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

MARY JO JENSEN-CARTER, U.S. TRUSTEE FOR THE BANKRUPTCY ESTATE OF PATRICIA A. QUAST,

Plaintiff,

v.

SEA RETIREMENT AND INVESTMENTS, LLP, JOHN D. KIRKMAN D/B/A SE RETIREMENT AND INVESTMENTS, LLP, AND THERESA N. STANLEY D/B/A SEA REITREMENT AND INVESTEMENTS, LLP,

Defendants.

OPINION AND ORDER

21-cv-309-wmc

Plaintiff Mary Jo Jensen-Carter, U.S. Trustee for the Bankruptcy Estate of Patricia A. Quast, filed this lawsuit claiming that defendants misrepresented Quast's investment status and caused her financial losses. More specifically, plaintiff claims that defendant SEA Retirement and Investments, LLP, as well as its principals, defendants Theresa Stanley and John Kirkman, violated the following eleven, Wisconsin common and statutory laws: (1) duty of reasonable care; (2) duty of competence; (3) duty of diligence; (4) duty of suitability; (5) duty of ongoing advice and monitoring; (6) fiduciary duty; (7) negligent misrepresentation or concealment; (8) intentional and reckless fraud and fraudulent nondisclosure and concealment; (9) contract; (10) common fraud; and (11) civil theft. Pending before the court is defendants' motion to dismiss all of these claims (dkt. #9), which will be denied for the reasons set forth below.[1]

[1] The court has jurisdiction under 28 USC § 1332, as total diversity exists between the parties and plaintiff has reasonably pled damages in excess of $75,000. (Compl. (dkt. #1) ¶¶ 1-6.)

BACKGROUND[2]

In 2011, Patricia Quast received $455,000 as a settlement in her divorce. Soon after, Quast met with John Kirkman to discuss investing that settlement. Kirkman allegedly suggested that she invest in two annuities: a short-term annuity and a lifetime annuity. Kirkman also allegedly told Quast's divorce attorney that some of the settlement would be invested in a lifetime annuity, which would pay out monthly for the rest of her life. After Quast agreed, Kirkman filled out an annuity application with Midland National Insurance Company ("Midland"), which Quast signed.

However, Kirkman allegedly filled out the application inconsistently, electing a lifetime annuity in one section but not another. As a result, although Quast was under the impression that she had purchased five-year and lifetime annuities, the money from her divorce settlement was actually invested in five-year and ten-year annuities instead.

On March 4, 2013, after she was unable to get in contact with Kirkman, Quast called Midland for information on her annuities. When the service representative told Quast that she held a five-year and a ten-year annuity, she managed to reach Kirkman to tell him that Midland said she had a ten-year, not a lifetime annuity. Nonetheless, Kirkman allegedly reassured Quast that: (1) she *did* have a lifetime annuity with Midland; and (2) the representative was likely speaking about Quast's ten-year certain death benefit, which would only pay her heirs for 10 years after her death.

[2] In resolving a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court takes all factual allegations in the complaint as true and draws all inferences in plaintiffs' favor. *Killingsworth v. HSBC Bank Nev.*, 507 F.3d 614, 618 (7th Cir. 2007).

Armed with this reassurance, Quast called Midland again on November 17, 2015, but was allegedly told once again that her annuities were *both* fixed term. Yet when Quast again contacted Kirkman, he allegedly again reassured her that she had a lifetime annuity. Further, later in 2016, when Quast asked Kirkman for paperwork confirming her lifetime annuity, he provided a payout sheet that allegedly noted a 10-year, guaranteed annuity with continuing payments for life thereafter.

After Quast filed for bankruptcy in 2018, her bankruptcy attorney, Joseph Dicker, followed up with Kirkman to get details about Quast's two annuities. At that time, Kirkman once again stated that Quast had a lifetime annuity, which would pay her monthly for life. In 2019, Quast also hired financial advisor, Tom Asenbrenner, who called Kirkman on March 18, 2019, to confirm that Quast had a lifetime annuity despite Midland telling Asenbrenner that she did not. For a third time, Kirkman represented that Quast had a lifetime annuity, suggesting the Midland representative must have confused the annuity term for Quast's certain, 10-year death benefit. Kirkman allegedly went on to state that (1) he was unaware of *any* Midland annuity without a lifetime benefit; and (2) only putting Quast's money in short-term annuities would not have been an appropriate financial decision. After the call, Asenbrenner also emailed Kirkman to ask for verification of his belief that Quast has a lifetime annuity. However, Kirkman allegedly never responded again to either any inquire from Asenbrenner *or* Quast.

OPINION

A motion to dismiss for failure to state a claim is designed to test the complaint's legal sufficiency. *See* Fed. R. Civ. P. 12(b)(6). The court must "construe the complaint

in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [the plaintiff's] favor." *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009). Thus, to survive a motion to dismiss, a plaintiff need only allege sufficient facts to state a plausible claim for relief. *Spierer v. Rossman*, 798 F.3d 502, 510 (7th Cir. 2015) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In their motion, defendants argue that Quast's claims, which were brought on May 7, 2021, are time barred, as she was aware of her claims even before the statute of limitations expired.[3] (Defs.' Mot. (dkt. #9) 2.) Quast's claims have statutes of limitations between three and six years, meaning that at least some of her claims are timely if they arose in 2018 or earlier. (Defs.' Rep. (dkt. #14) 1-2.) Defendants suggest that Quast knew about her claims when the contract was issued (or at the latest by 2013, when a Midland representative first told Quast she did not have a lifetime annuity). In contrast, Quast contends that the statute of limitations did not begin running until 2019 (or at maximum 2015). (Pl.'s Opp'n (dkt. #10) 2.)

