

Vladimir v Cowperthwait

2005 NY Slip Op 30359(U)

April 20, 2005

Supreme Court, New York County

Docket Number: 603019/04

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III

Justice

PART 57

Bert Vladimirov

Campbell Cowperthwaite

INDEX NO. 1603 019/04
MOTION DATE 2/3/05
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
APR 20 2005
NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/20/05

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
BERT VLADIMIR, individually and on behalf of all others
similarly situated,

Plaintiff,

-against-

Index No. 603019/04

CAMPBELL COWPERTHWAIT and U.S. TRUST
COMPANY,

Defendants.
-----X

Richard B. Lowe, III, J.:

Defendants Campbell Cowperthwait (CC) and U.S. Trust (UST) move, pursuant to CPLR 3211 and 3016 (b), to dismiss plaintiff's class action complaint.

On January 13, 2000, plaintiff entered into a Managed Assets Consulting Services (MACS) Client Agreement with non-party Prudential Securities Inc. (Prudential). As part of that agreement, plaintiff designated CC as the manager for approximately \$600,000 of the assets in his MACS account. Plaintiff alleges that from January 29, 2000 to September 30, 2001, CC engaged in misconduct which resulted in the loss of approximately 39% of his assets. Plaintiff closed his MACS account on August 16, 2001.

The complaint sets forth four causes of action: breach of fiduciary duty, negligence, and breach of contract (all three alleged on behalf of plaintiff and the prospective class), and fraud (alleged solely on behalf of plaintiff).

In the posture of defendants' CPLR 3211 motion to dismiss, our task is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners "factual allegations are discerned which

taken together manifest any cause of action cognizable at law.” In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference [internal citations omitted]

(*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]).

Breach of Fiduciary Duty

“A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation’ (Restatement [Second] of Torts § 874, comment a)” (*Mandelblatt v Devon Stores*, 132 AD2d 162, 168 [1st Dept 1987]). “[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect [citations omitted]. This is a sensitive and ‘inflexible’ rule of fidelity ...” (*Birnbaum v Birnbaum*, 73 NY2d 461, 465 [1989]). “Before courts can infer and superimpose a duty of the finest loyalty, the contract and relationship of the parties must be plumbed” (*Northeast General Corp. v Wellington Advertising*, 82 NY2d 158, 162 [1993]).

Here, the account which plaintiff opened with Prudential was, by its very nature, a “managed assets” account. The Client Agreement into which plaintiff entered with Prudential provides that: (1) Prudential would exercise no investment discretion over managed assets, but, as broker-dealer, would “only effect transactions for Manager Assets at the direction of the Manager managing the Manager Assets” (Client Agreement, ¶ 1 [c]); (2) plaintiff could impose “reasonable restrictions on the management of Manager Assets,” but could not “require that particular securities be purchased with Manager Assets” (*ibid.*); (3) the manager selected by plaintiff would have investment discretion over Manager Assets, and that, plaintiff, as an

“investment advisory client” of the manager, would have personnel of the manager reasonably available to him for consultation regarding the management of the managed assets (*ibid.*); (4) plaintiff authorized his manager “to effect transactions with respect to Manager Assets through [Prudential], as broker-dealer” “to the extent *consistent with a Manager’s obligation to obtain best execution*” (*id.*, ¶ 1 [f] [emphasis added]); (5) plaintiff granted “each Manager engaged by Client ... complete and unlimited discretionary trading authorization on the Manager Assets ... and designate[d] each such Manager as Client’s agent and attorney-in-fact with respect to such Manager Assets” (*id.*, ¶ 2 [a]).

The Investment Policy Statement for plaintiff, in its “Statement of Purpose,” provides, among other things, that “The *Investment Manager[] shall fulfill its fiduciary obligations in investing the assets of the Portfolio*” (Statement of Purpose, Part I [emphasis added]). The Investment Guidelines part of the same document provides that “the Investment Manager[] has been given full investment discretion with respect to the portion of the Portfolio it manages” (*id.*, Part IV).

The complaint alleges that “[o]n January 22, 2000, Prudential Securities Inc. (‘PSI’) at the request of plaintiff authorized [CC] to ‘begin managing the assets’ in plaintiff’s account PSI designated [CC] as one of the exclusive list of managers which plaintiff ... would be required to use if [he] wanted someone other than PSI to manage [his] investment account[]” (Complaint, ¶ 23). Accepting plaintiff’s allegations as true, as the court must, it is clear that plaintiff had to rely on either Prudential or one of the entities designated on Prudential’s “exclusive list” to manage his MACS account; he could not manage the account himself. It is also clear that, in their participation in the MACS program as a manager designated

for Prudential accounts, defendants subjected themselves to the fiduciary duties incumbent upon entities which exercise discretionary trading authority over a client's account (*see Guerrand-Hermes v J.P. Morgan & Co.*, 2 AD3d 235, 237 [1st Dept 2003]; *see also Tradewinds Financial Corp. v Refco Securities*, 5 AD3d 229 [1st Dept 2004] [relationship involving non-discretionary securities accounts is arms-length, not fiduciary]).

Defendants' motion to dismiss the complaint, with respect to the cause of action for breach of fiduciary duty, is denied.

Negligence

"To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty, a breach of that duty, and that the breach of such duty was the proximate cause of his or her injuries. However, absent a duty of care, there is no breach and no liability [internal citation omitted]" (*Marasco v C.D.R. Electronics Security & Surveillance Systems Co.*, 1 AD3d 578, 580 [2d Dept 2003]).

Plaintiff alleges that defendants were negligent

by failing to promptly manage and oversee the assets of the investment accounts; failing to pursue a prudent investment strategy; over-concentrating the portfolio in certain volatile industry sectors and stocks and by failing to eliminate conflicts of interest. In addition, defendants' selection, monitoring and continuation of investment strategies and alternatives and the execution thereof were negligently planned, performed and monitored

(Complaint, ¶ 54). Elsewhere, plaintiff alleges that, following the "en mass" departure of most of CC's management members (*id.*, ¶ 27 [emphasis in original]), defendants "failed to adequately staff the Campbell Cowperthwait Asset Management Team" (*id.*, ¶ 29), and failed to "adequately hire, staff, train and supervise the investment management team of the Large Cap Growth

Portfolio” (*id.*, ¶ 30). Plaintiff also alleges that many of the holdings in his portfolio were the same as many of the holdings in CC’s other funds (*id.*, ¶¶ 32-33), and that CC’s management of funds with different goals from those of plaintiff’s funds constituted an impermissible conflict of interest (*id.*, ¶ 35).

The sum and substance of plaintiff’s complaints concerning defendants’ alleged negligence in the management of his account pertain to “defendants’ lack of skill and prudence,” and failure to follow a prudent investment strategy, as the result of the alleged conflict of interest and the “inexperienced team” (*id.*, ¶¶ 40, 41).

None of the complaint’s allegations provides a basis for a negligence claim. Defendants had no duty to plaintiff to retain, for whatever the duration of plaintiff’s participation in the MACS program, the same asset management team that had managed other, prior accounts. Nor did defendants have a duty to provide staff who would manage plaintiff’s account exclusively, or with no overlap with any other fund. In the Client Agreement, plaintiff specifically acknowledged that defendants could perform investment management services for other clients, and agreed that such services to other clients “may differ from the timing or nature of the action taken with respect to the Manager Assets it manages” (Client Agreement, ¶ 1 [g]).

Plaintiff’s negligence cause of action is dismissed.

Breach of Contract

Plaintiff’s breach of contract claim must also be dismissed. Plaintiff’s contract was with Prudential, not with defendants, and plaintiff has not alleged any other contract as the basis of this claim. Moreover, “[i]n order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based” (*Atkinson v*

* 7] .
Mobil Oil Corp., 205 AD2d 719, 720 [2d Dept 1994]; *see also Murrin v Ford Motor Co.*, 303 AD2d 475 [2d Dept 2003]; *Rattenni v Cerreta*, 285 AD2d 636 [2d Dept 2001]). Plaintiff has not done so.

Plaintiff's assertion that he is a third-party beneficiary of the contract or agreement between Prudential and defendants must fail, since no such contract is before the court. The only contract now before the court is that between plaintiff and Prudential, and, since plaintiff is a party to that contract, he cannot also be a third-party beneficiary of it.

Fraud

Plaintiff's fraud claim cannot stand. "The elements of common-law fraud are a representation of a material fact, falsity, scienter, reliance, and injury" (*Kline v Taukpoint Realty Corp.*, 302 AD2d 433, 433 [2d Dept 2003]). Plaintiff here has alleged a claim based on fraud by concealment, i.e., that defendants did not apprise him of the fact that the asset management team that he expected was no longer there, and that the team that would be managing his account would be "inexperienced." An essential element of a fraud by concealment claim is a duty to reveal the allegedly withheld information (*Edison Stone Corp. v 42nd Street Development Corp.*, 145 AD2d 249, 257 [1st Dept 1989]).

While defendants owed plaintiff fiduciary duties, the alleged fraudulent omissions concerned the lack of competence and experience of the new asset management team, not the worthiness of the funds in which his assets were invested. Plaintiff has failed to establish that the purported fraudulent omissions concerning the competence and experience of the asset management team, rather than market conditions and fluctuations, "directly and proximately caused his investment losses" (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]).

Lastly, plaintiff invested assets in a Prudential MACS account. As an investor, he “implicitly assume[d] the commercial risk that a change in market conditions may produce adverse economic consequences” (*National Union Fire Insurance Company of Pittsburgh, Pa. v Robert Christopher Associates*, 257 AD2d 1, 12 [1st Dept 1999]). The unfortunate fact that he sustained losses from his investment does not constitute a basis for a fraud claim.

Punitive Damages

No basis for an award of punitive damages has been shown. The complaint’s request for punitive damages is denied.

Accordingly, it is


ORDERED that the motion to dismiss is granted in part, and the second, third, and fourth causes of action of the complaint are dismissed; and it is further

ORDERED that the motion is denied with respect to the first cause of action; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: April 20, 2005

ENTER:


HON. RICHARD S. LOVE, J.

FILED
APR 22 2005
NEW YORK
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