SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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ALEX GREENBERG as Trustee for the
RUBIN GREENBERG IRREVOCABLE
MILLENNIUM TRUST,

Plaintiff,

- against -

JP MORGAN CHASE BANK, N.A.,

Defendant.

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DECISION and ORDER
Index No. 652347-2011
Motion Seq. No. 002

SALIANN SCARPULLA, J.:

This is an action to recover approximately $350,000 in losses allegedly sustained by a family trust by reason of Defendant JP Morgan Chase Bank, N.A.'s ("JPM") mismanagement of its assets. In the Amended Verified Complaint, plaintiff Alex Greenberg as Trustee for the Rubin Greenberg Irrevocable Millennium Trust ("Alex") asserts claims against JPM for breach of contract, breach of the Prudent Investor Act and fiduciary duty, fraudulent misrepresentation, negligence, negligent supervision, breach of the covenant of good faith and fair dealing, and respondeat superior. JPM now moves to dismiss the complaint for failure to state a claim and lack of particularity (CPLR 3211(a)(7) and 3016(b).

The Amended Verified Complaint

The following facts are taken from the Amended Verified Complaint ("AC") and the two exhibits annexed thereto: the Rubin Greenberg Irrevocable Millennium Trust (the "Trust") (AC, Exh. A) and a related letter agreement dated February 15, 2006 (the "Letter Agreement") (AC, Exh. B). The parties have also submitted affidavits annexing copies of financial statements, e-mails and other documents referenced in the complaint.[1]

On or about January 5, 2000, Rubin Greenberg ("Rubin"), as grantor, established the Trust (AC ¶ 7). Plaintiff Alex Greenberg, one of Rubin's son, was named as trustee (Trust, p. 1 [introductory paragraph]). Alex was also made a beneficiary of the Trust, along with Rubin's two other sons, Bruce and Jesse (AC ¶ 7; Trust Art. VII [introductory paragraph]). At the time the Trust was created, Alex was 41, Bruce was 39 and Jesse was 35 (Greenberg Aff. ¶ 3).

The Trust provided that income from its property would accumulate and be added to its principal until Rubin's death or January 5, 2007, whichever came first (Trust, Article IV). At that time, its property was to be divided into three shares, one for each son (Trust, Article VI [introductory paragraph]). The share of any son who was no longer living was to be divided among his children (id).

[1] Plaintiff has submitted an affidavit identical to the one submitted in connection with the original motion to dismiss. Only some of the facts within it have been incorporated into the complaint. However, the court has considered it insofar as both parties have referred to the emails and other documents annexed thereto.

The Trust further required that percentage payments of principal be made to each son on certain birthdays as follows: (i) 25% at age 45; (ii) 33.3% of the remaining principal at 45, (iii) 50% of the remaining principal at age 55; and (iv) the remaining principal at age 60 (Trust § 6:01). Trust distributions of principal were also permitted to ensure that the sons could maintain their standard of living, meet the educational expenses of their children, pay medical expenses and cope with financial emergencies (Trust § 8:01). Similar provisions were made for the periodic percentage payments of principal and special principal distributions, upon any son's death, to his children (Trust, §§ 6:02, 8:02; Article VII).

Also upon the earlier of Rubin's death or January 5, 2007, the Trust provided that defendant JPM would become an additional trustee (AC ¶ 8; Trust § 15:01). The Trust conferred broad powers upon its trustees with regard to the purchase and sale of stocks, bonds, securities, real and personal property (Trust §§10:01, 10:03). JPM was specifically authorized to invest in "any security, account, proprietary mutual fund, or common trust fund issued, held, or administered by [JPM], or by any parent, subsidiary, [or] affiliated corporation" (Trust §§10:01). JPM was permitted to resign at any time, or, after serving for at least 36 months, be removed by the individual trustee (Trust § 15:01(B)(2)).