Under Wisconsin law, generally, "a claim accrues when the injury is discovered or reasonably should have been discovered," also known as the "discovery rule." *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 559, 335 N.W.2d 578, 582 (1983). While the discovery rule has since been limited under certain circumstances, cases sounding in tort continue to be governed by the discovery rule. *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 146, 580 N.W.2d 203 (1998). Specifically, in *Hansen*, the Wisconsin Supreme

[3] The court will continue to refer to the plaintiff as "Quast" for ease of reference, omitting formal plaintiff Mary Jo Jensen-Carter, U.S. Bankruptcy Trustee for the Estate of Patricia A. Quast, understanding that Jensen-Carter now speaks for the deceased's estate.

Court adopted the discovery rule for tort cases, exercising its power to determine when claims accrue 'in the interest of justice and fairness.'" *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 240, 601 N.W.2d 627, 640 (1999). Thus, the question of when a claim accrues is in the discretion of the court, taking into account the principles of justice and fairness. At this stage, Quast has sufficiently pled facts to suggest that the statute of limitations should not accrue in 2013, although the evidence may ultimately prove otherwise.

As an initial matter, there is a factual question as to whether Quast "should have known" that she had a short-term annuity in the face of Kirkman's multiple reassurances to the contrary: "It is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury." *Hansen*, 113 Wis. 2d 550 at 559. This would seem particularly true in a case where the investor was allegedly unsophisticated and trusted a professional advisor to guide her investment decisions. (Pl.'s Opp'n (dkt. #10) 1.) Moreover, while a Midland customer service representative later told Quast that she only had short-term annuities, on the limited allegations at the pleading stage, a reasonable jury might infer that Quast trusted her individual advisor, who, after all, filled out her annuity application, over an anonymous Midland employee. This is especially plausible given the lengths Kirkman allegedly went to in reassuring Quast, including sending her documentation and speculating that the Midland representative must have been referring to her 10-year death benefit.

Additionally, Quast has alleged reasonable diligence in trying to understand her annuity (or so a reasonable jury might conclude), including calling Kirkman for clarification

after talking with Midland and asking him for proof that her annuity was a lifetime annuity. (Pl.'s Opp'n (dkt. #10) 4-6.) Indeed, *Hansen* itself found reasonable diligence when a woman went to the doctor but was told that she didn't have Pelvic Inflammatory Disease ("PID"), despite being so diagnosed just two weeks later:

> In the instant case Hansen exercised reasonable diligence in seeking medical help for her condition. She saw Dr. Macken on June 13, 1978, and *was told that it was unlikely she had PID*. The record reveals that on June 16, 1978, she was asymptomatic. Sometime thereafter the symptoms returned. On June 26, 1978, Hansen went to see Dr. Fabiny who finally diagnosed her condition as PID. We cannot say that Hansen should have discovered her injury any earlier. *She could not be expected to personally diagnose her condition* or consult with a physician more frequently than she did.

Id. at 560-561 (emphasis added). Here, too, Quast consulted with her expert -- Kirkman -- and was repeatedly assured that she had a lifetime annuity. Accordingly, the court is hard pressed to find that Quast should have discovered the misrepresentation earlier over the unequivocal, affirmative assurances of her professional advisor, at least at the pleading stage. This also is enough to suggest tolling *may* be appropriate. Of course, the court should be better able to answer the question of when Quast actually had reasonable notice or knew about her annuity by the close of discovery.

Finally, a possible equitable estoppel argument may still reasonably lurk in Quast's pleading. In Wisconsin, estoppel of a statute of limitations defense applies if the representations be "so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions." *Johnson v. Johnson*, 179 Wis. 2d 574, 582, 508 N.W.2d 19, 21 (Ct. App. 1993) (citing *Hester v. Williams*, 117 Wis.2d 634, 645, 345 N.W.2d 426, 431 (1984)). This includes any fraud or inequitable conduct that a plaintiff may

reasonably have relied upon. *Id*. Moreover, "[p]roof of estoppel must be clear, satisfactory and convincing and is not to rest on mere inference or conjecture." *Id*. at 583. Here, Quast not only claims that Kirkman continuously misled her, but goes so far as to claim the same as to her attorney and financial advisor, even when confronted with information that, at minimum, should arguably have made him double-check the annuity. Plus, in all fairness, Kirkman's continued denials that the annuity was short-term, made over a period of nearly 10 years, may be the kind of unfair and misleading action that would justify the application of equitable estoppel. Whether either of these claims bear out through discovery is uncertain, but dismissal based on the statute of limitations is also not appropriate at this stage.

ORDER

IT IS ORDERED that defendants' motion to dismiss (dkt. #9) is DENIED.

Entered this 18th day of April, 2022.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge