

STATE OF NEW YORK  
SUPREME COURT COUNTY OF MONROE

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JAMES H. CATOR,,

Plaintiff,

DECISION AND ORDER

v.

Index #2005-8851

NEIL J. BAUMAN and WALL STREET  
FINANCIAL GROUP, INC.,  
Defendant.

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Defendant, Wall Street Financial Group, Inc. ("Wall Street"), has moved pursuant to CPLR §3211(a)(5 and 7) to dismiss plaintiff's complaint in its entirety. Wall Street's motion to dismiss is joined by defendant Neil J. Bauman, who also submits his own notice of motion and supporting affidavit seeking dismissal pursuant to CPLR §3211(a)(5, 7 and 8). Plaintiff commenced this action to recover investment losses he allegedly sustained as a result of defendant Bauman's poor investment advice. Plaintiff specifically alleges that Bauman failed to recommend an investment vehicle suitable for plaintiff's stated goals and risk tolerance, and thereafter failed to adequately monitor his account and recommend investment changes when the market took a downward turn. As Bauman's employer, plaintiff alleges that Wall Street had a duty to oversee Bauman and is responsible for his actions or inactions within the scope of his employment.

In his complaint, plaintiff sets forth the following five causes of action: (1) breach of fiduciary duty, (2) breach of contract, (3) unsuitability, (4) negligence, and (5) failure to supervise against defendant Wall Street. Plaintiff became involved with Bauman and Wall Street upon his retirement from Xerox in 1999. See Affidavit of J. Cator, ¶2. At that time, plaintiff was given the option of receiving periodic payments out of his pension or taking the entire pension proceeds in the form of a lump sum payment totaling \$447,891.94. Plaintiff opted to take the lump sum and place the proceeds into investments. Id. at ¶3. It is plaintiff's allegation that he intended to invest "fairly conservatively" to reduce the risk of loss of his entire pension. Id. at ¶4.

Bauman, also an employee of Xerox at the time of plaintiff's retirement, came to plaintiff's attention as a broker who might be able to assist with his investment of the pension proceeds. Id. at ¶5. Plaintiff alleges that Bauman told him he worked for Wall Street and that he would work with plaintiff "to invest and manage [the] funds in a manner consistent with [his] goals." Id. at 6. Plaintiff met with Bauman on August 11, 1999 to discuss investment goals. Plaintiff alleges that he informed Bauman he wanted to invest with minimal risk and that Bauman recommended that all of the funds go into a variable annuity. Id. at ¶7. Plaintiff alleges that after the funds were invested, he kept in

contact with Bauman concerning his investment and his options. Id. at ¶10. When plaintiff noticed his funds were not performing well, he contacted Bauman and alleges that Bauman indicated that he "needed to give the annuity a chance to turn around" and that he should not be discouraged. Id. at ¶13. Over the next two and a half years, plaintiff alleges he and Bauman remained in contact and that Baum visited him at his home in Middlesex, New York on at least four occasions to discuss the account. Id. at ¶14. Plaintiff alleges that it was based upon these meetings and Bauman's continuing advice with respect to the annuity that he kept the money in the annuity until February 2003. At that time, plaintiff states that he realized Bauman was not looking after his best interests, so he withdrew the funds to invest elsewhere. Id. at ¶15. At the time of plaintiff's withdrawal, the value of the annuity had dropped to \$161,639.09. Id.

#### **Motion to Dismiss**

##### **CPLR §3211(a)(8)**

Bauman moves to dismiss plaintiff's complaint on the basis of CPLR §3211(a)(8), which allows for dismissal where "the court has not jurisdiction of the person of the defendant." The affirmation of Steven M. Donsky, Esq., offered in support of Bauman's motion to dismiss, states: "upon information and belief defendant, Bauman, was not served personally and was served by substitute service. [S]uch service as executed may not be

sufficient to give the Court personal jurisdiction on Defendant, Bauman.” Affirmation of S. Donsky, ¶4. Bauman offers no evidence to support his claim that the substitute service effected by plaintiff was insufficient. The court does not have before it the affidavit of service of Bauman or any further rationale for why substitute service, specifically allowed by the New York State legislature in CPLR §308, is insufficient to confer the court’s jurisdiction on this particular defendant. As Bauman’s motion to dismiss pursuant to CPLR §3211(a) (8) completely wants of any proof to support the claim, the motion is denied.