Rubin died on December 16, 2005 (AC ¶ 12). At that time (and as of the filing of the complaint) all three sons were still alive (Id). Accordingly, pursuant to the terms of

the Trust, JPM became a trustee and separate trusts accounts were created for each son (Id). In the February 15, 2006 Letter Agreement,[2] Alex delegated the investment and management of the trust assets to JPM. The Letter Agreement recited that the delegation was being made in a manner consistent with the Trust, and that it complied with the Prudent Investor Act insofar as Alex had exercised care, skill and caution in designating JPM as a suitable designee, and would periodically review JPM's exercise of its obligations (Letter Agreement, p.1). With respect to JPM's duties, the Letter Agreement provided that:

> On an ongoing basis, [JPM] will determine the asset allocation target ranges (the percentage of the total Trust Portfolio to be applied to each asset class – stock, bonds and cash). In addition, from time to time [JPM] will select the specific securities to be purchased and sold within each of these classes, including, proprietary mutual funds, third party mutual funds, individual stocks, individual bonds and JPMorgan Chase Bank or Chase deposit account. These decisions will be based upon [JPM's] views of the outlook for global economies, bond and equity markets and upon [JPM's] views of specific securities and industries.
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> On a periodic basis, at least annually, [JPM] will review the asset allocation of the trust portfolio and make adjustments by purchasing and selling securities as deemed appropriate, taking into consideration the target ranges for the agreed upon objective and other circumstances such as taxes, liquidity needs and views of the economy and markets. Principal cash additions to the Trust will be invested by [JPM] in accordance with the then current asset allocation target ranges at the time of the deposit or at the time

[2] The complaint asserts that separate letter agreements were executed for each of the three trust accounts (AC ¶ 13). However, exhibit B to the complaint, denominated as the "Letter Agreement," relates solely to the account for Jesse. For the purpose of this motion, I presume that the other two letters were identical or substantially similar.

> of the next rebalancing, at [JPM"s] option. If necessary to make distributions from the Trust, [JPM] will liquidate securities in proportions equal to the then current asset allocation target ranges at the time of the liquidation.
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> (Letter Agreement, pp. 1-2). The parties further stated that:
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> We each agree to notify the other promptly of any changed circumstances which should be considered in determining whether or not the current investment objective and types of securities selected continue to be appropriate for the Trust portfolio. At least annually, [JPM] will contact [Alex] to review the current circumstances and to recommend changes to the investment objective or types of securities, if appropriate. [JPM] will be available during normal business hours to discuss the Trust portfolio, its performance, and any possible changes to the investment objective or the types of securities. Any changes in the investment objective or the types of securities for the Trust will be made in writing signed by both of us.

(Letter Agreement, p. 2). JPM also agreed to provide quarterly statements setting forth the assets and income held by the trust, the contributions, distributions and other transactions, and the market value of the assets and JPM's fees (Letter Agreement, p.3). Finally, the parties agreed that either one could terminate the agreement upon 30 days' prior written notice (Letter Agreement, p. 3).

The sons' three accounts were funded in July 2007 (AC ¶ 28). Alex received from JPM the periodic account statements required under the Letter Agreement (AC ¶ 11; D's Exhs. D-F, H-J, K-M). In 2007, the portfolios of the accounts averaged approximately 55% in equities, 18% in fixed income and 28% in cash. By March 2008, the portfolio allocation for Bruce was 61% equities, 26% fixed income and 12% cash; for Alex 65% equities, 14% fixed income and 5% cash; and for Jesse 70% equities, 23% fixed income

and 5% cash (AC ¶¶ 28-29). The accounts were initially serviced by Jean Tougas ("Tougas"), John Hess ("Hess") and Robert Hatch ("Hatch") of JPM's New Canaan, Connecticut office.

In mid-March 2008, Alex became concerned about the investments in the Trust due to the collapse of Bear Stearns (AC ¶22). On March 17, 2008, he emailed Tougas noting that markets had entered a "turbulent" period and that the value of the accounts had dropped about 10% since JPM began managing them. He asked whether the accounts were properly allocated or should be weighted more conservatively towards cash and bonds, noting that he and his brothers were concerned about the preservation of principal, and that Jesse in particular depended upon income. Tougas said she had asked Hess to give Alex a call about the issue (AC ¶31; Greenberg Aff., Exh. G).

Alex had a number of conversations with Hess over the next several months. In them, he repeated his concerns over how the market was reacting to the Bear Stearns collapse and how weighting the accounts in favor of equities was exposing them to market risk. He emphasized his desire to preserve principal, and to that end requested a reallocation and/or liquidation of the securities (AC ¶¶ 33-37). However, Hess refused to reallocate the assets, stating that the account was being managed for the long term and that reallocation and liquidation were not necessary to protect the principal (AC ¶37). In August 2008, JPM increased Bruce's equity position to 67% and Alex's equity position to

72%. By the end of September, Bruce's equity position was 65% and Alex and Jesse each held 68% equities (AC ¶¶ 39-40).

