

Celle v Barclays Bank P.L.C.

2006 NY Slip Op 30371(U)

October 10, 2006

Supreme Court, New York County

Docket Number:

Judge: Sherry Klein Heitler

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Sherry Klein Heitler
Justice

PART 30

CARLOS D. CELLE

INDEX NO. 601674/05

MOTION DATE _____

MOTION SEQ. NO. (001) 001

MOTION CAL. NO. _____

- v -
BARCLAYS BANK P.L.C.
BARCLAYS PRIVATE BANK

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

is decided in accordance with the
memorandum decision dated Oct 10, 2006

FILED
OCT 13 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Oct 10, 2006

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 30**

-----X

CARLOS D. CELLE as power-of-attorney and on
behalf of MISSANO, INC.,

Index No. 601674/05

Plaintiff,

DECISION & ORDER

-against-

BARCLAYS BANK P.L.C., BARCLAYS PRIVATE
BANK LIMITED, ROYAL BANK OF CANADA and
ROYAL BANK OF CANADA GLOBAL PRIVATE
BANKING,

Defendants.

FILED
OCT 13 2006
NEW YORK
COUNTY CLERK'S OFFICE

-----X
SHERRY KLEIN HEITLER, J.:

Motions sequence nos. 001 and 002 are consolidated for disposition herein. In motion sequence no. 001, defendants Royal Bank of Canada and Royal Bank of Canada Global Private Banking (together, "RBC") move, and in motion sequence no. 002, defendants Barclays Bank P.L.C. and Barclays Private Bank Limited (together, "Barclays") similarly move, pursuant to CPLR §§ 3211 (a) (1) and (7), for an order dismissing the complaint.

Plaintiff, who manages Missano, Inc. (Missano), his family's capital holding company, was a client of Barclays. On or about July 1, 2002, Barclays Bank P.L.C. sold Barclays Private Bank Limited to the Royal Bank of Canada, which merged the functions of Barclays Private Bank Limited with those of Royal Bank of Canada Global Private Banking. At that time, Missano's accounts were transferred to the custody of RBC. The gravamen of the complaint is that Missano's accounts were neglected during the transition from Barclays to RBC, in part because the person who had been Missano's investment advisor at Barclays was not retained by RBC. The complaint alleges the following five causes of action: (1) breach of contract; (2)

fraud; (3) breach of fiduciary duty; (4) promissory estoppel; and (5) novation of contract.

However, plaintiff has, in effect, withdrawn the fifth cause of action.

The first cause of action alleges that defendants failed to implement plaintiff's investment decisions in June and July 2002; that RBC failed to provide plaintiff with timely monthly statements for those two months, and that RBC liquidated Missano's accounts, without first advising plaintiff of the losses that the accounts would incur as a result of the liquidation. The accounts were liquidated at plaintiff's direction, in order to draw down a \$39.65 million loan to Missano. The sale of Missano's holdings resulted in a loss of approximately \$4 million. All of Missano's accounts were non-discretionary.

Missano's custody account agreement (Agreement) with Barclays (in which, by written addendum executed on July 5, 2002, RBC was substituted for Barclays), provides that Barclays is required to implement only such investment instructions as it receives from Missano in writing. The relevant factual allegation in the complaint states that plaintiff "made numerous attempts during June and July 2002 to reach Mr. Heller [the Executive Vice President and General Manager of the New York office of Barclays Private Bank Limited] for assistance with making transactions for the Missano accounts, however, [plaintiff's] phone messages went unanswered." However, inasmuch as the Agreement did not require Barclays to respond to oral instructions, Mr. Heller's alleged failure to respond to plaintiff's phone calls did not constitute a breach of contract. See Pane v Citibank, N.A., 19 AD3d 278, 278-79 (1st Dept 2005).

