

Bikowicz v Trustco Bank
2015 NY Slip Op 32672(U)
January 8, 2015
Supreme Court, Saratoga County
Docket Number: 20113129
Judge: Thomas D. Nolan, Jr.
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

TERRENCE BIKOWICZ and SUSAN BIKOWICZ,
Plaintiffs,

-against-

TRUSTCO BANK and MARK GILLEN,
Defendants.

DECISION AND ORDER
RJI No. 45-1-2012-0244
Index No. 20113129

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: NEIL S. WEINER, ESQ., LLC
Attorney for Plaintiffs
56 Clifton Country Road, Suite 201
Clifton Park, New York 12065

MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
Attorneys for Defendant Trustco Bank
677 Broadway, 5th Floor
Albany, New York 12207-2503

LEE GREENSTEIN
Attorney for Defendant Gillen
636 Delaware Avenue
Delmar, New York 12054

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In this action, plaintiffs seek damages allegedly caused by incorrect and misleading advice given by defendants which plaintiff Terrence Bikowicz contends he relied on when he decided to withdraw \$108,099.82 from his individual retirement account (IRA).

First, the background. In 2003, plaintiff "rolled over" \$88,221.50 in retirement funds maintained by a former employer into a traditional IRA with Trustco Bank as Trustee. In 2009, plaintiffs decided to construct a second home and applied to defendant Trustco Bank (Trustco) to increase their line of credit on an existing home equity loan covering their primary residence. Plaintiffs' application was denied. Plaintiff Terrence Bikowicz (hereafter plaintiff) then

discussed alternative financing options, with defendant Mark Gillen (Gillen), an assistant manager at one of Trustco's branch offices, and contends that Gillen advised him that he could withdraw funds from his IRA to finance the construction project. According to plaintiff, Gillen represented to him, that because he had a Roth IRA, he was permitted to make withdrawals without penalty or tax consequences.¹ Plaintiff decided to withdraw the full amount in his IRA and on September 8, 2009 signed a withdrawal authorization form which Gillen prepared and which on the line entitled "Plan Type" had the words "Roth IRA RO2" typed. Subsequently, when the form was reviewed by Trustco's IRA Department Manager, Elizabeth K. Black (Black), it was determined that plaintiff had a traditional IRA, not a Roth IRA, and on the withdrawal authorization, the typed words "Roth IRA" were crossed out and the word "Trad" was handwritten onto the form. According to Black, plaintiff should have been notified of the change by the branch; yet, Trustco has no record that he was told. Plaintiff denies ever being notified that the form he signed had been altered.

In January 2010, Trustco sent to plaintiff an IRS 1099-R form stating that plaintiff had received an IRA distribution of \$108,099.82 which was taxable and against which a 10% early withdrawal penalty applied. Plaintiff immediately contacted Trustco and ultimately was told the transaction could not be reversed.²

As a consequence of the defendants' alleged misrepresentations, plaintiffs contend that they paid \$53,148.00 in additional 2009 State and Federal income taxes, and also incurred a tax

¹According to information provided by T. Rowe Price, Roth IRA contributions, and earnings generated by contributions, may be withdrawn at any time without penalty or taxes.

²According to IRA rules, plaintiff had 60 days after the withdrawal to redeposit the funds into an IRA and thus avoid taxes and penalties.

penalty of \$10,109.98 because of the early withdrawal and sustained an additional \$3,000.00 loss of college financial assistance for their son and daughter as the withdrawal funds were considered funds available for college tuition.

Discovery has been completed and trial scheduled. Defendant Trustco moves, pursuant to CPLR 3211 (a) (7), for an order dismissing plaintiffs' complaint on the alleged ground it fails as a matter of law to state a cause of action.³ Trustco's motion is supported by the pleadings, plaintiff Terrence Bikowicz's deposition transcript and copies of plaintiff's IRA application, contribution form, and withdrawal authorization. Relying on Trustco's submissions, defendant Gillen likewise moves for an order of dismissal.

In opposition, plaintiffs submit an attorney's affirmation, excerpts from the deposition transcript of Black, and a copy of the original withdrawal authorization form.

Notwithstanding that plaintiffs' summons with notice states plaintiffs were seeking recovery of money damage for breach of fiduciary duty, misrepresentation of material facts, fraud and deceit, negligence and breach of contract, plaintiffs complaint has a single cause of action in which it is alleged that defendant's agent, Gillen, advised plaintiff incorrectly that he had a Roth IRA and that an early withdrawal of monies from that account would not be a taxable event; that defendant Gillen prepared a withdrawal authorization again incorrectly stating plaintiff's account was a Roth IRA; that plaintiff signed the withdrawal form in reliance on those representations; that plaintiff did not learn until January 2009 that the form had been changed and Gillen's advice

³Since issue has been joined, the correct motion would be one for summary judgment under CPLR 3212 (a) based on CPLR 3211 (a) (7) grounds raised in the answer. see Mann v Malasky, 41 AD3d 1136, 1137 (3rd Dept 2007). Defendant's brief cites the standard of review applicable to a CPLR 3211 (a) (7) motion.

was incorrect; and that plaintiffs' sustained financial damages. Defendants urge, even accepting the plaintiffs' allegations as true, that the documentary evidence - the IRA application and withdrawal application - establishes plaintiffs expressly waived and disclaimed reliance upon any representations defendants may have made regarding tax or legal advice and urge, again even accepting as true that defendant Gillen incorrectly represented to plaintiff that he had a Roth IRA and that the withdrawal would be nontaxable, there is no basis to impose legal liability against them.

Defendants' motions cite, as principal support, a provision in the initial IRA account application (Trustco, Exhibit I) stating as follows:

I agree to seek the advice of a legal or tax professional, as needed. the Trustee [Trustco Bank] has not provided me with any legal or tax advice, and, I assume full responsibility for this transaction. I will not hold the Trustee liable for any adverse consequence that may result from this transaction.

And, in the withdrawal form (Trustco Exhibit 1), defendants cite the following clause:

The individual whose signature appears below certifies that this withdrawal instruction complies with the terms of provisions for the underlying retirement plan and Trust and the requirements of the Internal Revenue Code. Trustco Bank may reasonably rely on such certification without further investigation or inquiry and shall incur no liability therewith.

In opposition, plaintiffs urge that defendants provided incorrect advice and knew or should have known plaintiffs would reasonably rely upon such advice and then further compounded such misinformation by failing to notify plaintiffs, after Trustco's IRA department reviewed the withdrawal and discovered the mistake so that plaintiff, within the 60-day window that was available, could have reversed the transaction and redeposited all the funds into an IRA

and thereby avoid the losses they incurred.

First, the general principles to be considered. As recently stated in Trask v Tremper Prop. Assn, Inc., __AD3d__, 2014 NY LEXIS 8226 (3rd Dept, Nov 26, 2014):

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), we are to afford the pleading a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (Sand v Chapin, 238 AD2d 862, 863 [1997]; see Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Whether a plaintiff can “ultimately establish its allegations is not part of the calculus in determining [such] motion” (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; see Lewis v DiMaggio, 115 AD3d 1042, 1044 [2014]).

To state a viable claim of negligent misrepresentation, again the only cause of action in plaintiffs’ complaint, plaintiffs must show that a special or privity-like relationship existed between plaintiffs and defendants which imposed a duty on defendants to impart correct information; that the information defendants provided was incorrect; and that the plaintiffs reasonably relied on the information. JAO Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007). To demonstrate privity or its functional equivalent, plaintiffs must show an awareness by defendants that the information it imparts will be used for a particular purpose and that the defendants understood or knew that the plaintiffs would rely on the information given. Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417, 425 (1989).

Viewing the facts and the inferences reasonably drawn from those facts in the light most favorable to plaintiffs, the complaint states a cause of action sufficient to survive the motion. Trustco was the Trustee of plaintiff’s retirement account, and the bank and its employees were aware that plaintiffs were seeking an arrangement to finance the construction of a second

residence; that defendants incorrectly advised plaintiff that he had a Roth IRA which permitted non-penalized withdrawals of contributions and accrued investment returns; and then the defendants failed to contact plaintiff when Trustco discovered that the withdrawal authorization incorrectly identified the type of IRA account so that plaintiffs could, if they chose, timely reverse the transaction.


In the court's view, Trustco's position toward plaintiffs was the functional equivalent of a privity relationship. The defendants knew also that plaintiffs were seeking alternative financing and that plaintiffs were reasonably relying on defendants' representations. The defendants subsequently recognized the mistake and had an opportunity to bring the mistake to the plaintiffs' attention in a timely manner but did not. Again, plaintiffs' complaint states a cause of action when the facts and inferences drawn therefrom are viewed in the light most favorable to plaintiffs.

Defendants' respective motions are denied, without costs.

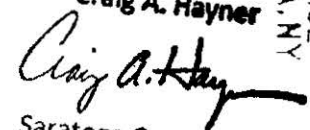
This constitutes the decision and order of the court. The original decision and order is returned to the counsel for plaintiffs. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for plaintiffs is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

DATED: January 8, 2015
Saratoga Springs, New York


HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

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Saratoga County Clerk

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