

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

DOROTHY H. NICKEL,

Plaintiff,

v.

MEMORANDUM AND ORDER
06-C-24-S

NEVIN J. GILLETTE and DIVERSIFIED
FINANCIAL OF ILLINOIS, INC.,

Defendants

Plaintiff Dorothy Nickel commenced this action for fraud, breach of fiduciary duty and negligence against her investment advisors and brokers, defendants Nevin Gillette and Diversified Financial of Illinois, Inc. The matter is presently before the Court on defendants' motion for summary judgment. The following is a summary of facts viewed most favorably to plaintiff.

FACTS

Plaintiff is a Wisconsin resident and an unsophisticated investor. Defendant Gillette is an Illinois investment advisor and broker and an agent of defendant Diversified. In 1985 defendants made representations to plaintiff and her husband and solicited them to open an account with defendants for the purpose of purchasing securities and life insurance. Plaintiff and her husband opened an account and invested funds, relying on defendants

to make investment decisions on their behalf. Defendants made the following representations to plaintiff and her husband: that defendants would invest to preserve principal, maximize return and maintain liquidity; that defendants were experienced, knowledgeable investment advisors; that plaintiff and her husband would profit from the investments; that plaintiff's risk exposure would be limited. Thereafter defendants received funds from and rendered reports to plaintiff setting forth investments allegedly made on plaintiff's behalf and the value of plaintiff's account. After plaintiff's husband's death in October 2005 plaintiff sought documentation of her investments from defendants. When defendants provided only limited and inaccurate documentation plaintiff commenced this action on January 11, 2006.

Notwithstanding numerous discovery conferences and motions to compel discovery, defendants have been unable to present the type of third party documentation which would normally be expected had investments been made as defendants represented in their statements. Defendants have provided incomplete and inadequate documentation and explanations of investments. During her relationship with defendants plaintiff and her husband had sent \$254,000 to defendants and had withdrawn \$69,380.57. On May 2, 2006 defendants paid plaintiff \$354,717.91, an amount which defendant represented to be the total of plaintiff's contributions and earnings held by defendants. Plaintiff's expert has opined

that the lack of adequate documentation makes it impossible to determine whether the amount paid represents the actual balance of funds and earnings.

MEMORANDUM

Defendants move for summary judgment on the basis that plaintiff lacks essential expert testimony to prove damages at trial. Plaintiff contends that damages may be established based on documents and testimony at trial which could establish that a greater return was realized on certain investments. Defendants also advanced several arguments relating to elements of plaintiff's liability case, which they abandoned in their reply brief.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Concerning the liability aspect of the motion, the facts viewed most favorably to plaintiff, particularly the virtual lack of documentation provided by defendants, could sustain the inference that defendants falsely reported the investments they were making on plaintiff's behalf, converting the funds to a different purpose. Such conduct clearly could sustain claims of negligence, misrepresentation and breach of fiduciary duty even in the absence of expert testimony that it is improper.

Defendants correctly note that proof of actual damages is an essential element of each of defendant's tort claims, Widemshek v. Fale, 17 Wis. 2d 337, 340, 117 N.W.2d 275 (1962), and that punitive damages are not recoverable in the absence of compensatory discrepancies. Tucker v. Marcus, 142 Wis. 2d 425, 418 N.W.2d 818 (1988). However, record keeping discrepancies and testimony could establish some amount of actual damages for which expert testimony would not be required.

More importantly, defendants' motion entirely overlooks plaintiff's alternative claim for the equitable remedy of an accounting. In general, an accounting is available as an equitable remedy when the legal remedy appears inadequate because underlying facts have been undiscoverable, the accounts are complicated and a

fiduciary relationship exists. Anitgo Superior Nursing Home, Inc. v. First Fed. S & L Ass'n, 51 Wis. 2d 196, 201, 186 N.W.2d 265; Walter Diehnelt, Inc. v. Root, 183 Wis. 535, 198 N.W. 388 (1924). See also 1 Am. Jur. 2d Accounts and Accounting § 59 (2005) ("equity jurisdiction may be exercised and an accounting decreed, in actions arising out of a tort where there is an allegation of fraud, especially where there is an additional ground for jurisdiction, such as the existence of a fiduciary relationship, or where the accounts and transactions alleged to have been tainted with fraud were complicated").

Accordingly, the evidence necessary to establish liability and damages (or the inability to prove damages so that a remedy at law is inadequate) is largely the same as that necessary to obtain an accounting. Defendants' disregard for the possibility of an accounting remedy at the conclusion of trial is particularly striking in light of their vigorous opposition to plaintiff's recent motion to compel on the basis that the accounting remedy remained available pursuant to count V of the complaint. See Defendants' response to plaintiff's motions at ¶ 2.

The evidence of record and inferences from it could sustain a finding that defendants breached their duty to plaintiff and defrauded her, and that she sustained damages as a result. In the absence of sufficient proof of damages at trial plaintiff may be entitled to an accounting as an equitable alternative based on the

fact that defendants' conduct itself precluded her from establishing a legal remedy.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is DENIED.

Entered this 13th day of September, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge