

**7/21/2020**

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

**COUNTY CLERK  
QUEENS COUNTY**

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38  
Justice

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JASUMATI PATEL and RAMCHANDRA PATEL, Index No. 708481/19

Plaintiffs, Motion

Date: October 7, 2019

-against-

M# 1

MASPETH FEDERAL SAVINGS AND LOAN  
ASSOCIATION d/b/a MASPETH FEDERAL  
SAVINGS BANK, ET AL.,

Defendants.

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The following papers numbered EF 5-14 read on this motion by defendant Maspeth Federal Savings and Loan Association d/b/a Maspeth Federal Savings Bank for an order dismissing the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	EF 5-11
Affirmation in Opposition - Exhibits .....	EF 12-13
Replying Affirmation.....	EF 14

Upon the foregoing papers it is ordered that this motion by by defendant Maspeth Federal Savings and Loan Association d/b/a Maspeth Federal Savings Bank ("Maspeth") is decided as follows:

Plaintiffs leased a safe deposit box since the 1980s from defendant Maspeth pursuant to a lease and paid an annual rental fee for the use of the safe deposit box. Plaintiffs stored jewelry and other valuable items in the safe deposit box, which was located at the Rego Park, Queens branch of the bank at 64-19 Woodhaven Boulevard.

Plaintiffs allege that a burglary occurred at Maspeth on Sunday, May 21, 2016 at approximately 1:00 A.M. As a result of the burglary, the contents of multiple safe deposit boxes,

including the plaintiffs, were stolen, and millions of dollars in currency and valuables were taken. According to the plaintiffs, the burglars approached the bank through a hole in a fence located in the back of the bank. They then used a ladder to reach the roof of the bank and cut through the bank's roof with a torch to allow them entry into the vault. Plaintiffs allege that the roof was not fortified with concrete or steel, which allowed the burglars to cut through the roof membrane and penetrate the safe with ordinary hardware and tools. Plaintiffs assert that the alarm was triggered, but no one responded to the alarm. Three suspects were subsequently arrested in connection with the burglary.

Plaintiffs commenced the instant action to recover damages for breach of contract, negligence, gross negligence and violation of General Business Law § 349. Defendant Maspeth now moves to dismiss the complaint pursuant to CPLR 3211(a)(1). In support of the motion, defendant Maspeth first contends that plaintiffs fail to allege any contractual provision that was violated. In addition, Maspeth asserts that plaintiffs merely allege conclusory claims of negligence and gross negligence, which are insufficient. Defendant further states that the plaintiffs have failed to allege any conduct that rises to the level of gross negligence. Finally, defendants argue that the complaint fails to set forth the specific requirements to constitute a valid claim for deceptive business practices under General Business Law § 349.

On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the nonmoving party the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Soodoo v LC, LLC*, 116 AD3d 1033 [2d Dept 2014]; *Alan B. Greenfield, M.D., P.C., v Long Beach Imaging Holdings, LLC*, 114 AD3d 888 [2d Dept 2014].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010], quoting *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

To maintain an action for breach of contract, a plaintiff must establish the existence of a contract, his performance pursuant to the contract, the defendant's breach of that contract and damages resulting from the breach. (*DeGuaman v American Hope Group*, 163 AD3d 915, 917 [2d Dept 2018]; *Kuzma v Protective Ins. Co.*, 104 AD3d 820, 821 [2d Dept 2013]; *Harris v Seward Park Hous.*

Corp., 79 AD3d 425, 426 [1st Dept 2010].)

In the case at bar, plaintiffs have sufficiently pled a cause action for breach of contract. The complaint alleges that "in consideration for Plaintiff's payment of annual rental fees, Defendant Maspeth Bank, agreed to safeguard and store their property in their safe deposit boxes located at the Rego Park branch." Further, the complaint alleges that Maspeth represented to the plaintiffs that the safe deposit boxes were safe and secure. Also, the complaint states that Maspeth's failure to safeguard plaintiffs' personal items constitute a breach of its obligations under the lease for the safe deposit box. Furthermore, the plaintiffs relied on the representations of Maspeth that its property would be secure in the safe deposit box. Thus, affording the plaintiff the benefit of every favorable inference, the court finds that the complaint pleads a cause of action for breach of contract. Moreover, a bailee, such as Maspeth, can be held liable for breach of contract for the failure to return the goods subject to the bailment. (see *Rodriguez v Central Parking Sys. of N.Y., Inc.*, 10 Misc 3d 435, 439, *affd* 17 Misc 3d 108 [App Term 1<sup>st</sup> Dept 2007].)

With respect to the cause of action for negligence, in order to recover in a negligence cause of action, a plaintiff must establish the existence of a duty owed by the defendant towards the plaintiff, a breach of the duty and injury to the plaintiff as a result thereof. (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981].)

In the matter at hand, the complaint sets forth a cause of action for negligence. The complaint alleges that defendant Maspeth failed to exercise reasonable care in safeguarding the contents of the safe deposit box. According to the complaint, defendant Maspeth failed to establish required security measures in the bank and failed to include required security devices. Moreover, the plaintiffs can make out a prima facie case of negligence by showing that they deposited their property with the defendant and the latter is unable to return it. (*Sun Yau Ko v Lincoln Sav. Bank* 99 AD2d 943, 943 [1<sup>st</sup> Dept 1984], *affd* 62 NY2d 938 [1984].)

Turning to the claim for gross negligence, gross negligence consists of conduct that "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014]; *Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency Inc.*, 297 AD2d 430, 431 [3d Dept

2002][citations omitted].) A party is "grossly negligent" when it fails to exercise even slight care or slight diligence. (*Food Pageant, Inc. v Consolidated Edison Co.*, 54 NY2d 167, 172 [1981]; *Goldstein v Carnell Assocs, Inc.*, 74 AD3d 745, 747 [2d Dept 2010].)

At bar, the complaint alleges certain facts amounting to gross negligence by the defendant, including its failure to properly respond to the alarm. According to the complaint, the alarm was initially triggered at 1:00 A.M., indicating a breach at the bank. It was reset at 1:30 A.M. and was triggered again at 2:00 A.M. Plaintiffs assert that none of defendant's agents or employees responded to the alarm. Defendant clearly did not have proper safety protocols in place. Such failure, at an institution such as a bank, certainly constitutes gross negligence.

Plaintiff also alleges that defendant Maspeth engaged in deceptive business practices in violation of General Business Law § 349.

General Business Law § 349 prohibits deceptive and misleading business practices. (*Karlin v IVF Am.*, 93 NY2d 282, 290 [1999].) In order to assert a prima facie cause of action under General Business Law § 349, a plaintiff must be able to establish that the defendant intended to deceive its customers to the customers' detriment and was successful in doing so. (*Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008].) Further, to assert a claim under General Business Law § 349(a), a party must plead that (i) the challenged conduct was consumer oriented, (ii) the conduct was materially misleading and (iii) he sustained damages. (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d 1169, 1172 [2d Dept 2012]; *Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2d Dept 2005].) However, intent to defraud is not an element of the statute. (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999].)

Here, the complaint alleges a claim for Deceptive Business Practices under General Business Law § 349. Defendant falsely represented to the plaintiffs, as well as other customers, that the safe deposit boxes at the bank were safe and secure. Thus, its actions were clearly consumer oriented. Further, the representation that the safe deposit box was secure was materially misleading inasmuch as the valuables of the plaintiffs were stolen from the safe deposit box. Indeed, the plaintiffs' purpose in storing their valuables in the safe deposit box was to ensure their safety.

Accordingly, this motion by the defendant Maspeth to dismiss the complaint is denied.

Date: July 20th, 2020



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CARMEN R. VELASQUEZ, J.S.C.

**FILED**

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