UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JEFFREY SCHAUB and HOWARD SCHAUB, as Co-Administrators of the ESTATE OF SYBIL SCHAUB, deceased, ARNOLD SCHAUB, individually, HOWARD SCHAUB, individually, and RUSSELL SCHAUB, individually,

Plaintiffs,

-against-

ORDER
06-CV-1238(JS)(WDW)

PRIVATE BANK OF AMERICA, BANC OF AMERICA INVESTMENT SERVICES, INC., BANC OF AMERICA SECURITIES LLC, BANC OF AMERICA CAPITAL MANAGEMENT, and BANK OF AMERICA,

Defendants.
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APPEARANCES:

For Plaintiffs: Richard Daniel De Vita, Esq.
Devita & Associates
1228 Garden Street
Hoboken, New Jersey 07030

For Defendants: Thomas E. Stagg, Esq.
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Syosset, New York 11791

SEYBERT, District Judge:

INTRODUCTION

Pending before the Court is a motion to dismiss brought by Defendants pursuant to Federal Rule of Civil Procedure 12(c). Defendants argue that Plaintiffs' claims are barred for various reasons, including the statute of limitations. For the reasons below, the Court GRANTS in part and DENIES in part Defendants' motion to dismiss.

BACKGROUND

The facts of this case are taken from the Amended Complaint. The Court presumes all these facts to be true for purposes of this motion.

In April 2000, Plaintiff Howard Schaub exercised his power of attorney over his mother's affairs to open two retirement accounts in her name (the "Accounts") at Fleet Bank ("Fleet"). (Complaint ("Compl.") ¶ 31.) Defendant Bank of America became the successor in interest to Fleet. (Id. ¶¶ 17-18.) As for the Accounts, Plaintiffs Howard, Russell, and Jeffrey Schaub - all brothers - were the beneficiaries on one account ("Account One") and Howard's father, Plaintiff Arnold Schaub, was the named beneficiary for the second account ("Account Two"). (Id. ¶ 25.)

In June 2000, Howard transferred approximately $890,000 from his mother's Board of Education Tax Deferred Annuity to fund the Accounts: Account One held $675,000, and Account Two held the balance. (Id. ¶ 32.) Account One was to be invested in quality equities - real companies with real earning - also known as Blue Chip stocks. (Id. ¶ 34.) Account Two was to be invested with Arnold Schaub's income needs in mind. (Id. ¶ 35.)

As of October 2000, Jeffrey Zipper ("Zipper") of Fleet was making all investment decisions. (Id. ¶ 36.) In June 2001, Plaintiffs Howard and Jeffrey Schaub expressed their displeasure to Fleet regarding the Accounts' performance, investments, and lack of

diversification. (Id. ¶ 38.) In November 2001, Zipper left Fleet, and Stephen Malo, Zipper's supervisor, took over the Accounts. (Id. ¶ 39.) Zipper does not appear to have been registered as an agent or securities broker. (Id.)

In February 2002, Plaintiffs once again complained to Fleet about the Accounts' performance, structuring, and lack of diversification. (Id. ¶ 41.) In June 2002, Plaintiffs liquidated the Accounts: Account One lost $111,187, and Account Two lost $60,405 with a total loss of $171,592. (Id. ¶ 42.) These losses were due to the lack of diversification of the Accounts. (Id. ¶ 43.)

Plaintiffs filed this suit on March 17, 2006. Plaintiffs bring the following causes of action: (1) breach of fiduciary duty, (2) violation of the 1940 Investment Advisors Act ("IAA"), (3) common law fraud, (4) constructive fraud, (5) negligence, (6) failure to monitor accounts, (7) negligent supervision, (8) breach of contract, (9) breach of New York General Business Law ("NY GBL"), and (10) respondeat superior. Plaintiffs seek recovery for their out-of-pocket losses of $172,000, compensatory and treble damages, rescission, disgorgement of account management fees and commissions, and attorneys' fees and costs.

Defendants argue the following: (1) that Plaintiffs' claims are barred by the statute of limitations or preempted by the Martin Act, (2) Plaintiffs do not plead their fraud claim with the

requisite specificity, (3) essential elements of a breach of contract claim are lacking, and (4) Plaintiffs cannot recover any attorneys' fees. (Defs.' Mot. 3-4.)

