Rogers v Krauss
2012 NY Slip Op 33553(U)
December 20, 2012
Supreme Court, New York County
Docket Number: 652078/12
Judge: Donna M. Mills

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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MARCIA ROGERS, BARTHOLOMEA M. ROGERS, JR., JOHN S. ROGERS, MARIANNE ROGERS DROXAK, J.C. CLARK and KRISTA CLARK,

Index No. 652078/12

Plaintiffs,

- against-

DECISION AND ORDER

HARVEY KRAUSS and SNOW BECKER KRAUSS, P.C.,

Defendants.

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MILLS, J.S.C.:

In this action for professional malpractice and breach of fiduciary duty, the defendant law firm Snow Becker Krauss, P.C. (Snow Becker), and defendant Harvey Krauss (Harvey), a partner of Snow Becker, move to dismiss the complaint on the ground of a defense founded upon documentary evidence (CPLR 3211 [a] [1]), and for failure to state a cause of action (CPLR 3211 [a] [7]). The motion is granted in part and denied in part.

This action arises from the substantial depletion of the principal of two testamentary trusts (the trusts) as a result of allegedly unauthorized invasions of principal, and also from market speculation involving the alleged use of options, margin, day-trading, and short sales.

Ignazio Bartholomew Rogers Sr. (Bart Sr.), the father of plaintiffs, created the two trusts in his last will and testament (ex. 3 to mov. aff.). Plaintiffs are the remaindermen of the

trusts. One trust was a credit shelter trust (the credit shelter trust) with initial principal of $675,000 in 2000. The other was a marital deduction trust (the marital deduction trust), with initial principal of approximately $9.7 million. According to a FINRA arbitration statement of claim (the statement of claim) by plaintiffs against Seaport Securities Corp. (Seaport, ex. 5 to mov. aff.), the brokerage that initially held the two trust accounts, the principal of the marital deduction trust declined in the first 11 months of 2008 by $7.04 million to $1.87 million.

Bart Sr.'s last will and testament initially appointed Harvey and Adele Rogers (Adele), Bart Sr.'s widow, as the sole trustees of both trusts, but a subsequent codicil added plaintiffs Bartholomea M. Rogers (Bart Jr.), and John S. Rogers (the co-trustees), Bart Sr.'s two sons from a prior marriage as trustees. From the inception of the trusts, Snow Becker billed substantial fees annually. The complaint alleges that these fees were for investment advisory and tax preparation services, totaling over $1 million, but in its brief, Snow Becker denies performing investment advisory and tax services (brief in support, at 14 n 9). According to the complaint, Adele and Harvey made all the investment and management decisions for both trusts, based upon the advice of Snow Becker. The complaint alleges that the co-trustees "were led to believe" that they had no say in investment decisions until Adele's death (Complaint, ¶¶

20, 23).

Defendants advised Bart Sr. on his estate planning, and prepared his last will and testament. Initially, the will appointed only Harvey and Adele as the sole trustees. In 2000, a codicil added the co-trustees. The credit shelter trust allowed for invasion of principal. The marital deduction trust directed the trustees to pay the income to Adele. It did allow Adele to direct that assets that did not produce income be sold, and income-producing assets purchased in their stead. The complaint alleges that the marital deduction trust did not permit invasion of principal, and defendants have not disputed this allegation.

On September 28, 2000, Bart Sr. died. Thereafter, according to the complaint, Harvey and Adele administered the trusts. The initial investment plan devised by defendants called for producing $30,000 a year in income for Adele. When the net income fell short, the difference was made up out of principal. Principal was also used to pay premiums on a life insurance policy on Adele's life.

In 2008, after incurring substantial losses, the trustees closed the Seaport accounts, and moved the assets to a new brokerage. The complaint and documentary evidence are not clear about what services Snow Becker continued to perform, or the role of Harvey and Adele after that transfer, but the complaint alleges that Snow Becker continued to act as attorneys for the

trusts until Adele's death in 2010.[1] This action was commenced by filing on June 14, 2012.

The complaint contains three causes of action. The first alleges that defendants committed malpractice in failing to protect all of the beneficiaries of the two trusts. It also alleges that defendants had a duty to Bart Sr. and then to his heirs to advise them about the

> conflicts of interest inherent in only two of the four Co-Trustees (Harvey and Adele) making distribution and investment decisions ... in direct violation of the Trustee's duty to act impartially ...

(Complaint, ¶ 30). The complaint alleges that Harvey was the "long-time trusted legal advisor for the entire family" (*id.*, ¶ 15).

