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**IN THE
COURT OF APPEALS OF INDIANA**

NAOMI PADDOCK,)
)
Appellant-Plaintiff,)
)
vs.)
)
BRADLEY K. MAIKRANZ, FIFTH THIRD)
SECURITIES, INC., and FIFTH THIRD BANK,)
)
Appellees-Defendants.)

No. 82A05-1010-CT-636

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Wayne Trockman, Special Judge
Cause No. 82C01-0803-CT-158

August 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Naomi Paddock filed suit against Fifth Third Securities, Inc., Fifth Third Bank (collectively Fifth Third), and Bradley Maikranz, alleging violations of the Indiana Uniform Securities Act (the Securities Act),¹ breach of fiduciary duty, and fraud. In two separate rulings, the trial court granted summary judgment in favor of Fifth Third and Maikranz. On appeal, Paddock presents the following restated issues for review:

1. Did the trial court properly determine as a matter of law that Paddock knew or in the exercise of ordinary diligence should have known of each of the alleged injuries prior to March 2005?
2. Did the trial court err in granting summary judgment on Paddock's fraud claims?

We affirm.

Paddock began banking with Fifth Third sometime between 1998 and 2000, and Maikranz acted as her financial advisor and broker at all relevant times herein. Paddock's investment account included annuities, certificates of deposit, stocks, and various other securities. Given her advanced age, Paddock's investment goals were conservative. Paddock received monthly account statements, as well as other documents, detailing activity in her accounts with Fifth Third. She reviewed and kept every account statement she received. During her relationship with Maikranz and Fifth Third, Paddock began to notice a number of questionable transactions (particularly in 2004 and the beginning of 2005) on her statements, including the alleged unauthorized sale of securities and annuities and the transfer of funds to her daughter's account. Upon receiving the statements, she promptly went to the bank and inquired of tellers, who could not answer her questions. She also unsuccessfully attempted to

¹ At the time this case commenced, the Act was codified at Ind. Code Ann. §§ 23-2-1-18.1 through 23-2-1-21. It was recodified in July 2008 at Ind. Code Ann. §§ 23-19-1-1 through 23-19-6-11 (West, Westlaw through 2011 Pub. Laws approved & effective through 6/28/2011).

reach Maikranz on a number of occasions over the period of about a year to find out why her account was continually being depleted. Finally, in May 2005, Paddock closed her securities account with Fifth Third. Thereafter, in 2006, she filed complaints with the NASD and the FBI.

On March 31, 2008, Paddock filed a civil complaint for damages against Fifth Third and Maikranz in the Vanderburgh County Circuit Court. In her complaint, Paddock alleged various violations of the anti-fraud provisions of the Securities Act in the first two counts of the complaint and alleged breach of fiduciary duty/constructive fraud in the third count.² Thereafter, in the fall of 2009, Fifth Third and Maikranz filed respective motions for summary judgment on statute of limitations grounds.

Following a hearing, the trial court granted summary judgment in favor of Fifth Third and Maikranz on the Securities Act and breach of fiduciary duty claims. Specifically, the court found that Paddock had actual knowledge of the acts alleged in her complaint prior to March 2005, and therefore, her claims accrued more than three years before she filed her complaint. As the statutes of limitations for violations of the Securities Act and breach of fiduciary duty are three years and two years, respectively, the court found these claims time barred. With respect to the fraud claim, which has a six-year statute of limitations, the trial court concluded that Paddock had failed to specifically allege fraud as required by Trial Rule 9(B). The court gave Paddock thirty days to file an amended complaint as to any fraud allegations.

² On appeal, Paddock summarizes her claims as for: 1) fraudulent misrepresentations with regard to certain financial transactions and 2) failure to properly invest her money in low-risk avenues.

