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Superior Court of Massachusetts,
Suffolk County, Business Litigation Session.

Elisha ERB, as Trustee of the Marc A. DiGeronimo Irrevocable Trust, and Marc A. DiGeronimo
v.
James D. JAVARAS et al. [1]

1584CV0048BLS2
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Caption Date: June 13, 2018
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File Date: June 15, 2018

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Kenneth W. Salinger, Justice of the Superior Court

***1** Plaintiffs claim that James Javaras and his insurance agencies ("Defendants") engaged in a "churning" scheme by misleading Marc A. DiGeronimo and the Marc A. DiGeronimo Irrevocable Trust into repeatedly buying unnecessary, unsuitable, and expensive life insurance policies in order to increase Defendants' commissions. DiGeronimo formed the Trust in 2002 to own life insurance policies that would be used to satisfy his anticipated future estate tax liability. Javaras served as a co-trustee of the Trust from the time it was formed until March 2013. Plaintiffs assert claims for breach of fiduciary duty, fraud, negligence, and violation of G.L.c. 93A.

Defendants have moved for summary judgment. They argue that all the claims are time barred, that Plaintiffs released these claims or are estopped from asserting them by the same document, and that DiGeronimo has no viable claim as to the so-called "Collateral Policy" because he got exactly what he paid for.

The Court is not convinced that Defendants are entitled to judgment in their favor as a matter of law. It will therefore DENY the summary judgment motion.

1. Statutes of Limitations

Defendants' argument that most of the claims against them are barred by the applicable statute of limitations turns on disputed issues of fact that cannot be resolved on a motion for summary judgment.

Plaintiffs filed suit on October 13, 2014. The applicable statutes of limitations therefore bar any tort claims that accrued before October 13, 2011 (see G.L.c. 260, § 2A) and any claim under G.L.c. 93A that accrued before October 13, 2010 (see G.L.c. 260, § 5A). Cf. *Passatempo v. McMenimen*, 461 Mass. 279, 296-97 (2012) (mere fact that allegations supporting 93A claim would also support common-law tort claim does not make 93A claim subject to shorter, three-year limitations period).

A limitations period is tolled so long as a defendant fraudulently conceals its wrongdoing. See generally *Hays v. Ellrich*, 471 Mass. 592, 601-02 (2015); G.L.c. 260, § 12. "Where a fiduciary relationship exists, the failure adequately to disclose the facts that would give rise to knowledge of a cause of action constitutes fraudulent conduct and is equivalent to fraudulent concealment." *Id.* at 602, quoting *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 519 (1997).

Thus, where the defendant is accused of breaching a fiduciary duty, the statute of limitations is tolled until the plaintiff "has 'actual knowledge' that she has been injured by the fiduciary's conduct." *Id.*, quoting *Doe v. Harbor Schools, Inc.*, 446 Mass. 245, 254-55 (2006). "Mere suspicion or mere knowledge that the fiduciary has acted improperly does not amount to actual knowledge that the plaintiff has suffered harm" as a result of the fiduciary's breach of duty. *Harbor Schools*, 446 Mass. at 255.

"This does not mean that the limitations clock begins only when the plaintiff has a legal claim, that is, when she realizes that the defendant has violated a law that entitles her to sue to recover damages." *Hays*, 471 Mass. at 602. "Rather, the clock begins when the plaintiff has 'actual knowledge of the wrong committed by the fiduciary." *Id.*

***2** In the circumstances of this case, if a jury were to find that Javaras was acting in a fiduciary capacity when he urged DiGeronimo or the Trust to buy the disputed policies, then the limitations clock would have

begun to run only when DiGeronimo or the trustee had "actual knowledge of the unsuitability of the" insurance policies and annuities. *Hays*, 471 Mass. at 606. That is because a fiduciary would have a legal duty to disclose that these financial products were unsuitable, and under Massachusetts law the failure to make that disclosure would constitute fraudulent concealment. *Id.*

DiGeronimo has presented evidence that neither he nor the Trust had actual knowledge that Javaras had advised them to purchase unsuitable policies until sometime after March 25, 2013, when Javaras resigned as trustee of the Trust and was replaced by Elisha Erb. Thereafter Attorney Erb reviewed the various policies that Plaintiffs had purchased on Javaras' recommendation, and concluded for the first time that the policies were unsuitable.

