SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

IOANNIS MILONAKIS,

Plaintiff,

-against-

LAMBRINI HARALAMPOPOULOS, J.P. MORGAN SECURITIES LLC, JP MORGAN CHASE BANK, N.A. JOHN DOE 1-2 and JANE DOE 1-2 at al.

Defendants.

X

INDEX NO. 653928/14

Motion Seq. No. 002

OSTRAGER, J:

Presently before the Court is a post-note of issue motion by defendants Lambrini Haralampopoulos ("Lambrini"), J.P. Morgan Securities LLC, and JP Morgan Chase Bank, N.A (collectively, "defendants") for an order pursuant to CPLR § 3212, granting them summary judgment dismissing all remaining claims against all defendants. Plaintiff Ioannis Milonakis ("Milonakis") asserted ten causes of action in his Verified Complaint, most of which were dismissed on the record on January 7, 2016 in connection with the defendants' pre-answer motion to dismiss (motion sequence 001). The third cause of action sounding in breach of fiduciary duty survived, pending further development of the record through discovery, and is the sole focus of this summary judgment motion. The motion is denied for the following reasons. [1]

Plaintiff started banking at a particular Chase Bank branch in Astoria, Queens in 2002 (*see* Milonakis Deposition dated June 1, 2016 at 33:15-20, 42:7-14)[2]. Defendant Lambrini, a Chase employee at this particular branch, performed various banking services for plaintiff, such as cashing rent

[1] To the extent defendants' in their present motion questioned whether the January 7, 2016 decision dismissed the remaining eight causes of action, this decision confirms that dismissal.
[2] *See* Weiss Affirmation, Exh. 2.

checks from Milonakis's rental property (*id.*), and, being a native Greek speaker like plaintiff, Lambrini occasionally translated certain conversations with other bank representatives for plaintiff during the course of their 10-year business relationship at the branch (*see* Milonakis Dep. 36:19-25, 40:3-4, 34, 45-47). In 2002, shortly after plaintiff retired from his union job, Lambrini introduced plaintiff to a colleague at Chase to discuss the purchase of an annuity with plaintiff's retirement funds of roughly $500,000 (Milonakis Dep. 35:15-36-21). Lambrini translated during that conversation (*id.*). Plaintiff purchased an annuity ("Annuity") issued by Genworth Financial ("Genworth") which was marketed by a Chase affiliate (*see* Weiss Aff., Exh. 39). Lambrini is a licensed insurance representative and holds Series 6 and Series 63 licenses with the ability to transmit insurance forms (Lambrini Dep. 70:24-71:5).

From 2006 to 2012, plaintiff made annual withdrawals from the Annuity, in different amounts, aggregating approximately $185,000 (Weiss Aff., Exhs. 7, 10, 13, 16, 19, 22, and 25). Plaintiff typically asked Lambrini for help in completing the withdrawal paperwork, and plaintiff executed the forms requesting the withdrawals (Milonakis Dep. 68:17-69:8). Plaintiff, who had an accountant since 1982 (*see* Milonakis Dep. 49:2-50-16), paid taxes on these withdrawals on his annual IRS returns as opposed to having the taxes automatically withheld upon withdrawal (Milonakis Dep. 72:5-8); (Tax returns annexed to Weiss Aff., Exhs. 8, 11, 14, 17, 20, and 23).

In 2011, plaintiff received a letter from Genworth dated January 24, 2011 which stated that plaintiff's Required Minimum Distribution after reaching age 70 ½ was $9,040.59 (Weiss Aff., Exh. 26). Plaintiff testified that he understood this requirement after receiving the letter (Milonakis Dep. 98:25-99:13, 100:7-11), and never asked any of his adult English-speaking children or anyone else to read or translate the letter for him (Milonakis Dep. 59:16-60:14, 99:6-12).

On June 14, 2012, plaintiff walked into the Chase Bank branch in Astoria and spoke with Lambrini about withdrawing additional funds from the Genworth Annuity (Milonakis Dep. 111:19-

112:12); (Weiss Aff., Exh. 27). The June 14 withdrawal form was improperly filled out and, thereafter, Plaintiff signed another annuity withdrawal form for the surrender of the entire Annuity on June 18, 2012 (Lambrini Deposition dated July 22, 2016 64:24-65:20, 67:25-68:13)[3]; (*see also* Weiss Aff., Exhs. 27, 30). Plaintiff left for Greece shortly thereafter (Milonakis Dep. 108:18-19) (*see* Weiss Aff., Exh. 29). The June 18, 2012 withdrawal was processed and $40,554.59 in federal taxes were automatically withheld from the withdrawal (Weiss Aff., Exhs. 32, 33, and 34). Plaintiff received a check from Genworth in the amount of $162,218.37 for the remainder of the Annuity, which was then worth $202,772.96 (Weiss Aff., Exhs. 33, 39). The proceeds of the Annuity were transferred to a new Chase checking account[4] bearing an interest yield of 0.2% as compared with the 2.75% interest the annuity yielded. (Compl., ¶13); (Milonakis Affidavit at 2); (Memorandum of Law in Opposition at 1-2).