Paddock timely filed her amended complaint on May 8, 2010. The only substantive amendment was the addition of the following paragraph:

24. The Defendants, collectively and individually, engaged in the following known fraudulent activities to the detriment of Plaintiff Naomi Paddock:

- a). Liquidated without knowledge or authorization of Naomi Paddock to [sic] certificates of deposit worth \$50,000 each, causing Naomi both direct and consequential harm, which misappropriations occurred in 2001 or 2002;
- b). The Defendants without the knowledge or authorization of Naomi Paddock liquidated a money market account worth \$25,359.69. This unauthorized and improper liquidation occurred on or about January of 2004;
- c). The Defendants fraudulently and without knowledge or authorization of Plaintiff Naomi Paddock liquidated securities worth \$63,145.76. This fraudulent action occurred on or about February of 2004;
- d). On or about March of 2004, the Defendants, without the knowledge or authorization of Naomi Paddock, fraudulently withdrew securities from Naomi's account valued at \$63,261.43.
- e). On or about March of 2004, the Defendants, without the knowledge or authorization of Naomi Paddock, fraudulently removed \$63,000 from Naomi's checking account;
- f). On or about June of 2004, the Defendants, without the knowledge or authorization of Naomi Paddock, fraudulently sold securities belonging to Naomi Paddock in the amount of \$24,514.56.
- g). On or about July of 2004, the Defendants, without the knowledge or authorization of Naomi Paddock, fraudulently sold securities belonging to Naomi Paddock in the amount of \$20,154.89;
- h). On or about July 2004, the Defendants, without the knowledge or authorization of Naomi Paddock, fraudulently sold securities belonging to Naomi Paddock in the amount of \$25,349.30;
- i). On or about January of 2005, the Defendants, without the knowledge or authorization of Naomi Paddock, fraudulently redeemed a Glen Book Life Annuity in the amount of \$23,134.32, causing the loss of death benefit and annuity and funds;
- j). On or about February of 2005, the Defendants, without the knowledge or authorization of Naomi Paddock, fraudulently redeemed a Nationwide annuity valued at \$67,918.28;
- k). On or about February of 2005, the Defendants, without the knowledge or authorization of Naomi Paddock, fraudulently redeemed a Mass Mutual annuity valued at \$68,918.28;

- l). That Defendant Maikranz fraudulently and through false and misleading information attempted to obtain a power of attorney from Naomi Paddock to his benefit;
- m). Upon information and belief, Plaintiff further believes that additional fraudulent actions by Defendant Maikranz have occurred, which have not yet been fully discovered through the discovery process.

Appellant's Appendix at 209-10.

Fifth Third filed a motion to dismiss the amended complaint, in which Maikranz joined, claiming that Paddock had failed to properly allege fraud or constructive fraud. After additional briefing by the parties, on September 30, 2010, the trial court treated the motion to dismiss as a motion for summary judgment and concluded that Fifth Third and Maikranz were entitled to summary judgment on the remaining fraud claims. The trial court specifically concluded that Paddock had not adequately pleaded fraud or constructive fraud. It further found that “the alleged unauthorized transactions, if any, are not fraud or constructive fraud, and are therefore barred by the two year statute of limitations regarding conversion and the statute of limitations under the Indiana Securities Act.” *Id.* at 266. This order resolved all issues in the case, thus becoming a final judgment at that time in favor of each defendant. Paddock now appeals.

We initially observe the well-settled standard of review for summary judgment rulings.

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Our review of a summary judgment motion is limited to those materials designated to the trial court.

Runkle v. Runkle, 916 N.E.2d 184, 190 (Ind. Ct. App. 2009) (some citations omitted), *trans. denied*. Further, we will affirm if the trial court's grant of summary judgment can be sustained on any theory or basis in the record. *Clary v. Dibble*, 903 N.E.2d 1032 (Ind. Ct. App. 2009), *trans. denied*.

Statutes of limitations are favored in Indiana because they afford security against stale claims and promote the peace and welfare of society. *Runkle v. Runkle*, 916 N.E.2d 184. They are enacted on the presumption that someone with a well-founded claim will not delay in enforcing it. *Id.* Moreover, the defense of a statute of limitation is particularly suited as a basis for summary judgment. *Id.* When the movant asserts the statute of limitation as an affirmative defense and makes a prima facie showing that the action was untimely commenced, the claimant has the burden of establishing an issue of fact material to the theory that avoids the affirmative defense. *Id.*

1.

Paddock initially challenges the grant of summary judgment on her breach of fiduciary duty and Securities Act claims. She argues that the trial court erred in concluding that the statutes of limitations began to run once she viewed her statements and became aware that she was losing money in her accounts. Rather, Paddock asserts that she did not know and should not have known that the defendants had caused her financial harm until May 2006, when she had communications with the NASD.