The second cause of action alleges that defendants breached their fiduciary and professional duties by failing to advise the beneficiaries that the marital deduction trust was being administered in a manner contrary to its terms, and that, as a result of defendants' conduct, the trusts incurred losses in the 2008 market decline that were in excess of what prudent investments lost in that downturn.

The third cause of action alleges that the trusts suffered a loss in excess of $10 million as a result of defendants'

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[1] The complaint states that Adele died in 2010 (Complaint, ¶ 30), although the Seaport complaint states that she died in March 2011 (ex. 5 to mov. aff., ¶ 23).

unauthorized invasion of principal in the marital deduction trust, and their failure to remove themselves from an irreconcilable conflict of interest that resulted in their acting in the interests of Adele only, in derogation of the interests of plaintiffs as remaindermen.

In support of their motion to dismiss based on documentary evidence, defendants submit the moving affirmation of Philip Touitou, annexing the complaint, a September 29, 2008 New York Times article on the severity of stock losses, the last will and testament of Bart Sr., and the first codicil thereto, and the statement of claim. They also submit the reply affirmation of Philip Touitou, annexing a year-end 2000 Seaport statement of the marital deduction trust, and three letters by Harvey on Snow Becker letterhead: a March 3, 2011 letter to John S. Rogers, explaining the distribution of life insurance proceeds on the life of Adele, a May 11, 2010 letter enclosing a bill to Oppenheimer & Co. for direct payment of a life insurance premium in the amount of $168,392, and a December 8, 2000 letter to the co-trustees, explaining calculation of trustee fees.

In determining whether the complaint fails to state a cause of action (CPLR 3211 [a] [7]), the inquiry is whether "'the facts as alleged [by the plaintiff] fit within any cognizable legal theory [citation omitted]'" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). The complaint must be

liberally construed, accepting the factual allegations as true, and the pleader must be given the benefit of every reasonable favorable inference (*see EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Defendant's motion based on documentary evidence (CPLR 3211 [a] [1]) can only be granted if the documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Defendants argue first that this action is untimely, based on defendants' position that their representation of Bart Sr. ended with his death in 2000, and that they only represented Bart Sr., not his children. Defendants contend that the complaint has not alleged sufficient facts to establish the existence of an attorney-client relation between defendants and plaintiffs. Defendants argue further that there can be no tolling of the statute of limitations based on continuous representation, because representing the estate or any testamentary trust is a separate representation from the estate planning and preparation of the last will and testament (*see Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1188 [2d Dept 2012]).

Next, defendants argue that, even if an attorney-client relation had been sufficiently pleaded, between both Harvey and

Snow Becker and plaintiffs, the alleged failure by defendants to advise plaintiffs of the claimed conflicts of interest did not proximately cause the investment losses. The two alleged conflicts of interest are between Adele and the remaindermen, which defendants aptly observe is generally present in surviving widow estate plans, and the conflicts allegedly resulting from the appointment of Adele as a trustee, without the appointment of an independent trustee, and the many roles of Harvey. Defendants allege that market crashes were a substantial contributing cause of the losses in the trusts, and that the co-trustees received regular statements of the trust accounts, and were aware of the trading strategy.

Defendants next argue that plaintiffs' breach of fiduciary duty claims are also untimely. Defendants contend that a three-year statute of limitations applies to the breach of fiduciary duty claims under New York law. Whether the applicable statute of limitations is three or six years depends upon the nature of the relief sought.

As the Court of Appeals stated:

> New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging injury to property within the meaning of CPLR 214 (4), which has a three-year limitations period. Where,

> however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies [citations and internal quotation marks omitted]

(*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]).

Defendants contend that this action accrued no later than January 1, 2009, when the Seaport accounts were allegedly closed, and the management of the accounts transferred to an investment advisory firm. This action was commenced on July 12, 2012.

Because plaintiffs have not submitted an affidavit based on personal knowledge, the motion to dismiss for failure to state a cause of action must be decided solely on the allegations of the complaint itself (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). "[I]f from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail [citations omitted]" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The facts stated in the memoranda of law submitted by both parties are merely unsworn statements not based on personal knowledge, and are not part of the record. They have no evidentiary value any more than facts stated in an attorney's affidavit (*see Chiarini v County of Ulster*, 9 AD3d 769, 770 [3d Dept 2004]; *Jabs v Jabs*, 221 AD2d 704, 704 [3d Dept 1995]).