STANDARD OF REVIEW

A Rule 12(c) motion for judgment on the pleadings is properly made after the close of the pleadings. FED. R. CIV. P. 12(c). A court analyzes a 12(c) motion under the same standard of a motion made pursuant to Rule 12(b)(6). See Greco v. Trauner, Cohen & Thomas, L.L.P., 412 F.3d 360, 363 (2d Cir. 2005). "Thus, accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the plaintiff, a complaint should not be dismissed under Rule 12(c) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (internal citations and quotations omitted).

DISCUSSION

I. The Statutes Of Limitations Bar The IAA And NY GBL Claims.

The IAA regulates the conduct of investment advisers and the Securities and Exchange Commission ("SEC") may enforce IAA regulations through an action for injunctive relief. See Kahn v. Kohlberg, 970 F.2d 1030, 1033 (2d Cir. 1992). Contracts whose performance and formation violate IAA are void. See id. Under the IAA, a plaintiff may sue only for restitution and rescission of the void contract. See id.

A plaintiff must bring an IAA claim no later than one year from the time of the commission of the wrong. See Van Syckle v. C.L. King & Assocs., Inc., 822 F. Supp. 98, 105 (N.D.N.Y. 1993) (quoting Kahn v. Kohlberg, 970 F.2d 1030, 1039 (2d Cir. 1992)). When the wrong is not discovered immediately, a plaintiff has one year from the discovery of the wrong but no later than three years from the commission of the wrong. See id. (citing Kahn, 970 F.2d at 1039). A plaintiff discovers wrongful conduct when he "obtains actual knowledge of the facts giving rise to the action, or notice of the facts, which, in the exercise of reasonable diligence, would have led to actual knowledge." Id. (citing Kahn, 970 F.2d at 1039).

Plaintiffs contend that they did not discover that Zipper was not a registered investment advisor until they were preparing for this litigation. (Pls.' Opp. 5.) This argument is unavailing. Plaintiffs entered into an agreement with Fleet to manage the Accounts as early as April 2000. (Compl. ¶ 32.) The last time that Zipper managed the Accounts was in June 2001 - when Zipper left Fleet. (Id. ¶ 39.)

Even if this Court gave Plaintiffs the benefit of the doubt, the last wrong that violated the IAA occurred in June 2001. Because Plaintiffs did not discover the wrongful conduct immediately, Plaintiffs had one year from the date of discovery but no more than three years from the commission of the wrong. Zipper

last committed a wrong in June 2001. Plaintiffs liquidated the Accounts in June 2002. Plaintiffs then had until June 2005 to file an IAA claim. Plaintiffs commenced this action in state court in February 2006 - more than three years from Zipper's wrongful conduct.

Plaintiffs' claims under NY GBL § 349 must suffer the same fate. Any claims brought under NY GBL are subject to a three-year statute of limitations. See Mercado v. Playa Realty Corp., 03-CV-3427, 2005 U.S. Dist. LEXIS 14895, at *34 (E.D.N.Y. July 7, 2005) ("[C]laims under NYGBL § 349 are subject to a three-year statute of limitations."). As already established, Plaintiffs commenced this action more than three years after the Accounts were closed at Fleet in June 2002.

Accordingly, the Court GRANTS Defendants' motion to dismiss Plaintiffs' claims brought under the IAA and the NY GBL.

II. The Statute Of Limitations Bars Plaintiffs' Negligence Claims.

Defendants argue - and Plaintiffs do not disagree - that the statute of limitations bars Plaintiffs' negligence claims. Accordingly, Defendants move to dismiss Plaintiffs' claims for negligence, failure to monitor the account, negligent supervision, and respondeat superior claims. Plaintiffs respond by saying that these claims are based upon theories of breach of contract and fraud.

Actions to recover damages for injury to property, i.e.,

investment losses, must commence "within three years from the time the cause of action accrues." Coleman & Co., Secs., Inc. v. Giaquinto Family Trust, 236 F. Supp. 2d 288, 303 (S.D.N.Y. 2002) (quoting N.Y. C.P.L.R. § 214(4) (McKinney 1998)). "[A] claim of injury due to negligence accrues on the date of injury." Id. at 303.