Nor did RBC's liquidation of Missano's accounts, on plaintiff's written instructions, constitute a breach. The Agreement expressly provides: (1) that, while the bank "may, in its sole discretion, make such recommendations to the Client as the Bank determines to be appropriate,...

the Bank is not obligated to make any such recommendations to the Client"; (2) that:

[t]he Client further acknowledges that, each time such Client places an order to purchase or dispose of an Investment through the Account, such Client will be deemed to have represented to the Bank that such Client has independently, without reliance on the Bank, made a decision to acquire or dispose of an investment subject to such order, having examined the information relating to the Investment and its issuer that Client deems relevant;

and (3) that "the Bank shall incur no liability for losses resulting from (1) the actions of the client, [or] complying with the directions of the Client."

Nor does the alleged failure to provide monthly statements for June and July to Missano constitute a breach. On July 12, 2002, RBC e-mailed to plaintiff a spreadsheet listing all of Missano's holdings in the RBC accounts, the value of each of those holdings and recommendations as to changes thereto. Plaintiff does not suggest that RBC was obligated to have sent him – or even that it *could* have sent him – other information that would have allowed him to avert the loss of which he now complains.

Plaintiff's fraud claim alleges that defendants had a duty to disclose material facts concerning the Missano accounts, and that they breached that duty by failing to disclose that they were ignoring those accounts during the pending sale of Barclays Private Bank Limited, a time during which the accounts were rapidly declining in value, although defendants had represented to plaintiff that there would be minimal disruption to the Missano accounts during their transfer from Barclays to RBC. Inasmuch as nothing in the Agreement required Barclays, or RBC, to offer investment advice, this claim is, at bottom, nothing more than a repetition of the allegations in the first cause of action, and it will be dismissed as cumulative. See Frydman & Co. v Credit Suisse First Boston Corp., 272 AD2d 236, 238 (1st Dept 2000).

Plaintiff's breach of fiduciary duty claim alleges that defendants had a fiduciary duty to implement such investments as plaintiff directed, and to offer advice and make recommendations that were in plaintiff's best interests; and that they breached that duty by neglecting service to the Missano accounts during June and July 2002, and by failing to advise plaintiff of the effects of liquidating the accounts. A bank's duty, in relation to non-discretionary accounts, is to follow the client's instructions with regard to particular transactions. See Press v Chemical Inv. Servs. Corp., 166 F3d 529, 536-37 (2d Cir 1999). However, a bank has no fiduciary duty to advise the owners of non-discretionary accounts at times between the transactions that such owners direct. See Fesseha v TD Waterhouse Investor Servs., Inc., 305 AD2d 268, 268-69 (1st Dept 2003).

Here, plaintiff does not allege that either Barclays or RBC failed to implement, in good faith, any transaction that he directed them to make, and it is undisputed that plaintiff directed RBC to liquidate the Missano accounts, that RBC promptly did so, and that, as discussed above, the Agreement provides that plaintiff, alone, would be responsible for the information and judgment underlying any direction to effect a transaction. There is no breach of fiduciary duty, where, as here, there is a "formal written agreement covering the precise subject matter of the alleged fiduciary duty." Pane v Citybank, N.A., 19 AD2d at 279. Plaintiff's promissory estoppel claim alleges that, while Mr. Heller assured plaintiff, in May 2002, that Missano's accounts would be managed by the same people who had been managing them at Barclays, and that there would be a "smooth transition" from Barclays to RBC, Mr. Heller acknowledged, at a meeting on August 22, 2002, that the transition of the Missano accounts from Barclays to RBC had not gone as smoothly as he would have liked. This claim fails for the same reasons that plaintiff's breach of contract claim fails. No matter how rocky the transition may have been, the

Missano accounts were non-discretionary, and plaintiff does not allege that either defendant failed, at any time, to implement any transaction that plaintiff directed it to make.

Finally, in addition to the reasons given above, the complaint must be dismissed because it establishes no causal nexus between the acts or omissions of which it complains and the damage that plaintiff claims to have suffered.


Accordingly, it is hereby

ORDERED that defendants' motions to dismiss the complaint pursuant to CPLR §§ 3211(a) (1) and (7) (motion sequence nos. 001 and 002) are granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: October 10, 2006


SHERRY KLEIN HEITLER
J.S.C.

FILED
OCT 13 2006
NEW YORK
COUNTY CLERK'S OFFICE