There is no dispute in this case that the alleged wrongful acts took place before March 2005. The parties also agree that the statute of limitation for violations of the Securities Act

is three years, *see Martin v. Brown*, 716 N.E.2d 1030 (Ind. Ct. App. 1999) (citing I.C. § 23-2-1-19(g) (now I.C. § 23-19-5-9(g)), and for breach of fiduciary duty is two years, *see City of Chicago v. East Chicago Second Century, Inc.*, 908 N.E.2d 611 (Ind. 2009). Thus, the only way that Paddock's claims can survive is if they were tolled by the discovery rule. *See Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 689 (Ind. Ct. App. 2006) (“[t]he discovery rule presents a limited exception to the requirement that a party must file suit within the statutory period”).

For an action to accrue, it is not necessary that the full extent of damage be known, but only that some ascertainable damage has occurred. *Runkle v. Runkle*, 916 N.E.2d 184. Under the discovery rule, “the statute of limitation begins to run, when a claimant knows or in exercise of ordinary diligence should have known of the injury.” *Id.* at 191 (quoting *Pflanz v. Foster*, 888 N.E.2d 756, 759 (Ind. 2008)). “[A]pplication of the discovery rule does not mandate that plaintiffs know with precision the legal injury that has been suffered, but merely anticipates that a plaintiff be possessed of sufficient information to cause him to inquire further in order to determine whether a legal wrong has occurred”. *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d at 689. “In other words, the discovery rule only postpones the statute of limitations by belated discovery of key facts and not by delayed discovery of legal theories.” *Id.*

In the instant case, the evidence establishes as a matter of law that Paddock knew or should have known that she had been injured and had a potential claim against Maikranz and Fifth Third before March 31, 2005. To be sure, Paddock's deposition testimony reveals that she timely discovered the key facts relevant to her claims as she received and reviewed each

statement from Fifth Third over the relevant time period.³ Specifically, Paddock admitted that the statements revealed the alleged unauthorized liquidation of a number of assets and large transfers of funds out of her account (and into her daughter's account). In her own words, her accounts "just kept declining and declining" without her authorization.⁴ *Appellant's Appendix* at 72. Upon reviewing the relevant statements and discovering that her accounts were being depleted she immediately began investigating and inquiring of bank employees.⁵ Paddock explained that she went to the bank to complain "all the time." *Id.* at 81. She also tried contacting Maikranz for about a year, but he did not return her calls and was unavailable when she went to the bank. Paddock eventually stopped banking with Fifth Third by March 2005. As set forth above, she did not file the instant complaint until March 31, 2008.

Paddock's bald assertion that she did not discover Maikranz's wrongdoing until May 2006 is unavailing. Though the record in this regard is vague, it appears that Paddock made a complaint to the NASD and had several phone conversations with an NASD representative in May 2006. The representative encouraged Paddock to "go ahead with [her] case" in order to

³ During the deposition, Paddock was questioned about when she discovered facts that she believed indicated some wrongdoing by Maikranz. Paddock responded:

Well, I had been finding it all along. I had been discovering it. I went to the bank and I had really tried to find out what was going on, and then I got my statements from my companies that they had been cashed in, and I said, ma'am, I never signed that, and she said, yeah, you signed them, and I said, no, I didn't.

Appellant's Appendix at 74.

⁴ Paddock testified that before this period of questionable transactions, her previous statements "remained practically the same". *Appellant's Appendix* at 73.

⁵ For example, Paddock acknowledged that her March 2004 bank statement clearly revealed that three of her securities were liquidated resulting in total proceeds of over \$63,000 and that, in turn, the \$63,000 was

recoup her money and gave her the name of an attorney in Chicago. *Id.* at 115. By the time Paddock received this advice, however, she already knew all the *key facts* that formed the basis of her claims against Fifth Third and Maikranz. In other words, well before March 31, 2005, Paddock possessed sufficient information to cause an ordinary person to inquire further in order to determine whether a legal wrong had occurred.⁶ *See Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d. 683. The trial court properly granted summary judgment in favor of Fifth Third and Maikranz on Paddock's Securities Act and breach of fiduciary duty claims.