In August of 2014, almost two years after the surrender of the Genworth Annuity, plaintiff returned to the branch and withdrew from the checking account approximately $150,000 to provide a gift to his children for a down payment to buy a house (Milonakis Dep. 169:18-22). It was at that point, that plaintiff realized there was "less money" in the account than he anticipated (Milonakis Aff., at 2); (*see also* Compl., ¶12) by virtue of the $40,554.59 in withheld federal taxes and the lower interest yield in the checking account as opposed to the 2.75% yield that the Genworth Annuity had generated (Compl., ¶¶13-14). Milonakis claims the bank statements related to this checking account were mailed to his son's home, and he therefore had no knowledge of such "mixing" until the summer of 2014 when he made the $150,000 withdrawal (Compl., ¶16). Upon discovery, plaintiff returned to the branch and had an argument with Lambrini (Milonakis Aff at 2); (Milonakis Dep. 34:3-5).

[3] *See* Sipsas Affirmation, Exh. B)
[4] Note that while plaintiff stated in his affidavit (at 2) that the money was transferred to a new Chase checking account, plaintiff's Verified Complaint and deposition testimony indicate the money was first transferred to a joint savings account owned by plaintiff and his wife, and later to his son's checking account (Compl., ¶12); (Milonakis Dep. 110:25-111:12).

Plaintiff commenced this action in December 2014 alleging, *inter alia,* that Lambrini never explained the withdrawal form to him, or the consequences of the withdrawal and surrender of the Annuity, when Lambrini knew that plaintiff did not speak English. Plaintiff further alleged that he had relied on Lambrini's "investment advice" when Lambrini told plaintiff in June 2012 that "it was *proper* to transfer the annuity funds" to a new Chase account, allegedly as part of a scheme by Lambrini to earn commissions at the expense of Greek Chase customers in the community (Milonakis Aff. at 3). Plaintiff claims he had a special relationship with Lambrini that rises to the level of a fiduciary duty and that Lambrini breached her fiduciary duty to him.

To establish a common law tort for breach of fiduciary duty, plaintiff must prove (1) the existence of a fiduciary relationship; (2) misconduct by the defendants; and (3) damages directly caused by the defendants' misconduct. *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014), *citing Kurtzman v Bergstol*, 40 AD3d 588, 590 (2d Dept 2007). A fiduciary relationship is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." *Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584, 593 (2012), *citing EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005). The Court of Appeals has held that a fiduciary duty exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011). Additionally, a fiduciary relationship *may* exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. *Id., quoting AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.,* 11 NY3d 146, 158 (2008) ("A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other"). Defendants cite cases such as *Bennice v Lakeshore Sav. & Loan Assn.*, 254 AD2d 731 (4th Dept 1998) for the proposition that ordinarily there is no fiduciary relationship between a bank and a depositor.

However, as that Court and others recognize, the conduct of the parties can create a "special relationship."

As the record shows, there are material issues of fact as to whether plaintiff and defendants, through Lambrini, had a sufficiently special relationship to support a claim for breach of fiduciary duty, and even assuming that a special relationship existed, there are material issues of fact as to what transpired between the parties in June 2012. Consequently, the motion for summary judgment must be denied.

Nevertheless, the Court is troubled by the numerous inconsistencies between plaintiff's Verified Complaint, deposition testimony, affidavit statements, and even his papers filed in opposition to defendant's motion which raise issues of credibility that will have to be resolved at trial. *See Francis v New York City Transit Authority*, 295 AD2d 164 (1st Dept 2002); *see also*, *Cuevas v City of New York*, 32 AD3d 372, 373 (1st Dept 2006) ("Any inconsistency in plaintiff's testimony would merely raise a credibility issue for the trier of fact," citing *Yaziciyan v Blancato,* 267 AD2d 152 (1st Dept 1999) ("The deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact"); *Luebke v MBI Group*, 122 AD3d 514, 515 (1st Dept 2014) ("The project manager's inconsistent testimony elsewhere in his deposition that he first learned of the defect when it was reported to him after the accident merely presents an issue of credibility to be determined by the trier of fact").

Plaintiff stated in his affidavit that, at all relevant times, he "trusted Defendant Lambrini's credibility and honesty concerning [his] retirement investments." Plaintiff's Verified Complaint corroborates that statement, *e.g.* Lambrini was the "main person" from whom plaintiff sought "investment advice" at the branch (Compl., ¶8), but this allegation is inconsistent with plaintiff's deposition in which plaintiff said he never sought nor received any investment advice from Lambrini or

others at Chase (Milonakis Dep. 37:2-7) ("Q. Did you ever receive any advice about investing your money from anyone at Chase? A. No. Ms. Lambrini would tell me, 'If you want to invest your money here, we can invest it for 5.0' and stuff like that."); (*see also,* Milonakis Dep. 104:25-105:6) ("Q. You never asked Lambrini whether you should take all the funds out of your annuity? A. No, never. Q. So why did you go to see her in June of 2012? A. I needed additional money"). The following is an excerpt from Milonakis's deposition (39:11-46:16):

> Q. Did you take all of that money [$500,000] as a lump sum after you retired?
> A. Yes, I have to. I had to take it. [...]
> Q. What did you do with that money?
> A. I gave to Chase Bank, and they told me they would give me 5.40, something like that.
> Q. Who told you that?
> A. Ms. Lambrini
> Q. When she said that, was she translating for this other man?
> A. Yes. She would ask the man and Lambrini would tell me.
> Q. So she was acting as a translator?
> A. Yes. [...]
> A. She told me I had to keep the money there for over five years and I would receive 5.40 percent.
> Q. For what kind of investment vehicle did she tell you would receive that kind of percent?
> A. I don't know. [...]
> Q. At any time after you made your initial investment in around 2001 or 2002, did Lambrini gave you investment advice? [...]
> A. Well, in 2002 when I initially invested with Ms. Lambrini the money at 5.40 percent, after that, then that was it. [...]
> Q. Did Lambrini ever advise you to make another investment?
> A No advice. She just asked me to move money from my accounts in other banks into Chase. [...]
> Q. Did you ever sit down after 2002 with Lambrini and explain your whole financial picture to her?
> A. No, never.

Plaintiff's inconsistent statements regarding Lambrini's alleged "advice" that plaintiff had to withdraw *all* funds from his Genworth Annuity because he reached age 70 is also confusing. Plaintiff alleged in his Verified Complaint that in June 2012, he went to the branch and

> Was seeking advice whether or not it was *appropriate* to withdraw the funds from said annuity and transfer to a Chase account. Defendant Lambrini stated to plaintiff that it was *proper* to

> transfer the annuity funds to a new Chase account because he is over 70 years old. (Emphasis added).

Complaint at ¶9.

When asked about this specific allegation at his deposition, plaintiff gave the following testimony. *See* Milonakis Dep. 104:25-107:10, which provides in relevant part and with emphasis added:

> Q. To summarize because we had a break, you said in your complaint that you went to see Lambrini in June of 2012 because you wanted advice on whether it was appropriate to withdraw the funds from your annuity and transfer it to a Chase account. That's what it says here,
> A. Never.
> Q. You didn't do that?
> A. No.
> Q. You never asked Lambrini whether you should take all the funds out of your annuity?
> A. No, never.
> Q. So why did you go to see her in June of 2012?
> A. I needed additional money.
> Q. I see. So did you actually meet with Lambrini in June of 2012?
> A. Yes. I went to the bank and she told me that I'm over 70 years old and I have to withdraw all the money. [...]
> Q. Is it correct that you didn't ask her what to do with the annuity, but that she just came out and told you you had to take all the money out of it?
> A. Her exact language was, 'You're 70 years old; this money has to be withdrawn from this account."
> Q. And you didn't ask her a question about that, she just told you; correct?
> A. No, just that I'm 70 and I have to change it.
> Q I'm going to read you the sentence again from your complaint that you swore to [...] [¶9]. Is that a false statement?
> A Yes, it's a false statement.

On the other hand, Lambrini, offers a different account of what happened in June 2012 (Lambrini Dep. 69:5-17):

> Okay, he came in, he came in, and sat at my cubicle, although he was rejected prior days, he came in again, sat at my cubicle and was insisting of surrendering, surrendering this fixed annuity policy, although I referred him to Mr. Augustine [a Chase financial advisor] he says no, you have to do it, you have to do it because I do know you have previously done it, you have to do the surrender. I checked with Mr. Augustine and he said yes, Lambrini, you can do surrender withdrawals service transactions on a fixed annuity contract, so go ahead and do it as he prefers to do so.

In addition, a third party eye witness, Mike Chronos, claims he was present at the bank and heard the conversation between plaintiff and Lambrini and provided an affidavit in support of plaintiff's opposition which narrates a different version of what happened at the branch (*see* Sipsas Aff., Exh. D). Although it is unclear from the affidavit whether Chronos is referring to plaintiff's June 14 or June 18 trip to the Chase branch, Chronos, plaintiff's friend and a branch customer, states as follows:

> In the summer of 2012, possibly in June of 2012, I was at the Chase Bank at the 30th Avenue ("Bank") doing some transactions at the bank when I saw Mr. Ioannis Milonakis there. Mr. Milonakis called and asked me to be with him when he will talk to [Lambrini]. I joined Mr. Milonakis with Lambrini. I heard the conversation between Lambrini and Mr. Milonakis. I heard Lambrini saying to Mr. Milonakis: "You have passed the 70 years and now you must withdraw the money from the annuity and surrender it."

Notably, plaintiff testified at his deposition that plaintiff's wife was present during the conversation between plaintiff and Lambrini (Milonakis Dep. 108:8-12) ("Q. Was anybody present at the time you had this conversation with Lambrini? A. No. I spoke to my wife. No, my wife together. When this happened, my wife was present."). Plaintiff did not mention in his deposition that Mr. Chronos was present during the conversation with Lambrini, nor did Mr. Chronos mention in his affidavit the presence of plaintiff's wife during the conversation.

Plaintiff's deposition testimony that he was aware of the required annual minimum withdrawal of $9,040.59 after reaching age 70 ½ as indicated in Genworth's letter dated January 24, 2011 is not necessarily irreconcilable with plaintiff's position that he trusted and relied upon Lambrini's "advice" (MOL in Opp. at 5) that he "must" withdraw all of the money from the Annuity because he reached age 70. But his testimony is irreconcilable with Lambrini's testimony in which she claims that she urged plaintiff to seek legal, investment, and tax advice prior to making the June 2012 withdrawal (Lambrini Dep. 64:9-65:20, 66:25-67:24). But as Lambrini insisted in her testimony, she eventually processed the paperwork at plaintiff's insistence.

As for plaintiff's claim to recover the tax payment as damages, defendants argue that tax payments are generally not recoverable under New York law, but the cases cited in support of that proposition are factually distinguishable from this case (*see* MOL in Support 19-20). In *Gertler v Sol Masch & Co.*, 40 AD3d 282, 283 (1st Dept 2007), plaintiffs sought to recover damages for professional malpractice in connection with accounting services provided by the defendants, but failed to present expert testimony at trial to establish the applicable standard of professional practice. "The damages theory presented by plaintiffs' expert was based on assumptions and speculation as to what plaintiff trustee might have done as an individual investor had he been advised by defendants of the applicable taxes when trading on margin in a pension account" (at 282-83). Further, the *Gertler* Court cited *Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67 (1990) for the proposition that "taxes and tax interest are not recoverable under New York law," but *Alpert* involved plaintiffs' damage claims for back taxes paid to the Internal Revenue Service (IRS). "The IAS court was correct in rejecting plaintiffs' damage claims for back taxes. The recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud." Finally, *Fownes Bros. & Co. v JPMorgan Chase & Co.*, 92 AD3d 582 (1st Dept 2012) involves a claim for back taxes and penalties in connection with professional negligence and accounting malpractice claims.

In sum, plaintiff has significant hurdles to overcome in order to establish either his liability or his damage claims. But, the record raises sufficient issues of fact to defeat defendants' motion for summary judgment on the breach of fiduciary duty claim inasmuch as there was no rational reason for plaintiff to withdraw his entire annuity that was earning 2.75% interest and deposit it in a Chase checking account earning 0.2% interest. Similarly, even if plaintiff intended to ultimately gift the lion's share of the annuity to one of his children years later, there were more tax efficient ways to do so.

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment is denied; and it is further

ORDERED that all liability and damage issues will be resolved by a jury at the trial which the Court is scheduling for May 31, 2017.

Dated: April 26, 2017

J.S.C.

BARRY R. OSTRAGER
JSC