


IT IS SO ORDERED.

Dated: 8 April, 2013 04:00 PM



Jessica E. Price Smith

JESSICA E. PRICE SMITH
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:

MICHAEL D. RUGGIE,

Debtor.

In Proceedings Under Chapter 7

CASE NO: 11-19707

ROBERT S. KRONENBERG,
Plaintiff,

ADV. PROC. NO. : 12-01025

v.

JUDGE JESSICA E. PRICE SMITH

MICHAEL D. RUGGIE,
Defendant.

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is the Motion for Summary Judgment filed by plaintiff, Robert S. Kronenberg. The underlying complaint alleges that investment losses and fees paid to the debtor as an investment advisor are debts owed to Plaintiff that are nondischargeable as a

result of fraud or defalcation while acting in a fiduciary capacity pursuant to 11 U.S.C. § 523(a)(4). The debtor and defendant, Michael D. Ruggie, opposes the Summary Judgment Motion. Viewing the evidence in the light most favorable to Defendant, and strictly construing the exceptions to discharge, Plaintiff's Motion for Summary Judgment cannot be granted.

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 of this District. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

It is undisputed that on December 15th, 2008, Plaintiff and Defendant entered into a Financial Consulting Agreement. In connection with that agreement, Plaintiff executed multiple documents, including a Fidelity Account Application and a Trading Authority Form. The Fidelity Account Application, which was completed by hand and bears the signature of the Plaintiff, provided for the establishment of an individual account owned by Plaintiff. The application has "Most Aggressive" selected as the investment objective of the account in section 2, Financial Profile. In addition, in section 4, Account Features, where applicants are instructed to complete the Active Trader Features provision if they plan to trade at least 36 times over a rolling 12-month period at Fidelity, or maintain at least \$25,000 in assets within their household group, the Plaintiff's application indicates that he planned to trade 120(+) times. The Trading Authority form, also completed by hand and bearing the signature of Plaintiff, granted Defendant "limited trading authority" over the account.

Defendant admits that he exercised his trading authority over the account from December of 2008 to July of 2009. He further admits that during that time there was a high level of trading activity on the account. At the hearing on the Motion for Summary Judgment, the parties agreed

that as of July 2009, the account had lost \$356,511.23. Plaintiff terminated the investment consulting services of the Defendant in July of 2009.

In considering Plaintiff's Motion for Summary Judgment, the evidence must be viewed in the light most favorable to Defendant in order to determine whether a genuine issue of material fact exists. *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The legal issue before this court is an exception to discharge. Exceptions to discharge are to be strictly construed against the creditor. *See Manufacturer's Hanover Trust v. Ward (In re Ward)*, 857 F.2d 1082, 1083 (6th Cir. 1988). If the uncontested facts do not support an exception to discharge under strict construction, summary judgment is not appropriate.

Plaintiff's first argument is that Defendant, an investment advisor under the Investment Advisers Act of 1940, breached his fiduciary obligation as an investment advisor. This argument is based on the obligation of an investment advisor to act for the benefit of his clients. *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 17 (1979). According to Plaintiff's pleadings and affidavit, he wanted a conservative investment strategy with an emphasis on growth. Therefore, the high level of trading activity on the account, acknowledged by Defendant, was not to his benefit. Plaintiff's assertion of his desired investment strategy is contradicted by the documents he signed to set up the investment account, however. Specifically, the signed Fidelity Account Application identifies Plaintiff's investment objective as Most Aggressive, and his rolling 12 month trading frequency was to be 120(+) times. Therefore, assuming arguendo that Defendant was acting as an investment advisor under the Investment Advisers Act of 1940, there is a genuine issue of material fact as to what investment

strategy Plaintiff desired and whether the actions of Defendant were consistent with that strategy and with acting for the benefit of the Plaintiff.

Plaintiff next argues that Defendant engaged in defalcation while acting as a fiduciary. To establish this fact, he first alleges that the funds in the investment account establish a trust over which Defendant had control. He further alleges that Defendant failed to fully disclose the risk of his recommended investments or to guide Plaintiff toward suitable investments. Finally, he alleges that the volume of trades was churning. Defendant had limited trading authority over the account. Even if that authority rises to the level of serving as the fiduciary of a trust, whether the investment strategy employed by Defendant was adequately disclosed to Plaintiff or appropriate for his desired investment strategy cannot be determined without first resolving the conflict between the Plaintiff's stated objectives and the identified objectives in the documents he signed. Similarly, Plaintiff cannot establish churning on the account for purposes of summary judgment, since the documents reflect his desire to trade at a high volume.

Based on the foregoing, Plaintiff's Motion for Summary Judgment is denied.

IT IS SO ORDERED.