Plaintiffs claim that Defendants were negligent when the Defendants did not protect their clients' assets, neglected the Plaintiffs' investment guidance, and selected unsuitable investments in light of Plaintiffs' investment guidance. (Compl. ¶¶ 67-69.) The last time Defendants managed Plaintiffs' Accounts was in June 2002. Thus, Plaintiffs had to file suit no later than June 2005. As already stated, Plaintiffs commenced suit in February 2006 - after the three-year period. Accordingly, Plaintiffs' claims sounding in negligence are dismissed. This includes Plaintiffs' fifth, sixth, seventh, and tenth claims: claims for negligence, failure to monitor accounts, negligent supervision, and respondeat superior.

This ruling does not affect Plaintiffs' claims to the extent they are based upon breach of contract and fraud (Plaintiffs' third, fourth, and eighth claims). This is so even if the breach of contract and fraud claims are premised upon a negligence theory, i.e., "failure to meet a contractual obligation because of negligent conduct." Coleman & Co., Secs., Inc. v.

Giaquinto Family Trust, 236 F. Supp. 2d 288, 303 (S.D.N.Y. 2002).

III. The Martin Act Preempts Plaintiffs' Breach Of Fiduciary Duty Claim.

Next, Defendants argue that the Martin Act preempts all private claims arising out of securities transactions that do not require a plaintiff to plead scienter. Thus, Defendants contend that the Court must dismiss Plaintiffs' claims for breach of fiduciary duty, constructive fraud, negligence, failure to monitor account, negligent supervision, breach of contract, and respondeat superior. Because the Court has already dismissed Plaintiffs' negligence claims, the Court will analyze whether the Martin Act preempts Plaintiffs' claims for breach of fiduciary duty, breach of contract, and constructive fraud.

The Martin Act, New York's blue sky law, "prohibits various fraudulent and deceitful practices in the distribution, exchange, sale and purchase of securities." Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 190 (2d Cir. 2001). If a court allowed a breach of fiduciary duty claim to proceed in the context of securities fraud, a private action would exist under the Martin Act, and this would conflict with the Attorney-General's exclusive jurisdiction and enforcement powers. See id. Thus, no implied private right of action exists under the Martin Act. See id.

In Castellano, the district court dismissed the breach of fiduciary duty claim because of the Martin Act. The Second Circuit affirmed. See id. Plaintiffs argue that New York's highest court

has never addressed this issue. The Castellano plaintiff made the same argument. The Second Circuit responded, "[P]rinciples of federalism and respect for state courts' interpretation of their own laws counsel against ignoring the rulings of those New York courts that have taken up the issue." Id. Thus, the Second Circuit applied the law as it was applied by the New York appellate judges.

Accordingly, the Court GRANTS Defendants' motion to dismiss the breach of fiduciary duty claim. As for the breach of contract and constructive fraud claims, the Court DENIES Defendants' motion to dismiss on the grounds that the Martin Act preempts such claims. Defendants' cited case law does not support the argument that the Martin Act preempts the breach of contract and constructive fraud claims.

IV. Fraud And Heightened Specificity Requirement

Defendants next argue that Plaintiffs failed to plead their common law fraud claims with the requisite specificity. A fraud claim arises "when one misrepresents a material fact, knowing it is false, which another relies on to its injury." Mercado, 2005 U.S. Dist. LEXIS 14895, at *37-*38. The elements of a fraud claim are "(1) a false misrepresentation of fact; (2) with scienter (i.e., deliberately or knowingly); (3) with an intent that a party will act or refrain from acting in reliance on the misrepresentation; and (4) that the party suffered pecuniary loss

as a result of the reliance." Id. at *38.

A party pleading fraud must state the claim "with particularity." Id. (citing FED. R. CIV. P. 9(b)). Rule 9(b) requires a complaint to "adequately specify the statements it claims were false and misleading, give particulars as to the respect in which plaintiffs contend the statements were fraudulent, state when and where the statements were made and identify those responsible for the statements." Id. (quoting McLaughlin v. Anderson, 962 F.2d 187, 191 (2d Cir. 1992)). At a minimum, a plaintiff must state the "time, place, content of false misrepresentation, facts misrepresented, identify of maker of the misrepresentation and what was obtained as a consequence of fraud." Id. (citation omitted).