If the jury were to credit that evidence, then it would find that the statutory limitations period did not start to run until sometime in 2013, which would mean that all the claims asserted in this case are timely. Summary judgment is not appropriate where, as here, "a reasonable jury could return a verdict for the nonmoving party." *Dennis v. Kaskel*, 79 Mass.App.Ct. 736, 741 (2011), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Defendants' assertion that some of DiGeronimo's claims accrued as soon as he realized he had suffered a loss on insurance policies, because Javaras is accused of recommending unsuitable policies by representing that they were sound investments that would yield a profit within two years, is incorrect. "[A]ctual knowledge of an investment loss is not sufficient by itself to constitute actual knowledge that the fiduciary falsely represented the investment's suitability ..." *Hays*, 471 Mass. at 607.

2. The Release of Guardian and its Affiliates

For much the same reasons, a jury will have to decide at trial whether a release of claims against Guardian Trust Company and its affiliates operates to bar the claims against Javaras and his insurance agencies.

In April 2010, Guardian Trust Company resigned as co-trustee and administrator of the Trust. Guardian, DiGeronimo, and the Trust beneficiaries all entered into an agreement titled "Resignation of Co-Trustee, Appointment of Successor Co-Trustee, and Release Agreement." One provision of that document states that DiGeronimo and the Trust beneficiaries agreed "to hold harmless" Guardian and "its affiliates ... for all liabilities, claims or demands that may be made against the Trust Agreement or Guardian" concerning "any distribution, exchange, surrender and/or policy loan" made by Guardian or its affiliates.

Judge Roach construed this provision in a prior decision in this case. She ruled that "the parties intended to release Guardian Trust and its affiliates" from any such liabilities, claims or demands.

The Court sees no reason to second-guess Judge Roach's ruling. And the Court will assume without deciding that Javaras and the other remaining Defendants were all "affiliates" of Guardian that were protected by this release.

But if a jury were to find that Javaras was acting in a fiduciary capacity when he urged DiGeronimo or the Trust to buy the disputed policies, and were to find that Javaras never disclosed that he had caused DiGeronimo and the Trust to buy unsuitable polices, then this release would not bar the remaining claims.

***3** "[W]here a release is obtained without a full disclosure of the relevant facts by one who is under a duty to reveal them, it can be set aside." *Sher v. Sandler*, 325 Mass. 348, 354 (1950) (where corporate stockholder assumed and then breached fiduciary duty to disclose material information regarding the business, release of claims against stockholder obtained in connection with sale of stock was unenforceable). Thus, Javaras could not invoke the release if the jury were to find that he owed Plaintiff a fiduciary duty, had recommended that Plaintiffs purchase unsuitable insurance policies, and failed to disclose that fact before the release was executed. See *Allen v. Moushegian*, 320 Mass. 746, 757 (1947) ("a release is not effective to discharge a fiduciary's liability for breach of the trust imposed in him unless the person executing the release had knowledge of all relevant facts that the fiduciary knew or ought to have known").

3. The Collateral Policy

In 2012 DiGeronimo applied for a commercial mortgage loan on an apartment complex. The lender required DiGeronimo to obtain an insurance policy on his life as additional collateral for the loan. DiGeronimo turned to Javaras for help. Javaras recommended that DiGeronimo purchase a whole life policy from Guardian to serve as this collateral. DiGeronimo now claims that a whole life policy was inappropriate, that Javaras should have told DiGeronimo to buy a much less expensive term life policy, and that Javaras deliberately recommended the more expensive alternative in order to increase his commission.

Javaras argues that he is entitled to summary judgment with respect to this "Collateral Policy" because "DiGeronimo received the product that he purchased and there is no allegation that the policy has not performed as advertised."

This argument is without merit. An insurance broker who holds himself out as possessing "particular skill" in obtaining appropriate insurance has a duty to exercise reasonable care in recommending that a client purchase a particular policy, and may be held liable for breach of that duty if they recommend the purchase of an inappropriate policy. See *Bicknell, Inc. v. Havlin*, 9 Mass.App.Ct. 497, 500 (1980). A reasonable jury could find that Javaras breached his duty to recommend an appropriate policy. It is no defense to assert that DiGeronimo knew what product Javaras had recommended, and that DiGeronimo got what he paid for.

ORDER

Defendants' motion for summary judgment is DENIED. The clerk shall schedule a final pre-trial conference to take place in the near future.

All Citations

Not Reported in N.E.3d, 2018 WL 3431959

Footnotes

1 Judgment dismissing all claims against the other defendants—Robert Fine & Randy S. Fine Insurance, LLC, Guardian Trust Co., FSB, and The Guardian Life Insurance Company—entered on June 16, 2015, as ordered by Judge Roach.