None of defendants' arguments or the documentary evidence,

establishes defendants' entitlement to judgment as a matter of law. Defendants have not demonstrated that this action is untimely as to Snow Becker. There is no allegation in the complaint that Snow Becker was replaced as investment advisor as argued by defendants, and there is no evidence in the record establishing a date on which any investment advisor was retained to replace Snow Becker.

The only documentary evidence submitted by defendants on this point is the May 11, 2010 letter from Snow Becker to Oppenheimer & Co., directing them to pay directly an insurance premium (ex. 3 to Touitou reply aff.). This documentary evidence certainly does not conclusively determine the timeliness issue as against Snow Becker. Nor does it establish that Oppenheimer & Co. was acting as an investment advisor. Defendants argue that paragraphs 22-25 of the statement of claim establish that Snow Becker's role as investment advisor ended no later than 2008 (mov. brief, at 21). Those paragraphs establish only that defendants changed brokerages. The statement of claim is silent as to any change in investment advisor, and thus has no probative value on the issue of timeliness.

Nowhere in the complaint or the documentary evidence are there any allegations of fact as to the current status of the two trusts, whether the principal has been distributed, or whether any accounting has been demanded by the beneficiaries.

Therefore, it cannot be determined on this record whether the cause of action for legal malpractice against Snow Becker still is an asset of the trust, or whether it has been distributed to the beneficiaries and may be asserted in this action. Also, in the absence of any evidence of the type of legal services that Snow Becker was rendering to the trust, other than the alleged investment advisory and tax services, it cannot be determined on this record whether there was continuous representation that would toll the statute of limitations.

The first cause of action, which is based on an alleged attorney-client relationship between defendants and plaintiffs must be dismissed. Defendants correctly argue that the complaint does not allege sufficient facts to establish, even prima facie, the existence of an attorney-client relation between defendants and plaintiffs. Under New York law, "absent fraud, collusion, malicious acts or other circumstances ... [the] draftsmen of the will, are not liable to the beneficiaries of such will or other third parties not in privity who might be harmed by their professional negligence" (*Mali v De Forest & Duer,* 160 AD2d 297, 298 [1st Dept 1990]). A person's unilateral belief that he or she is represented by an attorney is insufficient to establish an attorney client relationship (*see Jane St. Co. v Rosenberg & Estis,* 192 AD2d 451 [1st Dept 1993]). To establish the existence of an attorney-client relation, there must be evidence of an

explicit undertaking by the attorney to perform a specific task (*see Volpe v Canfield,* 237 AD2d 282 [2d Dept 1997]). Snow Becker undertook to perform services for the trusts, but there is no showing that Harvey undertook to represent plaintiffs, and defendants have demonstrated that there was no continuous representation based on Harvey's representation of Bart Sr.

There can be no dispute, based on the allegations of the complaint, that Snow Becker owed a fiduciary duty to the trusts as their attorneys, and that the allegations of the complaint that the investment strategy allegedly recommended by Snow Becker, and implemented by Harvey and Adele, including the use of highly speculative strategies at a time of extreme market uncertainty, and allowing for invasion of principal without express authority, sufficiently plead a cause of action for breach of fiduciary duty against Snow Becker, and also against Harvey, as trustee, for implementing these practices. It is immaterial whether Harvey represented defendants as counsel inasmuch as he owed them the same fiduciary duty as trustee (*see Weingarten v Warren,* 753 F Supp 491, 491 [SD NY 1990]).

Whether the alleged actions of Harvey, as trustee, violate the Prudent Investor Act (EPTL 11-2.3), effective in 2005, is a factual issue that

> depends on an examination of the facts and circumstances of each case ... [and requires] a balanced and perceptive analysis of [the fiduciary's] consideration and action in

> light of the history of each individual investment, viewed at the time of its action or its omission to act [internal quotation marks and citations omitted]

(*Matter of Janes,* 90 NY2d 41, 50 [1997]).

It is unnecessary to decide on this motion whether the three-year or six-year statute of limitations applies. While the relief sought in the complaint is money damages, it appears to be in the nature of an accounting, which is an equitable remedy. Plaintiffs may amend their complaint to assert a cause of action for an accounting, if they are so advised (*see* CPLR 3025 [a]).

Accordingly, it is

ORDERED that the motion of defendants Harvey Krauss and Snow Becker Krauss, P.C. to dismiss the complaint for failure to state a cause of action (CPLR 3211 [a] [7]), and based upon a defense founded on documentary evidence (CPLR 3211 [a] [1]) is granted, to the extent of dismissing the first cause of action, and is otherwise denied.

Dated: 12/20/12

E N T E R:

J. S. C.

DONNA M. MILLS, J.S.C.