

STATE OF MICHIGAN
COURT OF APPEALS

NESTOR KLEER and MARIA KLEER,

Plaintiffs-Appellants,

UNPUBLISHED
September 20, 2011

v

TACTICAL ALLOCATION GROUP, L.L.C.,
JAMES F. PETERS, JR., and PAUL J. SIMON,

Defendants-Appellees.

No. 298915
Oakland Circuit Court
LC No. 2009-102944-CZ

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's order granting summary disposition in favor of defendants. We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiffs Nestor and Maria Kleer began working with defendants when they sought professional advice and management of their money. Then, defendants left their employer and started Tactical Allocation Group, LLC (TAG), and plaintiffs and defendants continued their same relationship at TAG. Upon moving the accounts to TAG, plaintiffs signed a new Investment Advisory Agreement that established the details of the relationship. The agreement contemplated both an upside- and downside-return objective.

In the subsequent years, plaintiffs' portfolio was in better position than expected due to investments that performed exceptionally well and because plaintiffs withdrew less income. Defendants recommended that plaintiffs sign, and plaintiffs did sign, an addendum to their investment objectives, which essentially recommended that plaintiffs lower their required rate of return. During the next three years, defendants reduced the aggressiveness of plaintiffs' portfolio to meet the new rate of return. At this point, defendants felt appropriate to reduce the downside benchmark as well, so they had plaintiffs signed an addendum to their investment objectives, which recommended a lowering of plaintiffs' risk objective to No Loss Years. Shortly thereafter, plaintiffs' portfolio suffered significant losses.

II

Plaintiffs contend that the trial court incorrectly concluded that the addendum to plaintiffs' account was not binding on defendants. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Collins*, 468 Mich at 631. Summary disposition is appropriate under MCR 2.116(C)(10) if no genuine issue of any material fact exists, and the moving party is entitled to judgment as a matter of law. *West*, 469 Mich at 183. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

A valid contract is essential to a breach of contract claim. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). In order to have a valid contract, the essential elements that are needed are: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Id.* "Mutuality is the center piece to waiving or modifying a contract, just as mutuality is the centerpiece to forming a contract." *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). For modifications, the mutuality requirement can be satisfied through clear and convincing evidence of a written agreement. *Id.* at 364-365.

The addendum amended the original Investment Objective Questionnaire, which, according to Section 2, determined plaintiffs' investment strategy. Plaintiffs' modification of the Investment Objective Questionnaire was in writing and signed. Based on the investment objectives, defendants would continue to invest plaintiffs' money and plaintiffs would continue to pay defendants' fee. Furthermore, the addendum was based on defendants' recommendation and agreed to by plaintiffs.

The original Investment Advisory Agreement stated that defendants must invest plaintiffs' money according to their investment objectives. The trial court concluded that the no-guarantee provision included in the Investment Advisory Agreement vitiated any requirement for defendants to act based on the addendum. Had plaintiffs lost money and argued that they were guaranteed no-losses, then the no-guarantee provision may be applicable.

However, plaintiffs contend that defendants never even complied with their investment objectives as required by the original contract. The trial court's reliance on the no-guarantee provision is incorrect; as discussed above, defendants had an original contract that stated that they must act according to plaintiffs' approved investment objectives. The investment objectives were amended to read no-loss years. Plaintiffs established deposition testimony that the changes were never made to their investments. Because plaintiffs contend that defendants failed to act on these investment objectives, and provided deposition testimony to further their claim that there was a failure to act, there exists a question of fact as to whether defendants breached the original contract that required them to act according to the investment objectives.

III

Plaintiffs next contend that defendants breached their fiduciary duty by not changing plaintiffs' account based on the signed addendum. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Collins*, 468 Mich at 631. Summary disposition is appropriate under MCR 2.116(C)(10) if no genuine issue of any material fact exists, and the moving party is entitled to judgment as a matter of law. *West*, 469 Mich at 183. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

A fiduciary duty exists when there is a relationship that involves trust, confidence, and reliance on another for judgment and advice. *Williams v Griffin*, 35 Mich App 179, 183; 192 NW2d 283 (1971). A breach of a fiduciary duty occurs when a "position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v Ramirez* 211 Mich App 501, 508; 536 NW2d 760 (1998).

Based on the record, the relationship between plaintiffs and defendants is a fiduciary relationship. Furthermore, the Investment Advisory Agreement, signed by both parties, clearly states that defendants have discretionary authority to allocate plaintiffs' assets consistent with their investment strategy. Plaintiffs signed an addendum to their Investment Objectives Summary that stated that the downside to their investment strategy would be "No loss in any calendar year." While defendants never guaranteed a result, the contract did indicate that they must at least act on these objectives. Plaintiffs contend that defendants never even acted. Plaintiffs provided testimony that indicated that defendants failed to correctly change their asset allocation according to the investment strategy. Based on the available evidence, there is a question of fact as to whether defendants breached a fiduciary duty by failing to act on a request by plaintiffs.

IV

Plaintiffs next contend that the trial court incorrectly concluded that the representations by defendants were not in violation of the Michigan Uniform Securities Act. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Collins*, 468 Mich at 631. Summary disposition is appropriate under MCR 2.116(C)(10) if no genuine issue of any material fact exists, and the moving party is entitled to judgment as a matter of law. *West*, 469 Mich at 183. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

MCL 451.810, which this claim was brought under, has been repealed, but the old provisions remain applicable to plaintiffs' claims. MCL 451.810(A)(2) read: "the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the untruth or omission." Under MCL 451.810(A)(2), the misrepresentation can be an untrue statement of material fact or an omission to state a material fact.

Plaintiffs have not established any evidence to show the type of misrepresentation considered under this statute. There is no evidence that shows that defendants made an untrue statement or material omission of fact. While defendants may not have taken actions pursuant to

a contract, there are no actionable misrepresentations evidenced by plaintiff. Therefore, the trial court correctly granted summary disposition in favor of defendants on this issue.

V

Plaintiff finally argues that the trial court incorrectly concluded that the failure by defendants to implement changes was not gross negligence or reckless and willful misconduct. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Collins*, 468 Mich at 631. Summary disposition is appropriate under MCR 2.116(C)(10) if no genuine issue of any material fact exists, and the moving party is entitled to judgment as a matter of law. *West*, 469 Mich at 183. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

Gross negligence is the "intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Patton v Grand Trunk Western R Co*, 236 Mich 173, 178-179; 210 NW 309 (1926), *aff'd* 238 Mich 397 (1927). Willful and wanton misconduct occurs when there is intent to harm or indifference as to whether the harm will actually occur. *Odom v Wayne Co*, 489 Mich 459, 475; 760 NW2d 217 (2008).

Plaintiffs have established no evidence that shows that defendants' alleged failure to change the investment strategy was done intentionally to harm plaintiffs, or even done with an indifference to harm that would occur. Plaintiffs contend that the failure to act when contractually bound to do so and when so obligated by a fiduciary meets the minimum requirement of gross negligence but fail to cite any applicable caselaw to support this assertion. Without evidence, the trial judge correctly concluded that summary disposition was proper on this issue because no genuine issue of material fact existed as to whether defendants acted in gross negligence, recklessly, or willfully based on the proffered evidence.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, no party having prevailed in full.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause