

Judd v Madison Advisory Servs., Inc.

2020 NY Slip Op 30733(U)

March 5, 2020

Supreme Court, New York County

Docket Number: 152895/2017

Judge: Frank P. Nervo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

-----X
JONATHAN JUDD and DEBORAH JUDD,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.
152895/2017

MADISON ADVISORY SERVICES, INC.,
and JON E. SCHLUETER,

Defendants.
-----X

FRANK P. NERVO, JSC:

Defendants Madison Advisory Services, Inc. (hereinafter "Madison") and Jon E. Schlueter (hereinafter "Schlueter") move for summary judgment in their favor, pursuant to CPLR § 3212. Plaintiff's oppose.

This is an action for breach of fiduciary duty and constructive fraud stemming from defendants' financial planning and investment advice. The Court previously dismissed the professional negligence and breach of contract claims in its September 6, 2018 decision and order. That order found sufficient proof existed to establish defendants owed a fiduciary duty to plaintiffs, however there was insufficient evidence on that pre-discovery motion to determine whether plaintiff's reliance on defendants was reasonable. With discovery now complete, defendants contend the evidence establishes that they did not act as plaintiffs' financial advisors and, therefore, did not owe plaintiffs any fiduciary duty. Instead, defendants contend, as they did on their

motion to dismiss, that they acted merely as an insurance broker. Likewise, defendants contend that plaintiffs are well educated and did not reasonably rely on defendants to develop and implement a financial plan sufficient to trigger any fiduciary duty.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Plaintiffs, a husband and wife, were contacted by Schlueter, a principal of defendant Madison and registered Investment Adviser Representative, and offered no-fee financial advisory services. Schlueter subsequently met with plaintiffs where he gathered their financial information and held himself out to be an experienced financial planner in managing income, savings, retirement income, and investment strategies. In July 2013, Schlueter presented plaintiffs with a detailed, comprehensive financial plan providing for asset allocation, and an adjustable life insurance policy, among other

financial tools. Schlueter recommended the purchase of the life insurance policy as a tool to provide tax free income during their retirement, even though both plaintiffs already had term life insurance policies. The parties continued to meet over a period of several years where defendants encouraged plaintiffs implement the proposed financial plan and additional insurance and annuities were purchased. Thereafter, plaintiffs sought the opinion of a different financial advisor who advised plaintiffs that the life insurance policy was unsuitable for their needs and was, instead, designed to maximize commissions for the insurance agent. Plaintiffs then brought the instant lawsuit.

Here, plaintiffs present two claims against defendants, breach of fiduciary duty, and constructive fraud. Breach of fiduciary duty requires: a fiduciary relationship, misconduct/malfeasance by the fiduciary, and damages stemming from such misconduct (*Castellotti v. Free*, 138 AD3d 198 [1st Dept 2016]; *Pokoik v. Pokoik*, 115 AD3d 428 [1st Dept 2014]; *Kurtzman v. Bergstol*, 40 AD3d 588 [2d Dept 2007]). Constructive fraud requires: a fiduciary relationship, a false factual representation, justifiable reliance on the false representation, and detriment as a result of such reliance (see *Roni LLC v. Arfa*, 74 AD3d 442 [1st Dept 2010], *aff'd* 18 NY3d 846 [2011]; see generally *People v. Credit Suisse Sec. (USA) LLC*, 82 NY3d 622; see also *Bank v. Board of Educ. Of City of N.Y.*, 305 NY 119, 119 [1953]).

As an initial matter, defendants' reliance on the no-fee relationship as a basis for disclaiming any fiduciary relationship with plaintiffs is misplaced. As this Court noted on the motion to dismiss, it is the relationship between an insurance agent and the

client that determines whether the insurance agent has assumed additional duties of care commensurate with those of a financial advisor, not the contracted fee, if any (*see e.g. Bullmore v. Ernst & Young Cayman Is.*, 45 AD3d 461 [1st Dept 2007]; *see also EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11 [2005] [relationship between underwriter and issuer may establish fiduciary relationship irrespective of contract terms]). A fiduciary duty may be found where the insured relies on the insurance agent for expertise or where there was a course of dealing over a lengthy period which would put a reasonable insurance agent on notice that his/her advice was being relied on by the insured (*Murphy v. Kuhn*, 90 NY2d 266 [1997]).

Defendant Schlueter held himself and Madison out as experienced financial planners and developed a detailed financial plan regarding plaintiffs' retirement, assets, investments, and their children's education fund. A reasonable jury could conclude that Schlueter's advice went beyond that of an insurance broker, as he offered plaintiffs a variety of annuities, including an annuity for an IRA Jonathan Judd inherited from his father, and encouraged plaintiffs to implement his entire financial plan in a stepwise fashion. Madison is a Registered Investment Advisor and Schlueter is a registered Investment Advisor Representative, and Schlueter stated he hoped to manage plaintiffs' entire finances. Plaintiffs contend that they sought out Schlueter as a financial planner from the inception of their relationship with him, and relied on his expertise to develop a wholistic financial plan. Plaintiffs further claim that Schlueter documented his role as that of a financial advisor in an October 2015 letter. Defendants dispute these claims, contending that plaintiffs are well-educated, knew that defendants were not their

financial planners, and sought only insurance policy sales advice from defendants. Thus, defendants contend, neither the reliance nor fiduciary relationship required for plaintiffs' prima facie case has been established, and the claims must fail, as a matter of law.

Issues of fact exist regarding the relationship between defendants and plaintiffs and whether plaintiffs reasonably relied on the expertise of defendants. The parties have submitted contradictory affidavits, among other evidence, and the evidence submitted on this motion fails to establish the absence of material facts. Consequently, as defendants have not established their right to judgment as a matter of law, and issues of fact remain, summary judgment is precluded.

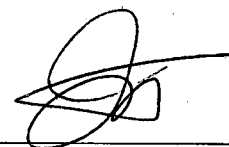
Accordingly, it is

ORDERED that the motion is denied in its entirety.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 5, 2020

ENTER:



Hon. Frank P. Nervo, J.S.C.