

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD J. WOJTAS and  
BONNIE M. WOJTAS,

Plaintiffs,

v.

MEMORANDUM AND ORDER  
05-C-317-S

CAPITAL GUARDIAN TRUST CO. n/k/a  
CAPITAL BANK & TRUST CO.,  
FIRST TRUST CORPORATION,  
d/b/a RESOURCES TRUST CO. and  
AIG SUNAMERICA, INC., a/k/a  
AIG RETIREMENT SERVICES a/k/a  
AIG ADVISOR GROUP/SUNAMERICA  
SECURITIES, INC.,

Defendants.

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Plaintiffs Richard and Bonnie Wojtas commenced this action for negligence and breach of fiduciary duty against defendants Capital Guardian Trust Co., First Trust Company and AIG SunAmerica, Inc. on April 19, 2005 in the Circuit Court for Dane County, Wisconsin. The matter was removed to this Court based on diversity of citizenship, 28 U.S.C. §§ 1441 and 1332. The matter is presently before the Court on defendant Capital's motion for judgment on the pleadings and on plaintiffs' motion to dismiss pursuant to Rule 41(a)(2). The following is a summary of the allegations of the complaint and the procedural posture of the case.

## BACKGROUND

Plaintiff Bonnie Wojtas was owner and defendant Capital the custodian of IRA Account #5923-6619. On April 13, 1999, pursuant to plaintiff's direction, defendant Capital rolled the IRA funds into an account created by Insurance Planning and Design, Inc., who represented itself to defendant Capital as a qualified IRA custodian. Defendant Capital undertook no effort to independently confirm that Insurance Planning was a qualified IRA custodian. At the time of these actions plaintiffs were residents of Illinois.

Insurance Planning was never a qualified IRA custodian. Insurance Planning's principal, Michael J. Murphy, converted the funds to his own use. Murphy created and sent fraudulent account statements to plaintiff showing better than average earnings on the funds. On February 6, 2003 Murphy was arrested by federal authorities. On April 1, 2003 Murphy was indicted on ten counts of mail fraud for which he was eventually convicted. Plaintiffs became aware of his unlawful conduct at the time of his indictment and cooperated with authorities in Murphy's prosecution.

## MEMORANDUM

Defendant Capital moved for judgment in its favor on the basis that the complaint fails to state a claim for relief and that the claims are barred by the applicable two year Wisconsin statute of limitations. Plaintiffs opposed the motion to dismiss on the

merits but offered no opposition to the statute of limitations argument. Instead, plaintiffs filed a separate motion to voluntarily dismiss their claims without prejudice so that they may re-file the claims in Illinois where, they assert, a five year statute of limitations governs.

A motion for judgment on the pleadings is governed by the same standard as a motion to dismiss under Rule 12(b). Thomason v. Nachtrieb, 888 F.2d 1202, 1204 (7th Cir. 1989). A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

Plaintiffs allege they were aware of Murphy's unlawful conduct at the time of his indictment on April 1, 2003. The complaint was filed more than two years after that date. Wisconsin Statutes § 895.57 provides a two year statute of limitations for intentional torts, which has been held to include claims for breach of fiduciary duty. Beloit Liquidating Trust v. Grade, 2004 WI 39, ¶ 40, 270 Wis. 2d 356, 677 N.W.2d 298. Assuming plaintiffs' claim is

a foreign cause of action, the Wisconsin borrowing statute, § 893.07(2), Wis. Stat., requires application of the shorter of the limitations period in Wisconsin or the applicable foreign jurisdiction:

If an action is brought in this state on a foreign cause of action and the foreign period of limitations has not expired, but the applicable Wisconsin period of limitation has expired, no action may be maintained in this state.

Plaintiff makes no effort to oppose the statute of limitations defense and has implicitly acquiesced in defendant's position that her claims against defendant Capital are barred by the Wisconsin statute of limitations. See Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co., 260 F.3d 742, 747 (7th Cir. 2001).

The remaining issue is whether the Court should grant plaintiffs' motion for voluntary dismissal under Rule 41(a)(2) so they may re-file the action in Illinois and avoid the Wisconsin time bar. More specifically, the issue is whether granting the order for dismissal and thereby depriving defendant of its statute of limitations defense constitutes "plain legal prejudice" which must be avoided under Rule 41(a)(2). Tyco Laboratories, Inc. v. Koppers Co., Inc., 627 F.2d 54, 56 (7th Cir. 1980).

In Bolten v. General Motors Corporation, 180 F.2d 379 (7th Cir. 1950), the Court held that it was error to deny plaintiff's motion to dismiss without prejudice under Rule 41(a)(2) because of a statute of limitations defense. In so ruling, however, the Court

noted that “[t]he adjudication on [the statute of limitations defense] had nothing to do with the merits of the case and meant nothing more than that the action could not proceed in the Illinois jurisdiction.” Id. at 382. See also Titus v. Wells Fargo Bank & Union Trust Co., 134 F.2d 223, 224 (1943) (statutes of limitations at that time generally did not extinguish a right of action and did not preclude refileing in another state). More recently, the Eleventh Circuit reached a similar result in McCants v. Ford Motor Co., Inc., 781 F.2d 855, 858-59 (1986), holding that a potentially viable statute of limitations defense did not preclude dismissal under Rule 41(a)(2) where the “Alabama statute bars this suit as filed, but that it could be refiled in Mississippi under the statute of limitations applicable there.” Id. at 858.

In contrast, the Fifth Circuit has held that a motion to dismiss under Rule 41(a)(2) is inappropriate if it would strip the defendant of a potential statute of limitations defense, because loss of the defense is clear legal prejudice. Phillips v. Illinios Cent. Gulf R.R., 874 F.2d 984, 986-87 (1989); Elbaor v. Tripath Imaging, Inc., 279 F.3d 314, 318 (2002). The Eighth Circuit agrees:

Voluntary dismissal under Rule 41(a)(2) should not be granted if a party will be prejudiced by the dismissal, and there is clear legal prejudice where a Rule 41(a)(2) dismissal is granted in the face of a valid statute of limitations defense.

Metropolitan Federal Bank of Iowa, F.S.B. v. W. R. Grace & Co., 999

F.2d 1257, 1262 (1993) (affirming dismissal where statute of limitations defense had not been proven).

Phillips and Metropolitan represent the better rule of law. There is no clearer legal prejudice than the loss of a complete defense to plaintiff's claims. Furthermore, their analysis is consistent with Bolten when Bolten is properly limited to circumstances where the statute of limitations defense was a bar to the remedy only and would not preclude refiling the action in a second jurisdiction.

The circumstances here compel the Court to deny plaintiffs' motion to dismiss under Rule 41(a)(2) and to grant defendant Capital's motion for judgment on the pleadings. First, there is no dispute that plaintiffs' claims against defendant Capital are time barred under Wisconsin law. Second, defendant Capital contends, and plaintiffs do not refute, that Wis. Stat. § 893.05 operates to extinguish the claims entirely, not merely to bar a Wisconsin remedy. Permitting dismissal without prejudice would therefore deprive defendant Capital of its established right to judgment on the pleadings and constitute plain legal prejudice.

ORDER

IT IS ORDERED that plaintiffs' motion to dismiss pursuant to Rule 41(a)(2) is DENIED.

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IT IS FURTHER ORDERED that defendant Capital's motion for judgment on the pleadings that plaintiffs' claims are barred by the applicable Wisconsin statute of limitations is GRANTED.

Entered this 31st day of August, 2005.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge