

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

HANNA PERLBERGER, Legal Guardian to	:	
SPENCER B. BRENNEN, A Minor,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
WACHOVIA BANK, N.A.,	:	NO. 02-CV-9091
Defendant.	:	

MEMORANDUM AND ORDER

LEGROME D. DAVIS, J.

DECEMBER 20, 2004

Presently before the Court is Defendant’s Motion for Summary Judgment (Doc. No. 19) filed on August 20, 2004, Plaintiff’s Memorandum of Law in Opposition to Summary Judgment (Doc. No. 21) filed on September 23, 2004, and Defendant’s Reply Memorandum of Law in Support of its Motion for Summary Judgment (Doc. No. 24) filed on September 29, 2004. For the reasons set forth below, Defendant’s Motion for Summary Judgment is GRANTED.

I. FACTS & PROCEDURAL HISTORY

Plaintiff filed the instant action on December 17, 2002 (Doc. No. 1) on behalf of Spencer B. Brennen, a minor, alleging Breach of Fiduciary Duty under 20 Pa. Con. Stat. § 7201 et seq. for mismanagement of a testamentary trust fund created for Spencer under the Last Will and Testament of Vera Martin (“the will”), Spencer’s paternal grandmother. (Pl.’s Compl. at ¶¶ 5, 37.) The will names CoreStates Bank as trustee over the funds inherited by Spencer. (Id.) Through merger, First Union, and later Wachovia, have succeeded CoreStates as trustee. (Id. at ¶ 5.) Under the will, the trust is to last until Spencer reaches age 30 (Id. at ¶ 4) and the trustee has

sole discretion as to how income and principal are applied for Spencer's support, education and welfare. (Pl.'s Mem. in Opp. to Summ. J. at 2.)

Consistent with the discretion given it under the will, in 1999 the trustee—at the time, First Union—invested the trust corpus (“the trust account” or “the account”) in five mutual funds, all owned by First Union, known as Evergreen Funds. (Pl.'s Compl. at ¶¶ 13, 20.) Over the next two years, the account suffered a persistent decline. (See Pl.'s Compl. at ¶¶ 22-30.) On August 29, 2000, after receipt of Spencer's full share of the estate and payment of taxes, the account had a balance of \$403,899.35. (Pl.'s Compl. at ¶ 21.) As of August 28, 2002, Spencer's account had fallen to \$233,792, forty-two percent below its initial value. (Id. at ¶ 30.) Plaintiff alleges that despite this persistent decline, “no effort was made by First Union to change the investment strategies it had employed” (Id. at ¶ 23.) In her complaint, Plaintiff contends that Wachovia breached its fiduciary duty to Spencer by failing to amend its investment strategy in the face of this decline and seeks recovery of the account's losses.

II. LEGAL STANDARD

In considering a motion for summary judgment, the Court must determine whether “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are “material.” Anderson, 477 U.S. 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his or her favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. DISCUSSION

A. Statute of Limitations

In its Motion for Summary Judgment, Defendant asserts that Plaintiff's claim is barred by the applicable two-year statute of limitations. (Def.'s Mem. of Law in Support of Summ. J. at 23-24. ("Def.'s Mem.")) See 42 Pa. Con. Stat. § 5524(7) (stating that the statute of limitations for an action for tortious conduct is two years); In re Mushroom Transp. Co., 382 F.3d 325 (3d Cir. 2004) (applying Pennsylvania's two-year statute of limitations to a breach of fiduciary duty claim). In response, Plaintiff argues that her suit challenges not the initial investment of the trust corpus, but the ongoing management of the trust account and, therefore, is not time-barred. (Pl.'s Mem. of Law in Opp. to Summ. J. at 7. ("Pl.'s Mem."))

A claim under Pennsylvania law accrues at "the occurrence of the final significant event necessary to make the claim suable." Barnes v. American Tobacco Co., 161 F.3d 127, 136 (3d Cir. 1998) (citation omitted). Further, under Pennsylvania law, the statute of limitations is tolled

until “plaintiff knows, or in the exercise of reasonable diligence should have known, (1) that he has been injured, and (2) that his injury has been caused by another’s conduct.” Id. at 136 (citation omitted).

While Defendant claims that Plaintiff’s claim ripened upon the initial trust investments in 1999 or, in the alternative, on May 29, 2000, when the trust account first declined (Def.’s Mem. at 23-24), when viewed in the light most favorable to the non-movant, Defendant fails to demonstrate that no genuine issue of material fact exists as to whether Plaintiff is outside the statute of limitations. “Only where the facts are undisputed and lead unerringly to the conclusion that the length of time it took the plaintiff to discover the injury or its cause was unreasonable may the question be decided as a matter of law on summary judgment.” Burnside v. Abbott Labs., 505 A.2d 973, 988 (Pa. Super. 1985). Therefore, Defendant cannot prevail in its Motion for Summary Judgment on this ground.

B. Breach of Fiduciary Duty

Defendant argues that summary judgment is appropriate on Plaintiff’s breach of fiduciary duty claim because none of its actions with respect to the trust account breached the duty it owes Plaintiff. Plaintiff contends that Wachovia’s management of the trust violated the Prudent Investor Rule. (Pl.’s Mem. at 7.)