On October 6, 2008, both Alex and Jesse wrote to Hess requesting a reallocation/liquidation of their accounts. Jesse expressed dismay that his account had lost 23% of its value since July 2007, falling from approximately $600,000 to $460,000 (AC ¶ 41; Greenberg Aff., Exh. N). In a telephone conversation with Alex, Hess agreed to liquidate Jesse's account (AC ¶ 41).

On October 9, 2008, Alex demanded a meeting with a high-level manager at JPM. The meeting was scheduled for October 16, 2008. With his brothers, he met with Hess and Michael Keden. (AC ¶42; Greenberg Aff.¶ 19, Exh. O). The JPM officers attempted to explain why the losses occurred, but told Alex that reallocation could not and would not be permitted (AC ¶¶ 42-44).

After the meeting, Alex again requested liquidation of Jesse's account, and the reallocation of the assets in his account and Bruce's account (AC ¶45). Jesse contacted JPM after the meeting as well, indicating his distress with market conditions and his desire to be on the "sidelines" insofar as at the meeting he had been advised that the conditions would get worse. Mr. Keden responded that JPM had to work with Alex, as co-trustee, "within the constraints and powers of the trust agreement, state of fiduciary law and prevailing market conditions to manage . . . for the best interests of the current

income beneficiary and potential further takers of the property" (Greenberg Aff.¶ 20, Exh. P).

In an email dated October 30, 2008, Hess addressed a request by Alex and Jesse to move funds to high quality short term investments. He stated that a reallocation could not be made unless at least 50% of the funds remained in equities. Alex responded that he believed a short term, rather than long term, investment outlook should govern their strategy (Greenberg Aff.¶ 24, Exh. Q). The requests for allocation and liquidation were again ignored. On November 10, 2008, Alex conducted a phone conference with Hess and a new JPM employee, Nadja Steve ("Steve"). Steve asserted that the accounts had to consist of at least 49% equities. Alex was reassured that the market conditions were just temporary and that while small changes could be made to the account, there was no need to change the overall allocation (AC ¶¶ 46-48).

In March 2009, Alex requested that JPM permit the Trust to be moved to another bank. JPM agreed to step aside as trustee, even though the 36 month period during which it could not be removed involuntarily had not expired (Greenberg Aff ¶¶ 27-28; Exh. R).

Plaintiff alleges that JPM breached its fiduciary duties by failing to limit the Trust's exposure to the risks of the equities market after March 2008. The complaint asserts that JPM sought to maximize its fees by leaving the funds in its own investment products, making $40,000 from them while the Trust lost approximately $350,000. Plaintiff also claims that JPM misrepresented its internal rules regarding the permissible

reallocation of assets in order to justify its denials of plaintiff's requests. The complaint sets forth seven cause of action: (1) breach of contract; (2) breach of the Prudent Investor Act and fiduciary duty; (3) fraudulent misrepresentation; (4) negligence; (5) negligent supervision; (6) breach of the covenant of good faith and fair dealing; and (7) respondeat superior (AC ¶¶ 51-106).

Discussion

The motion is denied as to the claim for breach of the Prudent Investor Act and breach of fiduciary duty and breach of contract, and is granted as to all other counts. The Amended Complaint adequately pleads that JPM exposed the Trust's principal to excessive market risk, and disregarded it obligations under the Letter Agreement to confer with the co-trustee and adjust the portfolio if required. The remaining claims are either redundant or non-cognizable.

As relevant here, the Prudent Investor Act, EPTL 11–2.3, provides:

> (a) A trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard defined by this section.
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> (b)(3) The prudent investor standard requires a trustee:
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> (A) to pursue an overall investment strategy to enable the trustee to make appropriate present and future distributions to or for the benefit of the beneficiaries under the governing instrument, in accordance with risk and return objectives reasonably suited to the entire portfolio;
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> (B) to consider, to the extent relevant to the decision or action, the size of the portfolio, the nature and estimated duration of the fiduciary relationship,

> the liquidity and distribution requirements of the governing instrument, general economic conditions, the possible effect of inflation or deflation, the expected tax consequences of investment decisions or strategies and of distributions of income and principal, the role that each investment or course of action plays within the overall portfolio, the expected total return of the portfolio (including both income and appreciation of capital), and the needs of beneficiaries (to the extent reasonably known to the trustee) for present and future distributions authorized or required by the governing instrument;
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> (C) to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provisions of the governing instrument; and
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> (D) within a reasonable time after the creation of the fiduciary relationship, to determine whether to retain or dispose of initial assets.
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> (6) For a bank, trust company or paid professional investment advisor . . . which serves as a trustee, and any other trustee representing that such trustee has special investment skills, the exercise of skill contemplated by the prudent investor standard shall require the trustee to exercise such diligence in investing and managing assets as would customarily be exercised by prudent investors of discretion and intelligence having special investment skills.
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> EPTL 11–2.3(b)(3), (6).

"The prudent investor rule requires a standard of conduct, not outcome or performance. EPTL 11–2.3(b)(1). "Compliance with the prudent investor rule is determined in light of facts and circumstances prevailing at the time of the decision or action of a trustee . . . [a] trustee is not liable to a beneficiary to the extent that the trustee acted in substantial compliance with the prudent investor standard or in reasonable reliance on the express terms and provisions of the governing instrument. *Id.* "The test is

prudence, not performance, and therefore evidence of losses following the investment decision does not, by itself, establish imprudence." *Matter of Janes*, 223 A.D.2d 20, 27 (4th Dept 1996), aff'd 90 N.Y.2d 41 (1997). Thus, "[t]he Court may not view alleged acts or omissions aided by hindsight, but instead must view the fiduciary's actions in light of the history of each individual investment." *In re JP Morgan Chase Bank, N.A.*, 2013 WL 6182548, *10 (NY Sur, 2013) (citations and internal quotations omitted); *see In re HSBC Bank USA*, 37 Misc3d 875, 880 (Surr. Ct, Erie Co), aff'd 109 A.D.3d 1118 (4th Dept 2013). A mere error in judgment does not violate the standard. *Id.*

As anticipated by EPTL 11–2.3(b)(C)(3), a concentration of the assets of a trust in one particular security or class of securities may violate the diversification requirement. *See In re Huang*, 2003 WL 21048965, *2 (Sup Ct, NY Co 2003) (trustees engaged in "high-risk reckless pattern of stock trading, and/or 'day trading' and stacked the [beneficiary's] portfolio almost exclusively with high tech stocks which lost substantial value"); *In re Hunter*, 100 A.D.3d 996 (2d Dept 2012) (trustee maintained a high concentration of Kodak stock for an extended period of time). A failure to formulate an investment plan tailored to the beneficiaries' need, or a violation of the trustee's internal rules regarding the retention of securities, may give rise to liability. *Matter of Janes*, 90 N.Y.2d 41, 55 (1997); *In re Hunter*, 100 A.D.3d 996, 998 (2d Dept 2012). However, "[t]here is no blanket prohibition to retaining stocks in a concentrated manner, provided the decision to do so was made with "reasonable care, skill and caution." *In re HSBC*

Bank USA, 37 Misc3d 875, 822 (acquisition and/or retention of shares of the common stock of General Electric Company, Merck & Company, Inc., Microsoft Corporation and Pfizer, Inc. found not violative under the circumstances).

Plaintiff's claim -- that JPM retained, and even increased, a high concentration of equities in the Trust portfolios after March 2008, during a period of extreme volatility and uncertainty in the stock market, rather than transitioning into safer investments to preserve principal -- states a claim for relief. The court cannot, as defendant urges, hold as a matter of law that a trustee is immune from liability merely because the plaintiff's losses correlated with a widespread market decline. Nor can the action be summarily dismissed as one based on hindsight. "Whether a trustee has acted prudently is a factual determination that is generally made by the trial court . . . [n]o precise formula exists for determining whether the prudent person standard has been violated in a particular situation; rather, the determination depends on an examination of the facts and circumstances of each case." *Matter of Janes*, 90 N.Y.2d 41, 50; *In re Hyde*, 44 A.D.3d 1195, 1198 (3d Dept 2007). Accordingly, the issue of prudence has almost always been determined at trial or summary judgment, with the aid of expert witnesses. *See, e.g.*, *In re JP Morgan Chase Bank, N.A.* (trial), *In re Hyde* (trial), *In re HSBC Bank USA* (summary judgment).

In re Duffy, 25 Misc 3d 901 (Surrogate's Co, Monroe Co 2009), aff'd 79 A.D.3d 1732 (4th Dept 2010) upon which defendant relies, is no exception. There, the court

entertained competing expert witnesses and weighed their credibility. Although the court stated that "[f]iduciaries holding stocks in times of economic stress and falling markets are to be shown 'leniency,'" it evaluated the question of prudence upon the totality of the circumstances. *Id.* at 905. To the extent defendant is arguing that the market decline was a superceding event that cut off its liability, it is raising the fact-laden question of causation which cannot be resolved at this juncture. *See, e.g. MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 295 (1st Dept 2011) ("it is the job of the fact-finder to determine which losses were proximately caused by misrepresentations and which are due to extrinsic forces . . .[i]t cannot be said, on this pre-answer motion to dismiss, that [plaintiffs'] losses were caused, as a matter of law, by the 2007 housing and credit crisis").

