

Averick v Glickenhau
2017 NY Slip Op 30862(U)
April 27, 2017
Supreme Court, New York County
Docket Number: 650235/2016
Judge: Cynthia S. Kern
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NYSCEF DOC. NO. 26

RECEIVED NYSCEF: 04/28/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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PAMELA AVERICK, AVERICK FINANCIAL LLC

Plaintiffs,

DECISION/ORDER
Index No. 650235/2016

-against-

SETH GLICKENHAUS,

Defendant.

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HON. CYNTHIA KERN, J.:

Plaintiffs have commenced the present action to hold defendants liable for losses they claim to have sustained between August 2008 and February 2009 in one or more accounts they held with Glickenhau & Co. ("Glickenhau"), an investment advisory firm. Defendants have brought the present motion to dismiss this action with prejudice on the ground that it is barred by the statute of limitations. As will be explained more fully below, the motion is granted in its entirety and the action is hereby dismissed.

The relevant facts are as follows. Plaintiff Pamela Averick claims that in or about the end of August 2008, she told her investment adviser at the time, Seth Glickenhau, to take her out of the market and sell her holdings. She claims that during the months that followed, she believed she was out of the market based on her conversation with Mr. Glickenhau. She alleges that in February 2009, she called up Glickenhau because she needed additional money and was told that there was not enough cash in her account because she was still invested in the market. She alleges that without any further discussion or a meeting, a large portion of her account was then sold after this conversation. She claims that based on not being taken out of the market in 2008 and a large portion of her account being sold in 2009, she lost a substantial amount of money. However, she continued to use Mr. Glickenhau as her financial advisor until August 2011, at which point she moved her funds away.

Plaintiffs have commenced the present action against defendants for breach of fiduciary duty based on the actions of Mr. Glickenhaas in not following her instructions to take her out of the market in 2008. Defendants have brought the present motion to dismiss this action on the ground that it is barred by the statute of limitations.

The first question the court must determine is whether a three or six-year statute of limitations applies to plaintiff's breach of fiduciary duty claim. There is no single statute of limitations for breach of fiduciary claims under New York Law. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009). Rather, what limitations period applies depends on what substantive remedy that the plaintiff seeks. *Id.* According to the Court of Appeals:

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 (*see e.g. Yatter v Morris Agency*, 256 AD2d 260, 261 [1st Dept 1998]). Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies (Loengard, 70 NY2d at 266-267). Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8) (Kaufman v Cohen, 307 AD2d 113, 119 [1st Dept 2003]).

Id.

In the present case, the court finds that the three- year rather than the six-year statute of limitations should be applied as the remedy plaintiff is seeking is purely monetary and an allegation of fraud is not essential to plaintiff's breach of fiduciary duty claim. Plaintiff's breach of fiduciary duty claim is based on her allegation that Mr. Glickenhaas did not comply with her instruction take her out of the market in 2008. This claim would exist whether he did not comply with her wishes based on negligence on his part or because he had a fraudulent intent on his part not to comply with her instructions. Moreover, plaintiff cannot make out a breach of fiduciary duty claim sounding in fraud because she cannot establish an intent on the part of Mr. Glickenhaas to deceive her. It is undisputed that plaintiff received a monthly statement that disclosed the exact status of her account. Mr. Glickenhaas could not have had the requisite intent to commit fraud with respect to his alleged failure to sell the securities in her account where he repeatedly disclosed to her every month exactly what the holdings in her account consisted of. Even assuming she failed to review her monthly statements, it cannot be disputed that this information was disclosed to her

monthly. Thus, she cannot establish intent to deceive on the part of defendant and therefore cannot make out a viable fraud claim.

The next issue the court must determine is when plaintiff's claim for breach of fiduciary duty accrued. The general rule is that a tort claim, including a breach of fiduciary duty claim, arises when the claim becomes enforceable which is when the damages are sustained. *Id.* In the present case, the tort claim arose when defendant allegedly did not follow plaintiff's instructions which would have been in 2008 or at the latest 2009. Since the present action was not commenced until 2016, it is barred by the three-year statute of limitations.

The argument by plaintiff that the statute of limitations was tolled by the open repudiation doctrine is without basis. The First Department has specifically held that the open repudiation doctrine, which tolls the statute of limitations when there is an ongoing fiduciary relationship between the parties, does not apply to claims for money damages. *Matter of Clark*, 146 A.D.3d 495, 496-497 (1st Dept 2017). *See also Cusimano v. Schmurr*, 137 A.D.3d 527, 530 (1st Dept 2016) (open repudiation doctrine only applies to claims for equitable or accounting relief); *Stern v. Morgan Stanley Smith Barney*, 129 A.D.3d 619 (1st Dept 2015) (open repudiation claim only applies to claims for accounting or equitable relief and does not apply to claims solely at law).

The argument by plaintiff that the statute of limitations is tolled based on the equitable tolling doctrine is also without merit. Initially, the First Department has held that the doctrine of equitable tolling is applied to federal causes of action in New York, which are not being asserted in this case. *See Shared Communications Servs. of ESR Inc. v. Goldman, Sachs & Co.*, 38 A.D.3d 325 (1st Dept 2007). Moreover, even if the doctrine were to apply to a state claim, it would not apply in the instant action as plaintiff cannot establish that she was "'actively misled' by defendant, or that in some extraordinary way had been prevented from complying with the limitations period." *Id.*

Finally, the court also finds that the continuous representation doctrine is not applicable in this case to toll the statute of limitations. New York courts recognize a tolling of the statute of limitations where there is a "continuous representation" of the plaintiff by the professional. *Transport Workers Union of*

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America Local 100 AFL-CIO v. Schwartz, 32 A.D.3d 710, 713 (1st Dept 2006). The “continuous representation doctrine tolls the running of the statute of limitations on a cause of action against a professional defendant only so long as the defendant continues to represent the plaintiff ‘in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship.’” In the instant case, plaintiff cannot establish that defendant continued to represent her in connection with the particular transaction which is the subject of this action as opposed to the continuation of a general professional relationship. The transaction that forms the basis of the instant action, the alleged representation by defendant that he would take plaintiff out of the market, was a singular discrete investment decision that was unrelated to the other advice that defendant gave plaintiff over the years. However, even assuming *arguendo* that the continuous representation doctrine applies, it would not help plaintiff as she did not commence any action within three years after defendant stopped having a professional relationship with plaintiff.

The request by defendants for sanctions is denied as defendants have failed to establish a sufficient basis for the imposition of sanctions.

Based on the foregoing, the action is hereby dismissed with prejudice because it is barred by the statute of limitations. The foregoing constitutes the decision, order and judgment of the court.

DATE :

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KERN, CYNTHIA S., JSCHON. CYNTHIA S. KERN
J.S.C.