Construing all inferences in favor of Plaintiffs, the Court finds that Plaintiffs have not stated their fraud claim with the requisite specificity. Generally, Plaintiffs state that Defendants represented and omitted material information about their expertise in investing and handling Plaintiffs' assets and Accounts. (Compl. ¶ 63.) Plaintiffs specify that Mr. Rosenblatt of Fleet represented that they had the expertise to transfer the assets, set up the Accounts, and manage the Accounts. (Id. ¶¶ 28-30.) Plaintiffs attached Defendants' slideshow presentation of their expertise and experience. (Compl., Ex. A.)

But Plaintiffs fail to allege that Defendants acted with

scienter, that is, that Defendants acted knowingly and deliberately when they stated they had the expertise to manage the Accounts. Plaintiffs also fail to allege that these statements were false and that they were made with the intent to get the Plaintiffs to act and rely on those misrepresentations.

Accordingly, the Court GRANTS Defendants' motion to dismiss the common law fraud claim. However, in light of Plaintiffs' allegations, the Court finds it necessary to grant Plaintiffs leave to amend the Complaint. Plaintiffs thus have thirty days from the date of this Order to address their common law fraud claim with the requisite specificity as stated in this Order.

V. Breach Of Contract

Defendants also argue that Plaintiffs' breach of contract claim fails because Plaintiffs did not allege they performed under any contract. (Defs.' Mem. 11.) The parties agree that to state a breach of contract claim, a plaintiff must allege that there was a contract, plaintiff performed under that contract, defendant breached or failed to perform under the contract, and plaintiff suffered damages. See MDCM Holdings, Inc. v. Credit Suisse First Boston Corp., 216 F. Supp. 2d 251, 260 (S.D.N.Y. 2002). For breach of contract claims, all that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a); see id.

The Court rejects Defendants' argument. The Complaint

states that Plaintiffs opened up Accounts with Defendants, and were advised that certain investment advisors of Defendants would manage the accounts. This constitutes an agreement to manage the Accounts. Plaintiffs contend that the agreement to manage the Accounts also contained certain representations about Defendants' skill and expertise, and Plaintiffs alleged that Defendants breached the agreement with respect to those agreements. Specifically, Plaintiff points out that the first investment advisor on the Accounts, Zipper, was not a registered investment advisor. Lastly, Plaintiffs suffered monetary loss - the last essential element of a breach of contract claim. Construing all inferences in favor of Plaintiffs, the Court DENIES Defendants' motion to dismiss the breach of contract claim.

VI. Attorneys' Fees

Lastly, Defendants argue that Plaintiffs are not entitled to attorneys' fees and costs because no statute provides such relief. Plaintiffs may only recover attorneys' fees if they prevail on a statutory claim that expressly allows for recovery of attorneys' fees. See Int'l Chem. Workers Union v. BASF Wyandotte Corp., 774 F.2d 43, 47 (2d Cir. 1985). However, if the Court needs to exercise its equitable powers, it may award attorneys' fees in the event that opposing counsel acts in "bad faith, vexatiously, wantonly, or for oppressive reasons." Id.

The Court finds Defendants' argument premature. It is

too early to decide whether attorneys' fees will be awarded in this case. Defendants are welcome to make the same arguments later on in the proceedings of this matter. Accordingly, the Court DENIES Defendants' motion to dismiss Plaintiffs' request for attorneys' fees.

CONCLUSION

For the reasons above, the Court DENIES in part and GRANTS in part Defendants' motion to dismiss. The Court dismisses with prejudice Plaintiffs' claims under the IAA, NY GBL, as well as those claims for negligence, failure to monitor, negligent supervision, respondeat superior, and breach of fiduciary duty. The Court dismisses without prejudice Plaintiffs' common law fraud claim. Plaintiffs have thirty days from the date of this Order to amend the Complaint in accordance with this Court's findings as to the common law fraud claim. Plaintiffs' claims for constructive fraud and breach of contract may proceed. The parties are ordered to appear before the Magistrate to set a discovery schedule.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
March 26, 2007