitute a bailment, which is doubtful,⁷ it is undisputed that Emigrant transferred plaintiff’s funds to plaintiff’s account at SunTrust. The property at issue – the \$25,000 – was transferred to the plaintiff. As such, he cannot make out his *prima facie* case, and his claim will be dismissed.

Count III: Breach of Contract

Mr. Goldhammer alleges that Emigrant was in breach of contract by transferring money from his account without his knowledge or consent. Even assuming Emigrant had a contractual

⁷*See In re Smith*, 382 B.R. 279, 284 (D. Md. 2006) (noting that a deposit account at a financial institution is not a bailment of cash); *see also Dunlop Sand & Gravel Corp. v. Hospelhorn*, 191 A. 701, 705-06 (Md. 1937) (characterizing the relationship of depositary bank and depositor as debtor-creditor).

obligation to safeguard its customer's funds, *see In re Smith*, 382 B.R. at 284 (explaining that a deposit account at a financial institution is a contract obligating the bank to repay the balance upon the customer's request), the facts in the complaint do not sufficiently allege a breach.

As discussed above, the only reasonable inference that can be drawn from the allegations in the complaint is that Mr. Goldhammer authorized Ms. Hayes to make the initial transfer from his Emigrant account and that, within three months, Ms. Hayes made the allegedly unauthorized transfer. The plaintiff has not offered any alternative scenario; indeed, he has not made any factual assertions regarding who actually made the first authorized transfer or how the second transfer, coming so soon thereafter, was made. Rather, Mr. Goldhammer's cause of action relies on the implication that because the transfer was made without his knowledge and consent, Emigrant must have breached its contractual obligation. While the court must assume all alleged facts are true at this stage of the litigation, the alleged facts must raise a right to relief above the speculative level, *see Twombly*, 127 S.Ct. at 1965, and these do not.

Count IV: Negligence

To establish negligence under Maryland law, the plaintiff must prove: "(1) a duty or obligation under which the defendant is to protect the plaintiff from injury; (2) breach of that duty; and (3) actual loss or injury to the plaintiff proximately resulting from the breach." *Bobo v. State*, 697 A.2d 1371, 1375 (Md. 1997). As to the third element, "[p]roximate cause will only be established if there is a reasonable connection between the defendant's alleged negligence and the plaintiff's injuries." *Washington Metro. Area Transit Auth. v. Reading*, 674 A.2d 44, 52 (Md. App. 1996). In other words, "[p]roximate cause exists where there is a complete continuance and unbroken sequence between the act complained of and the act finally resulting in the injury, so

that one may be regarded by persons of ordinary judgment as the logical and probable cause of the injury.” *Vito v. Sargis & Jones, Ltd.*, 672 A.2d 129, 139 (Md. App. 1996) (internal quotations omitted).

Even assuming Mr. Goldhammer has alleged sufficient facts to satisfy the first two elements of negligence – duty and breach – the facts alleged in the complaint do not satisfy the proximate cause element of negligence. The complaint alleges that within three months of an authorized transfer, Emigrant transferred an additional \$25,000 into the plaintiff’s own account at SunTrust. As discussed above, it can be inferred from the facts alleged in the complaint that Ms. Hayes made the first authorized transfer and was involved in the second transfer as well. Subsequent to the allegedly unauthorized transfer, Ms. Hayes fraudulently obtained the funds when SunTrust paid over allegedly unauthorized checks drawn on that account.

In light of the attending circumstances – Ms. Hayes’s prior authorization to transfer funds from Emigrant, that the funds were transferred into another of plaintiff’s accounts, and that SunTrust’s alleged transgressions ultimately gave Ms. Hayes access to the funds – the plaintiff’s loss was not a logical and probable result of Emigrant’s conduct. Accordingly, the plaintiff has failed to state a claim for negligence.

Count V: Accounting

Regardless of whether Maryland recognizes an accounting remedy in law or only in equity, *see Shah v. HealthPlus, Inc.*, 696 A.2d 473, 476-77 (Md. App. 1997), it appears that an accounting remedy is available only when remedies at law are inadequate. *See P.V. Props., Inc. v. Rock Creek Village Assocs. Ltd. P’ship*, 549 A.2d 403, 409 (Md. App. 1988). Inadequacy in this context suggests the plaintiff’s inability even to identify a potential cause of action due to

the defendant's unwillingness to render an accounting. *See, e.g., id.* at 411 (holding that where the defendant landlord issued an annual statement reflecting expenses but refused to render an itemized bill, an accounting was appropriate because the plaintiff could not determine whether the annual statement reflected the actual expenses incurred by the landlord).

Inadequacy, however, does not equate to a plaintiff's failure to plead sufficient facts to support an action at law. Here, while Mr. Goldhammer has failed to plead sufficient facts to support any of his causes of action, he has provided no justification for a court-ordered accounting from Emigrant. He has not alleged that Emigrant failed to provide him with regular statements regarding his account or has denied him information specific to the allegedly unauthorized transfer. Rather, he merely suggests that Emigrant, together with the other bank defendants, has "failed to render ... an accounting with respect to the funds and assets taken ... from Plaintiff by Defendant Hayes." (Compl. ¶ 44.) Lacking any justification for why further accounting is required, Mr. Goldhammer's claim will be dismissed.

Count VI: Tortious Aiding and Abetting

Under Maryland law, one may be held civilly liable in tort as an aider and abettor to a tort committed by another. *Saadeh v. Saadeh, Inc.*, 819 A.2d 1158, 1170 (Md. App. 2003). "[P]roof of tortious aiding and abetting requires a . . . showing that the aider and abettor engaged in conduct knowing that the criminal (or tortious) act would be the natural consequence of his conduct." *Id.* at 1171 (discussing *Rice v. Paladin, Inc.*, 128 F.3d 233 (4th Cir. 1997), a Fourth Circuit case interpreting Maryland's civil aiding and abetting law).

Given that the allegedly unauthorized transfer was made to plaintiff's account at SunTrust – the same account to which the initial authorized transfer was made less than three

months earlier – and that there has been no suggestion that Emigrant assisted Ms. Hayes in obtaining the funds from the SunTrust account, there are no facts to support a claim of tortious aiding and abetting against Emigrant. The mere allegation that Emigrant transferred money from the defendant’s account without his consent or knowledge fails to raise an inference that Emigrant knew that Ms. Hayes’s criminal and tortious acts would be the natural consequence of its conduct. Accordingly, this claim will be dismissed.

Count VII: Statutory Conversion

Mr. Goldhammer’s conversion claim against Emigrant will likewise be dismissed. Statutory conversion applies only to negotiable instruments. *See* Md. Code, Coml. Law § 3-420(a) (referring solely to the conversion of instruments); *id.* § 3-102(a) (“This title applies to negotiable instruments.”). The transaction at issue is an electronic fund transfer, not a negotiable instrument, thus Mr. Goldhammer cannot maintain a cause of action in statutory conversion.⁸

CONCLUSION

For the foregoing reasons, the court will (1) deny SunTrust’s motion to dismiss plaintiff’s claims for negligence and breach of bailment, and (2) grant Emigrant’s motion to dismiss all

⁸ “[T]he term ‘negotiable instrument’ is limited to a signed writing that orders or promises payment of money.” Md. Code, Coml. Law § 3-104 cmt. 1. An electronic fund transfer, on the other hand, is “any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument,” initiated through electronic, telephonic or other similar means. 15 U.S.C. § 1693a(6).

claims. A separate order follows.

June 8, 2009
Date

/s/
Catherine C. Blake
United States District Judge

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FOR THE DISTRICT OF MARYLAND**

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	:	
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ORDER

For the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that:

1. the motion to dismiss (docket entry no. 7) filed by defendant United Bank is **DENIED** as moot;
2. the motion to dismiss (docket entry no. 10) filed by defendant SunTrust Bank is **DENIED without prejudice**; and
3. the motion to dismiss (docket entry no. 22) filed by defendant Emigrant Bank and Emigrant Bancorp, Inc. is **GRANTED**, and all counts against Emigrant are **DISMISSED with prejudice**.

June 8, 2009
Date

/s/
Catherine C. Blake
United States District Judge