Moreover, contrary to defendant's contention, the complaint meets the heightened pleading requirement for fiduciary claims. It is sufficient that plaintiff identified JPM's practice of concentrating the investments in equities, provided the percentage breakdown of the portfolios, and pled facts indicating that plaintiff expressed concern with defendant's strategy. *See, e.g.*, *Rioseco v Gamco Asset Management, Inc.*, 2011 WL 4552544 (Sup Ct, NY Co 2011) (holding breach was sufficiently alleged where plaintiffs asserted that over their voiced objections, defendants put all of their investments in equities rather than a mix of equities and fixed income). In any event, defendant has ample notice of the transactions complained of, which can easily be determined by

reference to the limited set of financial statements for the period March 2008 to March 2009.

Defendant also claims that its refusal to reallocate the portfolios was justified under the Prudent Investor Act because it had longer-term obligations to contingent beneficiaries (the children of the three sons). This argument merely raises additional factual questions. Apart from whether those interests were the actual impetus for defendant's equity-weighted strategy, the question remains whether the strategy was appropriate for the needs of any of the beneficiaries, vested or contingent.

The court also rejects JPM's argument that Alex waived the Trust's rights by allegedly reaffirming a "growth" objective in 2008. The record does not amplify precisely what that term means, whether JPM had guidelines defining it, and whether they were followed. Nor would the existence of such guidelines require strict adherence should the consideration of the totality of beneficiaries' circumstances and external conditions indicate that a change in the strategy was required. *See Ambac Assur. UK Ltd. v J.P. Morgan Inv. Management, Inc.*, 88 A.D.3d 1, 10 (1st Dept 2011) ("adhering to the maximum contractually permitted percentages despite 'seismic changes to the economy, to world markets and J.P. Morgan's own internal conclusion[s] [about an impending financial meltdown in the housing market],' suggests the very opposite of managing the accounts and exercising discretion as to whether the securities should be held at all"). Defendant's related argument that Alex could have revoked the bank's authority upon

notice under the Letter Agreement also fails, in view of the fact that JPM would still have remained a co-trustee and could still have resisted the demanded change in allocation.

Finally, in connection with the Prudent Investor Act claim, defendant contends that it cannot face fiduciary liability merely from investing Trust funds in its own financial products. However, plaintiff does not dispute that JPM had the legal and contractual right to do. Rather, plaintiff merely raises defendant's potential profit from those products as a possible motive for its alleged disregard of its duties.

The motion to dismiss the contract claim is similarly denied. Although the Letter Agreement references the Prudent Investor Act, it also imposed specific obligations upon JPM to review the asset allocation of the Trust with regard to various enumerated factors. Moreover, it required JPM to confer with Alex regarding any changes. The court finds that contractual provisions afford plaintiff rights which are separate and distinct from those set forth in the Prudent Investor Act.

The remaining claims, however, are dismissed. The negligence claim is superseded by of the Prudent Investor Act claim, which defines the boundaries of a very specific form of negligence applicable to the management of trusts. Similarly, the alleged misrepresentation by defendant's employees that reallocation was not "permissible" merely restates a breach of the Act.

Furthermore, "[r]espondeat superior is not an independent cause of action, but a theory that must attach to an underlying claim." *Alexander v Westbury Union Free*

School Dist., 829 F.Supp. 2d 89, 112 (EDNY 2011). It is inapplicable here, as plaintiff is suing JPM directly for its role as trustee, not for some independent tort committed by its employees. The claim for negligent supervision fails for the same reason. Finally, the claim for breach of the covenant of good faith and fair dealing is dismissed as abandoned, as plaintiff does not defend it in his brief.

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is denied as to the first cause of action for breach of contract and as to the second cause of action for breach of the Prudent Investor Act and breach of fiduciary duty, and it is further

ORDERED, that defendant's motion to dismiss is granted as to all other claims, and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 208, 60 Centre Street, on May 28, 2014, at 2:15 pm.

This constitutes the decision and order of this Court.

Dated: New York, New York
April 25, 2014

ENTER:

Saliann Scarpulla, J.S.C