Plaintiff’s claim of breach of fiduciary duty is governed by Title 20 of the Pennsylvania Consolidated Statutes and, more specifically, Chapter 72, the Prudent Investor Rule. The pertinent general rule under this chapter provides that “[a] fiduciary shall invest and manage property held in a trust as a prudent investor would, by considering the purposes, terms and other circumstances of the trust and by pursuing an overall investment strategy reasonably suited to the

trust.” 20 Pa. Con. Stat. § 7203(a). Further, 20 Pa. Con. Stat. § 7203(c) lists the factors a fiduciary must consider in making investment and management decisions.¹ The degree of care exercised by a fiduciary must be one of “reasonable care, skill and caution in making and implementing investment and management decisions.” 20 Pa. Con. Stat. § 7212. Moreover, “[a] fiduciary who represents that he has special investment skills shall exercise those skills.” Id. However, section 7213 of Title 20 states, “The rules of this chapter are standards of conduct and not of outcome or performance.” 20 Pa. Con. Stat. § 7213. See also Estate of Pew, 655 A.2d 521, 544 (Pa. 1994) (“Hindsight is not the test of liability for surcharge.”). Thus “[a] fiduciary is not liable to the extent the fiduciary acted in substantial compliance with the rules of this chapter or in reasonable reliance on the terms and provisions of the governing instrument.” Id. If it appears that the fiduciary properly exercised its powers and complied fully with its duty of

¹20 Pa. Con. Stat. § 7203(c) provides:

Considerations in making investment and management decisions.--In making investment and management decisions, a fiduciary shall consider, among other things, to the extent relevant to the decision or action:

- (1) the size of the trust;
- (2) the nature and estimated duration of the fiduciary relationship;
- (3) the liquidity and distribution requirements of the trust;
- (4) the expected tax consequences of investment decisions or strategies and of distributions of income and principal;
- (5) the role that each investment or course of action plays in the overall investment strategy;
- (6) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries, including, in the case of a charitable trust, the special relationship of the asset and its economic impact as a principal business enterprise on the community in which the beneficiary of the trust is located and the special value of the integration of the beneficiary's activities with the community where that asset is located;
- (7) to the extent reasonably known to the fiduciary, the needs of the beneficiaries for present and future distributions authorized or required by the governing instrument; and
- (8) to the extent reasonably known to the fiduciary, the income and resources of the beneficiaries and related trusts.

investment, it is not liable for any loss resulting from the investments. In re Saeger's Estate, 16 A.2d 19 (Pa. 1940).

To survive summary judgment, Plaintiff must put forth evidence that demonstrates that Defendant's conduct in managing the estate fails to meet the requirements of Chapter 72. In In re Estate of Niessen, 413 A.2d 1050 (Pa. 1980), the Pennsylvania Supreme Court affirmed a lower court ruling that a corporate trustee satisfied the "superior skill" standard of care required of fiduciaries with above-average investment skills—though a lower standard was actually applicable—where the fiduciary utilized an elaborate research analysis system in an effort to service its clients, including the creation of a research department, use of securities analysts, investment committee review, and individual account managers. In doing so, the Court validated the defendant's retention of the entire portfolio in substantially similar condition during the five-year accounting period as a valid strategy which "sought to identify financially sound companies, invest in them and 'stick' with them through even volatile periods . . . [to] achieve a more stable investment which, while in the short run might not appear as profitable as others, in the long run, would provide steady and significant financial remuneration for the trust beneficiaries." Id. at 1053-54.

Defendant is in a substantially similar situation to the trustee in Niessen. Plaintiff does not dispute that, like the trustee in Niessen, Defendant Wachovia (1) assigned a trust officer to the trust; (2) formulated a coherent strategy, considering all of the factors enumerated in 20 Pa. Con. Stat. § 7203(a); and (3) conducted an annual review of the Trust's investments. Moreover, Defendant's investment strategy, to hold onto its investments through volatile periods to minimize risk and maximize long-term gain, is identical to the one given the imprimatur of the

Pennsylvania Supreme Court in Neissen.

Plaintiff does not cite with any specificity the way in which provisions of Chapter 72 were allegedly violated by Defendant, nor does she reference any case law to support her assertion that Defendant's failure to adjust its investment strategy rises to the level of a breach of fiduciary duty. While Plaintiff might not agree with Defendant's investment strategy, Plaintiff has alleged no fact that, even if taken as true, would support a jury finding that Defendant breached its fiduciary duty.

Nor does Plaintiff's expert report raise any genuine issues of material fact. Nothing in Plaintiff's proffered expert report addresses the specific claim Plaintiff has placed in issue, Defendant's management of the trust account. Plaintiff's expert states that Defendant has violated its fiduciary duty, but does so without reference to the applicable statute or specific facts. Accordingly, Plaintiff's argument that existing and contradicting expert reports precludes summary judgment fails.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED. An appropriate order follow.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

HANNA PERLBERGER, Legal Guardian to	:	
SPENCER B. BRENNEN, A Minor,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
WACHOVIA BANK, N.A.,	:	NO. 02-CV-9091
Defendant.	:	

ORDER

AND NOW, this 20th day of December 2004, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 19) filed on August 20, 2004, Plaintiff's Memorandum of Law in Opposition to Summary Judgment (Doc. No. 21) filed on September 23, 2004, and Defendant's Reply Memorandum of Law in Support of its Motion for Summary Judgment (Doc. No. 24) filed on September 29, 2004, it is hereby ORDERED that the motion for Summary Judgment is GRANTED. Judgment is hereby entered in favor of Defendant Wachovia and against Plaintiff Hanna Perlberger. The Clerk is hereby directed to statistically close this matter.

BY THE COURT:

S/LEGROME D DAVIS
Legrome D. Davis, J.