State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 31, 2020 527861

SHIRLEY HE,
Appellant,
v MEMORANDUM AND ORDER

APPLE, INC.,
Respondent,
et al.,
Defendants.

Calendar Date: November 17. 2020

Before: Egan Jr., J.P., Pritzker, Reynolds Fitzgerald and Colangelo, JJ.

Shirley He, Clifton Park, appellant pro se.

Schiff Hardin LLP, New York City (Katia Asche of counsel), for Apple, Inc., respondent.

Colangelo, J.

Appeal from an order of the Supreme Court (Bruening, J.), entered October 2, 2018 in Saratoga County, which, among other things, granted defendants' motions to dismiss the amended complaint.

Plaintiff fell victim to a scam in which individuals posing as federal tax officials telephoned her, demanded payment for unpaid taxes and directed her to make that payment by providing redemption codes from iTunes gift cards. She proceeded to purchase several thousand dollars worth of iTunes

gift cards and gave the codes to the scammers. After realizing that she had been duped, plaintiff reported the matter to local police and asked for a refund from defendant Apple, Inc. and the retailers from whom she had purchased the gift cards. The retailers and Apple denied her requests, citing the policy that lost or stolen gift cards are nonrefundable.

Plaintiff then commenced this action, asserting claims for fraud, unjust enrichment and negligence against Apple, Inc. and related individuals and entities (hereinafter collectively referred to as Apple) and claims for fraud and unjust enrichment against the retailers and related individuals and entities (hereinafter collectively referred as to the retailers). Apple moved to dismiss the amended complaint following the service of an answer on behalf of Apple, Inc., while the retailers filed similar motions prior to serving an answer. Plaintiff then cross-moved for leave to serve a second amended complaint alleging a claim that Apple had engaged in deceptive business practices. Supreme Court granted the motions by Apple and the retailers and denied plaintiff's cross motion. Plaintiff appeals and, as she has settled her claims against the retailers, we focus upon her arguments regarding the claims against Apple.

We affirm. In reviewing a motion to dismiss the complaint for failure to state a cause of action (see CPLR 3211 [a] [7]), a court accepts the facts as alleged in the complaint as true, affords every possible inference to the plaintiff and determines only whether the allegations fall within a cognizable claim (see Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 38 [2018]; Simkin v Blank, 19 NY3d 46, 52 [2012]; Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Affidavits or other proof submitted by the plaintiff may be used to remedy any defect in the complaint (see Carlson v American Intl. Group, Inc., 30 NY3d 288, 298 [2017]; Leon v Martinez, 84 NY2d at 88). Dismissal is nevertheless appropriate where a claim is premised upon "bare legal conclusions," where the alleged facts do not support "an element of the claim," or where "the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (Connaughton v Chipotle Mexican Grill, Inc., 29 NY3d

137, 141-142 [2017] [internal quotation marks and citations omitted]; see Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, PLLC, 155 AD3d 1218, 1219 [2017], affd 31 NY3d 1090 [2018]). Applying that liberal standard here, we agree with Supreme Court that plaintiff failed to state any viable claim against Apple.

A fraud claim, which must be pleaded with particularity (see CPLR 3016 [b]; Carlson v American Intl. Group, Inc., 30 NY3d at 310), requires allegations of "misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception and resulting injury" (Lusins v Cohen, 49 AD3d 1015, 1017 [2008] [internal quotation marks and citation omitted]; accord Doller v Prescott, 167 AD3d 1298, 1300 [2018]; see Ambac Assur. Corp. v Countrywide Home Loans, Inc., 31 NY3d 569, 578-579 [2018]). Plaintiff acknowledged that Apple was not involved with the scammers and pointed to no misrepresentations by it, instead asserting only that it had profited from the gift card sales and that its policy of not issuing refunds "motivated" the fraudulent acts of the scammers. Accordingly, absent allegations of any "misstatements or misrepresentations made specifically by [Apple's] representatives to [plaintiff], as required by CPLR 3016 (b)," plaintiff failed to state a claim for fraud against Apple (Moore v Liberty Power Corp., LLC, 72 AD3d 660, 661 [2010], lv denied 14 NY3d 713 [2010]; see Bynum v Keber, 135 AD3d 1066, 1067-1068 [2016]).

"A cause of action for unjust enrichment is stated where a plaintiff shows (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (Doller v Prescott, 167 AD3d at 1301 [internal quotation marks and citations omitted]; see New York State Workers' Compensation Bd. v Program Risk Mgt., Inc., 150 AD3d 1589, 1594 [2017]). The third element is the key and, although Apple profited from plaintiff's purchase of gift cards, there is nothing inherently inequitable in it making money from a legitimate transaction (see Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011]; Schoch v Lake Champlain OB-GYN, P.C.,

184 AD3d 338, 344 [2020], lv granted 35 NY3d 918 [2020]; Kingston Oil Supply Corp. v Smith, 101 AD3d 1569, 1570 [2012]). Plaintiff made no allegations that those profits rightly belong to her or that circumstances existed – such as Apple playing a role in her falling victim to scammers or having promised to make her whole in the event that she did – that would render it inequitable for Apple to keep them. It follows that plaintiff failed to state a claim for unjust enrichment against Apple (see Mandarin Trading Ltd. v Wildenstein, 16 NY3d at 182-183; DerOhannesian v City of Albany, 110 AD3d 1288, 1291 [2013], lv denied 22 NY3d 862 [2014]; Baron v Pfizer, Inc., 42 AD3d 627, 630 [2007]).

Supreme Court also properly dismissed the negligence claim against Apple, which was premised upon its failure to suspend the scammers' iTunes account after learning of their conduct. "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (Pulka v Edelman, 40 NY2d 781, 782 [1976]) and, even if Apple was in a position to protect plaintiff from the scammers, it would ordinarily have no duty "to control the conduct of third persons to prevent them from" harming her (Purdy v Public Adm'r of County of Westchester, 72 NY2d 1, 8 [1988]; see Malik v Ultraline Med. Training, P.C., 177 AD3d 515, 515 [2019]). Inasmuch as plaintiff failed to allege that Apple had "actual control" over the scammers' actions or a relationship with plaintiff that obliged it to protect her from them, there are no indications of a special relationship that would create such a duty (Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 233 [2001]; accord Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc., 28 NY3d 731, 736 [2017]). To the contrary, plaintiff's own motion papers reflect that Apple made clear to purchasers that iTunes gift cards were nonrefundable, that Apple disavowed any responsibility for stolen gift cards and that Apple reserved the right, but did not assume the obligation, to close a user's iTunes account upon learning of fraudulent activity. Accordingly, as plaintiff failed to allege any facts suggesting a duty on Apple's part to protect her from the acts of the

scammers, she did not state a cause of action for negligence (see Malik v Ultraline Med. Testing, P.C., 177 AD3d at 515).

Finally, Supreme Court did not abuse its discretion in denying plaintiff's cross motion for leave to serve a second amended complaint asserting a claim for deceptive business practices against Apple (see General Business Law § 349), as she did not attach the proposed pleading as required and failed to give any reason to believe that the claim had merit (see CPLR 3025 [b]; Curtin v Community Health Plan, 276 AD2d 884, 886 [2000]). Plaintiff's remaining contentions, to the extent that they are properly before us, have been considered and found to lack merit.

Egan Jr., J.P., Pritzker and Reynolds Fitzgerald, JJ., concur.

ORDERED that the order is affirmed, without costs.

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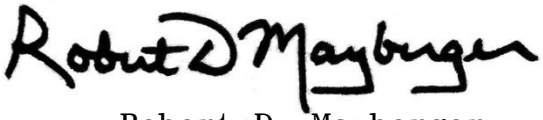

Robert D. Mayberger
Clerk of the Court