**CPLR §3211 (a) (5)**

Dismissal under CPLR §3211(a) (5) is warranted where, among other bases, the applicable statute of limitations prevents the action from being maintained. Where a party moves for dismissal on this ground, “it is that party’s burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations has elapsed.” Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc., 168 A.D.2d 822, 823 (3d Dept. 1990). See also, Minichello v. Northern Assur. Co. of Amer., 304 A.D.2d 731 (2d Dept. 2003); In re Rodken, 270 A.D.2d 784 (3d Dept. 2000); Doe v. Roe, 5 Misc.3d 1032(A) (Sup. Ct. Nassau Co. 2004).

Defendants contend that the timeliness of plaintiff’s claims for purposes of the statute of limitations must be measured from

August 10, 1999. As defendants further allege that plaintiff's claims "essentially" sound in tort, defendants state that the causes of action accrued when the injury occurred. Defendants conclude that plaintiff's causes of action are time-barred by the three year statute of limitations set forth in CPLR §214.

***First Cause of Action- Breach of Fiduciary Duty***

Defendants maintain that plaintiff's first cause of action for breach of fiduciary duty is governed by the three year statute of limitations. Defendants acknowledge that a breach of fiduciary duty claim may be governed by either a three or six year statute of limitations, dependent upon the nature of relief sought. In this instance, defendants allege that the three year limitations period applies because the claim seeks monetary relief. See Loengrad v. Santa Fe Ind., Inc., 70 N.Y.2d 262, 266 (1987); Bouley v. Bouley, 19 A.D.3d 1049 (4<sup>th</sup> Dept. 2005); Escava v. Escava, 9 Misc.3d 1101(A) (Sup. Ct. Kings Co. 2005); Geren v. Quantum Chemical Corp., 832 F.Supp. 728, 735 (S.D.N.Y. 1993). As the claims accrued on August 10, 1999, defendants conclude that the statute expired three years later, on August 10, 2002. Under defendants' theory, as the instant action was commenced on August 9, 2005, the first cause of action is time-barred.

Plaintiff responds to this argument, alleging that a reading of Sears, Roebuck & Co. v. Enco Assoc., Inc., 43 N.Y.2d 389, 396 (1977), a case cited by the Court of Appeals in Loengrad,

confirms that causes of action having their genesis in a contractual relationship are afforded a six year statute of limitations. Sears, Roebuck, a case which has been overruled at least in part by the New York State Legislature via an amendment to CPLR §214(6), effective September 3, 1996 (see e.g. Brzozowski v. Zio Italian Bistro, 178 Misc.2d 761 (Sup. Ct. Kings Co. 1998)), does not provide plaintiff with the longer six year statute for which it hopes. The portion of Sears, Roebuck cited by counsel for plaintiff relates specifically to a malpractice claim having a genesis in contract law. See Plaintiff's Memo of Law at 4. That is the very proposition for which Sears, Roebuck was abrogated by the legislature. See Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d 20 (2001); Brothers v. Florence, 95 N.Y.2d 290, 300 (2000); Brzozowski, 178 Misc.2d at 763.

Plaintiff's first cause of action seeks monetary relief. See Plaintiff's Complaint ¶20. As such, the Court of Appeals' decision in Loengrad is controlling and the statute of limitations applied to the breach of fiduciary duty claim stated in plaintiff's complaint is three years. Plaintiff's first cause of actions is barred by the statute of limitations, and defendants' motion to dismiss that cause of action pursuant to CPLR §3211(a)(5) is granted. As such, the motion to dismiss pursuant to CPLR §3211(a)(7) is rendered moot on the first cause

of action. Cf., De Kwiatkowski v. Bear Stearns & Co., 306 F.3d 1293 (2d Cir. 2002).

***Second Cause of Action- Breach of Contract***

Defendants claim that the second cause of action for breach of contract must be dismissed because it is in essence simply a malpractice claim governed by CPLR §214(6) providing for a three year statute of limitations. In support of their claim, defendants cite Kliment v. McKinsey & Co., 3 A.D.3d 143 (1<sup>st</sup> Dept. 2004), aff'd 3 N.Y.3d 538 (2004). In Kliment plaintiff's breach of contract claim was dismissed by the court which held that the claim was governed by a three year statute, not a six year statute. The Court of Appeals explained its decision, stating that even where there is an allegation that an express term of a contract has been breached, "[m]aking such ordinary obligations express terms of an agreement does not remove the issue from the realm of negligence . . . nor can it convert a malpractice action into a breach of contract action." Kliment, 3 N.Y.3d at 542-43. The Court of Appeals therefore applied the three year statute of limitations applicable to non-medical professional malpractice actions. See CPLR §214(6). See also, Kliment, 3 N.Y.3d at 539; County of Rockland v. Kaeyer, Garment & Davidson Architects, P.C., 309 A.D.2d 891 (2d Dept. 2003); 6645 Owners Corp. v. GMO Realty Corp., 306 A.D.2d 97 (1<sup>st</sup> Dept. 2003).

As such, defendants' theory is dependent upon a finding that

Bauman was a "professional" who committed malpractice. Whether financial advisors or investment specialists such as Bauman are subject to a professional malpractice claim is an issue the Court of Appeals has thus far declined to determine. See EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 23 (2005) (stating that the court "leave[s] open the question whether a financial advisor or underwriter may ever be treated as a professional for purposes of such liability"). In leaving this issue open for future analysis and determination, the Court of Appeals cites Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d 20 (2001), a case in which the court grappled with the inquiry of "who is a 'professional' within" the meaning of CPLR §214(6). The Court of Appeals in Chase Scientific referred to architects, engineers, lawyers and accountants, professions commonly understood to be "learned professions," to define the term "professional."

[T]hose qualities include extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards. . . . Additionally, a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients.

Id. at 29. The Court of Appeals determined that this definition recognized "the Legislature's intention to benefit a discrete group of persons affected by the concerns that motivated the

shortened statute of limitations.” Noting the “rise of large numbers of skilled ‘semi-professions,’” the court observed that a “broader definition would, for the future, make it hard to draw meaningful distinctions and the groups covered by CPLR 214(6) would quickly proliferate.” Id. Having set forth these criteria, the Court of Appeals determined that insurance agents and brokers, the group of individuals before the court for determination in Chase Scientific, did not fall within the specter of CPLR §214(6). In declining to extend CPLR §214(6) to cover them, the court stated:

While agents and brokers must be licensed, they are not required to engage in extensive specialized education and training; rather, a person who has been regularly employed by an insurance company, agent or broker for at least one year during the three years preceding the date of license application may qualify to be a broker. . . Nor are insurance agents and brokers bound by a standard of conduct for which discipline might be imposed. . . Moreover, . . . an insurance agent has a common-law duty to obtain requested coverage, but generally not a continuing duty to advise, guide or direct a client based on a special relationship of trust and confidence....

Id. at 30.

Plaintiff alleges that Bauman, an investment specialist, is not a “professional” within the meaning of CPLR §214(6). Plaintiff notes that there are no specific licensure requirements to become a personal financial advisor, nor is there a required college degree. Despite the often continuing nature of the

relationship forged with an individual selected to advise as to investments, the court notes that there is no evidence before it detailing Bauman's training and expertise as an investment specialist. Likewise, no evidence has been submitted to suggest that Bauman had attained a higher echelon within the classes of financial advisors; defendants do not submit evidence as to his attainment of a professional certification or the title of a Chartered Financial Analyst, an investment professional who has undergone more extensive training. As a consequence, on the facts presented as to Bauman's status as an investment specialist, the court declines to deem him a "professional" as that term is used in CPLR §214(6). The court recognizes that circumstances could be presented in a case such that a financial advisor could be deemed a "professional," as the Court of Appeals has left that possibility open. See EBC I, Inc., 5 N.Y.3d at 23. The facts and evidence presented here, however, do not warrant such a determination. Consequently, the breach of contract claim stated by plaintiff is not subject to the shorter, three-year statute of limitations period. Defendants' motion to dismiss the second cause of action pursuant to CPLR §3211(a)(5) is denied but see, below).

***Fourth Cause of Action- Negligence***

o Negligence causes of action, such as the claim stated in plaintiff's complaint, are governed by CPLR §214(4) and a three

year statute of limitations. See N.Y. CPLR §214(4); Synor v. Padavano, 15 A.D.3d 1010 (4<sup>th</sup> Dept. 2005); Witherwax v. Transcare, Inc., 8 Misc.3d 1005(A) (Sup. Ct. N.Y. Co. 2005). Plaintiff contends, however, that the continuous treatment or representation doctrine extends the accrual date. The continuous representation doctrine is inapplicable, however, in instances where a individual would not be deemed a "professional" within the meaning of CPLR §214(6). See Castle Oil Corp. v. Thompson Pension Employee Plans, Inc., 299 A.D.2d 513, 514 (2d Dep't 2002); Certain Underwriters at Lloyd's, London v. Mercer, Inc., 7 Misc.3d 1008(A) (Sup. Ct. N.Y. Co. 2005); New York District Council of Carpenters Pension Fund v. Savasta, \_\_\_ F.Supp.2d \_\_\_, 2005 WL 22872 (S.D.N.Y. 2005); Renzor v. J. Artist Management, Inc., 365 F.Supp.2d 565 (S.D.N.Y. 2005).

As stated above, and as argued by plaintiff himself (see Plaintiff's Memo of Law, at 4-5), the court declines to extend the meaning of "professional" as used in CPLR §214(6) to include Bauman, an investment specialist, on the facts and circumstances presented herein. As such, the three year statute of limitations is applicable, and defendants' motion to dismiss the fourth cause of action pursuant to CPLR §3211(a)(5) is granted. Defendants' motion pursuant to CPLR §3211(a)(7) on the fourth cause of action is rendered moot. Cf., De Kwiatkowski v. Bear Stearns & Co., 306 F.3d 1293, 1302 (2d Cir. 2002).

### **CPLR §3211(a) (7) - The Remaining Causes of Action**

On a motion to dismiss pursuant to CPLR §3211(a) (7) the complaint must be given every favorable inference and the allegations in the complaint are deemed to be true. See Chaikovska v. Ernst & Young LLP, 21 A.D.3d 1324 (4<sup>th</sup> Dept. 2005); Washington Mutual Bank, F.A. v. SIB Mortgage Corp., 21 A.D.3d 953 (2d Dept. 2005). When considering such a motion, it is the task of the court to determine whether, “accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.” Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995) (citations omitted). If the court determines “that plaintiffs are entitled to relief on any reasonable view of the facts stated,” the court’s inquiry is complete, and the complaint is deemed legally sufficient. See id. Plaintiff’s complaint must be examined in accordance with the above standards.

### ***Second Cause of Action- Breach of Contract***

Defendants allege that plaintiff’s second cause of action for breach of contract fails to state a cause of action in that it fails to plead the material terms of the purported contract. The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant’s failure to perform, and

(4) resulting damage. See Furia v. Furia, 116 A.D.2d 694 (2d Dept. 1986); Commissioners of State Ins. Fund v. Branicki, 2 Misc.3d 972, 976 (N.Y. City Civ. Ct. 2004). Additionally, an essential element of a breach of contract cause of action is an allegation as to the "contractual provision upon which this claim is based." Rattenni v. Cerreta, 285 A.D.2d 636, 637 (2d Dept. 2001). Defendants allege that plaintiff's breach of contract claim must fail in that it does not provide the material terms of the alleged contract and that, in fact, no such contract existed. Plaintiff correctly points out that, in such a circumstance, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). See also, Chaikovska, 21 A.D.3d at 1324; McGuire v. Sterling Doubleday Enterprises, L.P., 19 A.D.3d 660 (2d Dept. 2005). The criterion, therefore, "is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. . . ." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). See also, Operative Cake Corp. v. Nassour, 21 A.D.3d 1020 (2d Dept. 2005).

The court has reviewed both the complaint and the affidavit of plaintiff specifically in consideration of this point.

Plaintiff's complaint contains the following allegations: (1)

"Plaintiff approached Defendants about investing the proceeds of

his pension in some type of investment vehicle which would provide long term growth, income, stability of the principal, some protection from Medicaid and a death benefit for his wife" (Complaint ¶5); (2) Bauman "recommended investing Plaintiff's pension funds in a flexible-premium deferred variable annuity known as 'Franklin Valuemark IV'" (Complaint ¶7); (3) "Defendants failed to reevaluate the propriety of the annuity for Plaintiff's needs and goals and failed to reallocate the funds in the annuity to try to compensate for the losses experienced" (Complaint ¶9); (4) "On or about August 11, 1999, Defendants entered into a contract with . . . [plaintiff] to provide investment advice and placement consistent with Plaintiff's investment experience and objectives" (Complaint ¶22); (5) "Defendants breached the aforementioned contract by recommending an annuity containing stock investments of an aggressive character and with a high degree of risk which was inconsistent with Plaintiff's stated goals and involved a degree of risk that Plaintiff was not aware of nor capable of assuming" (Complaint ¶23); (6) "Defendants further breached the aforementioned contract by failing to re-evaluate the propriety of the annuity for Plaintiff's needs and goals and failing to recommend that the funds in the annuity be reallocated to try to compensate for the losses experienced" (Complaint ¶24).

Plaintiff's affidavit attaches a copy of the contract

between the parties, which constituted the opening of a new account and noted that plaintiff's objectives were long term, growth, income, and stability of principal. See Affidavit of J. Cator ¶9 & Exhibit A thereto. Plaintiff's affidavit also offers the following additional allegations as to the continuing nature of the investment advice: (1) Plaintiff kept in contact with Bauman with respect to his investment (id. at ¶10); (2) Bauman told Plaintiff "to give the annuity a chance to turn around" and to "not be discouraged by what he called a 'lull' in the market" (id. at ¶13); (3) Bauman visited plaintiff's home on at least four occasions to discuss the account (id. at ¶14); (4) "Based upon these meetings and the advice he continued to give me, I kept my money in the annuity until February 2003." At that point, plaintiff withdrew from the annuity, concluding that Bauman was not looking after his best interests (id. at ¶15).

Even taking the allegations of both the complaint and the affidavit of plaintiff into consideration, plaintiff has not stated a cause of action for breach of contract. The implication from the complaint and plaintiff's affidavit, that Bauman undertook to provide various items of investment advice on a continuing basis to plaintiff, is insufficient to support a breach of contract claim. Neither the complaint nor the affidavits plead any of the terms of the purported contract which allegedly bound Bauman and WSEF to provide continuing investment

advice to plaintiff. Plaintiff fails to identify any consideration paid to defendants in exchange for such a promise to provide continuing advice, the duration of the alleged contract, or the scope of defendants' responsibilities under the contract. As such, plaintiff has failed to allege the basics of contract formation and has failed to plead an essential element of a breach of contract claim. See Furia, 116 A.D.2d 694; Commissioners of State Ins. Fund v. Branicki, 2 Misc.3d at 976.

Moreover, defendants allege that the breach of contract cause of action should be dismissed on the grounds that Bauman is not a "professional" and did not owe plaintiff any contractual duties other than that otherwise provided for under the common law, that is to procure the variable annuity. The court has reviewed the cases cited by defendants in support of this proposition and finds that they compel dismissal of the breach of contract cause of action in the case presented. Akin to the brokerage relationships presented in these cited cases, to the extent plaintiff had any contractual relationship with Bauman, such contract was limited to the otherwise applicable common law duty owed by defendants in these circumstances, i.e., procurement by Bauman of the variable annuity. Perl v. Smith Barney Inc., 230 A.D.2d 664, 666 (1<sup>st</sup> Dept. 1996). See De Kwiatkowski v. Bear Stearns & Co., 306 F.3d 1293 (2d Cir. 2002); Press v. Chem. Inv. Servs. Corp., 166 F.3d 529 (2d Cir. 1999);

Sands Bros. & Co., Ltd. v. Alba Perez TTEE Catalina Garcia Revocable Trust, 2004 WL 2186574 (S.D.N.Y. 2004). The document presented to the court as evidence of the variable annuity contract does not contemplate an ongoing relationship. Moreover, the papers submitted to the court, giving every favorable inference in plaintiff's favor, fail to establish the existence of any other purported contract between the parties, or the terms thereof. It is plaintiff's burden to allege that defendants undertook by contract a relationship with plaintiff different from that contemplated by the common law. For the reasons stated quite comprehensively in De Kwiatkowski v. Bear Stearns & Co., 306 F.3d at 1302-07, particularly in regard to the giving of advice by Bauman, "an unexceptional feature of the broker-client relationship" which "does not alter the character of the relationship by triggering an ongoing duty to advise in the future (or between transactions) or to monitor all data potentially relevant to a customer's investment," id. 306 F.3d at 1307, plaintiff has failed to plead any set of facts supporting his view that a contract was formed between the parties obligating defendants to perform something more in the way of duties to plaintiff than otherwise they were obligated to perform under the common law. Defendants' motion to dismiss the second cause of action pursuant to CPLR §3211(a)(7) is granted.

**Third and Fifth Causes of Action- Unsuitability and  
Failure to Supervise**

Defendants contend that the third and fifth causes of action, which are premised upon alleged violations of Rules 2310 and 3010 of the NASD, must be dismissed because there is no private right of action for breach of these rules. Indeed, the case law provides that no private right of action exists for breach of NASD rules. See Levine v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 639 F.Supp. 1391 (S.D.N.Y. 1986); Klock v. Lehman Brothers Kuhn Loeb Inc., 584 F.Supp. 210, 217 (S.D.N.Y. 1984); Coleman v. D.H. Blair & Co., Inc., 521 F.Supp. 646 (S.D.N.Y. 1981). Plaintiff herein has provided no basis for the court to conclude, contrary to the weight of authority on this topic, that it should be allowed to proceed with its causes of action premised upon the NASD. As such, defendants' motion to dismiss the third and fifth causes of action pursuant to CPLR §3211(a)(7) is granted. Defendants' motion to dismiss the third and fifth causes of action pursuant to CPLR §3211(a)(5) is consequently rendered moot.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: December 13, 2005  
Rochester, New York