2.

Paddock also challenges the trial court's subsequent grant of summary judgment on her fraud claims. In this regard, Paddock argues only that her amended complaint adequately states a claim for both actual fraud and constructive fraud. She entirely fails, however, to respond to Fifth Third's argument that Paddock cannot avoid application of the applicable statutes of limitations by seeking to characterize her fiduciary and Security Act claims as fraud.

Leaving aside whether Paddock adequately stated claims for fraud and constructive fraud, we conclude that these claims are time barred. Our Supreme Court has explained:

the applicable statute of limitations should be ascertained by reference to the nature of the harm alleged rather than by reference to theories of recovery. In other words, the applicable statute of limitations is ascertained by identifying

transferred out of her checking account. After reviewing the statement, Paddock went to the bank to complain and spoke with a teller, who could not explain the alleged unauthorized transactions.

⁶ Paddock's reliance on *Merck & Co., Inc., v. Reynolds*, 130 S.Ct. 1784 (2010) (addressing a federal securities act claim) is misplaced. Not only is the case not controlling, it is distinguishable on its facts, as key facts in *Merck* were not available to the eventual plaintiffs until many years after the misconduct due to the defendant's deceptive actions. As set forth above, in this case, Paddock was aware of Maikranz's questionable and unauthorized transactions all along.

the nature or substance of the cause of action and not of the form of the pleadings.

Whitehouse v. Quinn, 477 N.E.2d 270, 273 (Ind. 1985). See also *O.K. Sand & Gravel, Inc. v. Martin Marietta Corp.*, 786 F. Supp 1442 (S.D. Ind. 1992) (applying two-year statute of limitations to fraud claim in fiduciary setting), *modified by* 819 F. Supp 771 (S.D. Ind. 1992), *aff'd* 36 F.3d 565 (7th Cir. 1994).

“In short, though parties confronted with a limitations problem often attempt...to evade such difficulties by reliance upon pleading technicalities, the courts have consistently rebuffed these efforts in favor of substantive analysis. Particularly in view of the heightened emphasis on substance and the disregard of mere form which the Trial Rules demand, it is clear that such formalistic pleading arguments no longer merit serious attention.”

O.K. Sand & Gravel, Inc. v. Martin Marietta Corp., 786 F. Supp at 1448 (quoting *Shideler v. Dwyer*, 417 N.E.2d 281, 286 (Ind. 1981)) (omission in original). Thus, a plaintiff’s decision to plead several theories of recovery does not control the applicable limitation period. See *Whitehouse v. Quinn*, 477 N.E.2d 270.

On the record before us it is clear that Paddock is attempting to recharacterize her primary claims (breach of fiduciary duty and Security Act claims) as fraud to avoid the statute of limitations problem posed by those claims. The substance of her fraud claims, however, is no different than the other claims. To be sure, her fraud claims are based on the same allegations that “Maikranz in violation of the previous agreement with regard to how the account funds would be invested and managed, engaged in a series of inappropriate and unauthorized transactions”.⁷ *Appellant’s Brief* at 22-23. Therefore, notwithstanding the form

⁷ With respect to her constructive fraud claim, Paddock explained further:

of the pleadings, we conclude that Paddock’s fraud claims are, in substance, ones for breach of fiduciary duty and/or violations of the Securities Act. *See Spolnik v. Guardian Life Ins. Co. of Am.*, 94 F. Supp.2d 998, 1008 (S.D. Ind. 2000) (“[f]or statute of limitations purposes, the forgery, scheme to defraud, and fraud claims arising out of a fiduciary relationship should be treated as claims for a breach of fiduciary duty”). As such, her fraud claims are time barred, and we affirm the grant of summary judgment on that ground.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.

Maikranz represented that his actions on the account were consistent with the instructions agreed upon between Paddock and Maikranz that any and all investments would be consistent with conservative management policies designed to create modest income for Paddock and minimal risk, giving [sic] her advanced age. When Maikranz instead engaged in the financial transactions described in [the complaint], he engaged in misrepresentations because he had previously advised Paddock that any and all transactions he would engage in in her account on her behalf would be consistent with that philosophy.

Appellant’s Brief at 24.