

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARJORIE ROSENTHAL BLOOM)	
)	
Plaintiff,)	
)	
v.)	Civil Case No. 22-01250 (RJL)
)	
PNC BANK, N.A.)	
)	
Defendant.)	


MEMORANDUM OPINION
(February 28, 2023) [Dkt. # 13]

Plaintiff Marjorie Rosenthal Bloom (“Bloom” or “plaintiff”) is a customer of PNC Bank, N.A. (“PNC”) and the alleged victim of a technical support scam. Bloom filed suit against PNC for breach of contract and negligence related to PNC’s failure to intervene in the suspicious banking activity connected to Bloom’s personal PNC checking account. PNC now moves to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The Motion to Dismiss as it applies to the breach of contract claim is DENIED but the Motion to Dismiss as it applies to the negligence claim is GRANTED.

BACKGROUND

Bloom is a 75-year-old widow and a retired government employee. *See* Compl. at ¶17 [Dkt. 1] (“Compl.”). She has been a client of PNC since 2009, when she opened an account and entered into the PNC Account Agreement for Personal Checking, Savings and Money Market Accounts (“PNC Account Agreement”). *Id.* at ¶2. From 2009 through 2017,

Bloom used her account as an ordinary checking account, receiving regularly deposited income and making everyday purchases. *Id.* at ¶26.

In the spring of 2021, Bloom was the victim of a computer scam. *Id.* at ¶18. Fraudsters posing as a Microsoft Engineer and a PNC fraud investigator instructed her to liquidate the financial assets in her PNC bank account and wire transfer her life savings of \$661,000 to a third-party account at Signature Bank in New York. *Id.* at ¶¶19-25. Bloom executed several deposits and wire transfers of large sums of money at PNC locations from April to May 2021. *Id.* at ¶27. According to her Complaint, the five wire transfers were inconsistent with Bloom's historic account activity. *Id.* at ¶¶26-27. Despite the unusual nature of the wire transfers, none of the PNC employees who helped execute the wire transfers questioned Bloom about the large amount of money being transferred or inquired about the purpose of Bloom's transactions. *Id.* at ¶¶28-30. The one employee who did express concern questioned the potential legitimacy of a check for over \$230,000 and called the headquarters office to ensure the availability of the deposited funds. *Id.* at ¶29. Otherwise, the employee did not further investigate the transfer and took no note of the previous wire transfers for large sums of money. *Id.* Those funds were later transferred from Signature Bank to an account with the cryptocurrency trading platform Coinbase, where they were converted to cryptocurrency, and transferred to offshore accounts on the Binance crypto-trading platform in the Cayman Islands. *Id.* at ¶¶24-25. These assets cannot be recovered. *Id.*

On May 5, 2022, Bloom filed a complaint against PNC for breach of contract and negligence. *See* Compl. Bloom seeks compensatory damages of \$661,000 and attorneys' fees. Defendants have moved to dismiss plaintiff's complaint under Federal Rules of Civil Procedure 12(b)(6). *See* Mot. of Def., PNC Bank, N.A., to Dismiss the Compl. [Dkt. 13] ("MTD"). Briefing is now complete. *See* Pl. Marjorie Rosenthal Bloom's Opp'n to Def. PNC Bank, N.A.'s Mot. to Dismiss the Compl. [Dkt. 15] ("Pl.'s Opp'n"); Def. PNC Bank's Reply in Further Supp. of Its Mot. to Dismiss the Compl. [Dkt. 16] ("Def.'s Reply").

LEGAL STANDARD

A Rule 12(b)(6) motion "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A claim is facially plausible when the allegations contained in the complaint allow the Court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although the standard does not amount to a "probability requirement," it does require more than a "sheer possibility that a defendant has acted unlawfully." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not sufficient to state a claim. *Id.*

When resolving a Rule 12(b)(6) motion, the Court "assumes the truth of all well-pleaded factual allegations in the complaint and construes reasonable inferences from

those allegations in the plaintiff's favor[.]” *Sissel v. U.S. Dep’t of Health & Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014).

“Although Maryland statutes and case law do not constitute the law of the District of Columbia, courts customarily look to Maryland law as ‘especially persuasive authority’ in determining how the District of Columbia courts would rule on a question of law.” *Potomac Plaza Terraces v. QSC Prods., Inc.*, 868 F.Supp. 346, 352 n.9 (D.D.C. 1994); *Conesco Indus., Ltd. v. Conforti & Eisele, Inc.*, 627 F.2d 312, 315-16 (D.C. Cir. 1980) (“since there is no District law on point, we should look to Maryland law first . . . because the District of Columbia derives its common law from that state and because District of Columbia courts have in the past looked to Maryland law for guidance.”). Indeed both parties have agreed to look to Maryland cases for guidance because there is limited applicable D.C. case law concerning the relevant Uniform Commercial Code (“U.C.C.”) provisions. *See* MTD at 7-8; Pl.’s Opp’n at 11 n.7.

ANALYSIS

PNC moves to dismiss Bloom’s claims for failure to state a claim for both breach of contract as well as for negligence. Bloom disagrees on both counts. For the reasons discussed below, the Court agrees with Bloom that she has plausibly pled her breach of contract claim. However, the Court agrees with PNC that Bloom has failed to make a legally cognizable claim of negligence.

a. Breach of Contract

PNC argues that plaintiff's breach of contract claim should be dismissed for two reasons: 1) Article 4A of the U.C.C. preempts plaintiff's contract claim; 2) plaintiff cannot sufficiently plead a contractual duty. MTD at 5-15. Plaintiff counters that Article 4 does not preempt her claims and that she does indeed state a claim for breach of contract. For the following reasons, I agree with the plaintiff's argument.

First, Article 4 does not preempt plaintiff's contract claim because plaintiff's claims fall outside the scope of Article 4A's express provisions. Article 4A of the U.C.C. governs fund transfers, also known as wire transfers. D.C. Code § 28:4A-102 (2018). Article 4A is "intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties *in any situation covered by particular provisions of the Article.*" D.C. Code § 28:4A-102 cmt. (emphasis added). Indeed, the 11th Circuit, reviewing claims against a bank related to wire transfers, held that Article 4A of the U.C.C. is *not* the exclusive remedy for wire transfer related claims. *See Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1274-75 (11th Cir. 2003). Although parties should look first to Article 4A for guidance resolving wire transfer related claims, the Article "has not completely eclipsed the applicability of common law in the area." *Sheerbonnet, Ltd. v. American Exp. Bank, Ltd.*, 951 F.Supp. 403, 407-08 (S.D.N.Y. 1995). Situations not covered by a particular provision of an Article are "not the exclusive province of the Article" and the only restraint on the plaintiff seeking such relief is that the plaintiff should not "resort to principles of law or equity outside of Article 4A [which are] inconsistent with provisions within the Article." *Id.* at 407; *see also Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley*, 999 F.Supp.

34, 48-49 (D.D.C. 1998) (Attridge, J.) (holding that the Court can turn to common law claims when a disputed wire transfer fell outside the purview of U.C.C. Article 4A). “[W]here the provisions do not venture, the claimant ... may seek other guides, statutory or judicial.” *Sheerbonnet.*, 951 F.Supp. at 408.

Undaunted, PNC argues that the U.C.C. provides a comprehensive statutory scheme for rights and remedies and that the U.C.C. does not impose liability on banks for wire transfers actually ordered and authorized by the accountholder. *See* MTD at 8-9; *Mahabare v. SunTrust Bank*, 573 F.Supp.3d 1006, 1011-12 (D. Md. 2021). Unfortunately, PNC’s argument is unpersuasive! Here, none of Article 4A’s specific provisions encompass PNC’s conduct or the alleged harm it caused Bloom. Article 4A applies only to instances where a funds transfer is not authorized, or if there is an error in the actual mechanics of executing a funds transfer. *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 89 (2d Cir. 2010).¹ Bloom does not allege that the wire transfers here were unauthorized or that there were any errors in PNC’s execution of the wire transfers. Instead, she alleges that PNC repeatedly failed to respond appropriately to clear indications that Bloom was being defrauded, *despite* PNC’s extensive institutional knowledge about elder financial exploitation. *See* Pl.’s Opp’n at 6-7. Because Article 4A preemption only applies when a common law claim fits squarely within the terms of the Article, Bloom’s claims are not precluded by the U.C.C.

¹ For a more specific breakdown of Article 4A’s specific provisions, *see* Pl.’s Opp’n at 5-6 and *Ma*, 597 F.3d at 89-90.

Second, plaintiff sufficiently pleads a contractual claim because the U.C.C. establishes an implied duty of ordinary care in an account agreement between a bank and its customer. While there is limited relevant D.C. law, Maryland law recognizes an implied duty of ordinary care between a bank and its customers under Articles 3 and 4 of the U.C.C. Article 3 of the U.C.C. governs negotiable instruments. D.C. Code § 28:3-102 (2018). Article 4 governs bank deposits and collections. *Id.* at § 28:4-102. Article 4A governs wire transfers. *Id.* at § 28:4A-102. Collectively, Articles 3, 4, and 4A govern the retail services that banks offer customers.

Under Maryland law, bank customers may enforce the duty of ordinary care through an action for breach of contract. In *Schultz v. Bank of America, N.A.*, the Court of Appeals of Maryland held that the U.C.C. imposes an implied contractual duty of ordinary care in an account agreement between a bank and its customer that “neither party can disclaim.” 413 Md. 15, 37-38 (2010). As a result, bank customers “may enforce the duty of ordinary care ... through an action for breach of contract.” *Id.* at 38; *see also G&D Furniture Holdings, Inc. v. SunTrust Bank*, No. TDC-16-2020, 2017 WL 2963350, *3 (D. Md. July 11, 2017) (recognizing that in Maryland a “depositor may sue in an action for breach of contract to enforce the bank’s contractual obligation to use ordinary care”).

PNC next argues that plaintiff’s breach of contract claim should be dismissed because the plaintiff fails to establish a legally actionable duty owed by PNC.² I disagree.

² Defendant argues that plaintiff fails to establish that PNC had an actionable duty stemming from D.C. common law, the Bank Secrecy Act (“BSA”), PNC’s internal policies and procedures, Maryland’s Project SAFE, or the ABA Foundation Survey. *See* MTD at 9-15.

The text of the U.C.C. establishes that Bloom's PNC Account Agreement includes an implied duty of ordinary care that applies to PNC's alleged wrongdoing. Bloom's PNC Account Agreement governs her PNC checking, savings, and money market accounts. *See* Compl., Ex. A at 3. Through her PNC Account, Bloom was able to write checks,³ as governed by Article 3, make deposits,⁴ as governed by Article 4, and order wire transfers, as governed by Article 4A. Several provisions establish a duty of ordinary care. Article 3 defines ordinary care as the "observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." D.C. Code § 28:3-103(a)(8). The ordinary care definition applies to both Article 3 and Article 4. *Id.* at § 28:3-103 cmt. 5. In Article 4, parties to the agreement "cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care" through an agreement. *Id.* § 28:4-103. As such, Bloom effectively argues that the U.C.C. establishes a duty of ordinary care implicit in her PNC Account Agreement.

b. Negligence

Next, PNC contends that the Independent Duty Rule bars Bloom's negligence claims because Bloom fails to allege a negligence claim independent of her contractual relationship with PNC. MTD at 20-21. In essence, Bloom merely characterizes negligence as an alternative to breach of contract, not an independent cause of action. Pl.'s Opp'n at

³ *See* Compl., Ex. A at 5-7.

⁴ *See* Compl., Ex. A at 4, 18-19.

17-18. Unfortunately for Bloom, that is not good enough under the Independent Duty Rule. How so?


The Independent Duty Rule requires that “[T]he tort must exist in its own right independent of the contract, and any duty upon which the tort is based must flow from considerations other than the contractual relationship. The tort must stand as a tort even if the contractual relationship did not exist.” *Carter v. Bank of Am., N.A.*, 888 F.Supp.2d 1, 15 (D.D.C. 2021) (Howell, J.); *see also Cannon v. Wells Fargo Bank, N.A.*, 952 F.Supp.2d 1, 10 (D.D.C. 2013) (Kollar-Kotelly, J.). In *Hawthorn v. Rushmore Loan Mgmt. Servs., LLC*, my colleague Judge Moss dismissed a similar negligence claim. No. 20-393 (RDM), 2021 WL 3856626 (D.D.C. Aug. 30, 2021) (J., Moss). He reasoned that because the plaintiff’s negligence claims were grounded “at least in large part, on the premise that [the defendant] owed her various duties arising from the [agreement] and other contractual documents,” plaintiff therefore failed to allege properly that her negligence claims could exist independent of the contractual relationship. *Id.*

Here, Bloom’s negligence claim arises entirely from her contractual relationship with PNC. MTD at 20. As such, PNC points out that Count II of the complaint, the negligence claim, “simply re-packages the Count 1 contract claim as a tort for a second bite at the apple.” *Id.* PNC also notes that none of the sources cited in Bloom’s Complaint – the BSA, PNC’s internal policies and procedures, Maryland’s Project SAFE, and the ABA Foundation Survey – establishes a relevant duty of care independent of Bloom’s Agreement with PNC. *Id.* In response, Bloom merely contends that she clearly pleaded

breach of contract and negligence in the alternative. Pl.'s Opp'n at 17. Indeed, she concedes that both her breach of contract and negligence claims "are based on the same underlying factual allegations," *id.* at 18, and fails to demonstrate how her negligence claim can "stand as a tort even if the contractual relationship did not exist," *Carter*, 888 F.Supp.2d at 15. As such, her negligence claim fails to stand independently of the contractual PNC Account Agreement and is barred by the Independent Duty Rule.

CONCLUSION

For the forgoing reasons, this Court GRANTS the Motion to Dismiss with respect to Bloom's negligence claim. However, the Court DENIES the Motion to Dismiss with respect to Bloom's breach of contract claim.


RICHARD J. LEON
United States District Judge