Superior Court of Connecticut,

Judicial District of New Haven.

James ROSCOE, Executor of the Estate of John Roscoe, et al.

v.

ELIM PARK BAPTIST HOME, INC.

No. NNHCV146049541S.

Dec. 22, 2015.

Attorneys and Law Firms

Knott & Knott LLC, Cheshire, for James Roscoe, Executor of the Estate of John Roscoe, et al.

Robinson & Cole LLP, Hartford, for Elim Park Baptist Home, Inc.

Opinion

HON. MATTHEW E. FRECHETTE, J.

\*1 The instant matter concerns claims brought by a decedent's executor and widow against a Continuing Care Retirement Community (CCRC). This action was commenced on August 15, 2014 by service of process on the defendant, Elim Park Baptist Home, Inc. In an eight-count amended complaint, dated January 8, 2015, the plaintiffs, James Roscoe as executor of the estate of John Roscoe, and Geraldine Perzanoski, allege the following facts. On April 4, 2002, the decedent, John Roscoe, contracted with the defendant to be provided with a residence for the rest of his natural life. The contract gave the decedent access to the residence unit and the defendant's services in exchange for an entrance fee and subsequent monthly payments. A portion of the entrance fee was held in an “Entrance Fee Refund Account,” which was to be paid to the decedent's estate upon his death, with the interest earned being paid to the defendant.

The decedent married Perzanoski on August 24, 2012. Following the marriage, the decedent became concerned about outliving his assets and about Perzanoski's long-term financial welfare. Due to his financial concerns, the decedent experienced a strong desire to obtain more liquid assets.

During the summer of 2012, Carl Jahrstorfer, the defendant's director of planned giving, made various presentations to the decedent in order to persuade him to make a gift to the defendant. Based on those conversations, Jahrstorfer, as an agent and employee of the defendant, offered the decedent an agreement whereby the defendant would permit the decedent to transfer all of the assets in his Entrance Fee Refund Account as follows: $41,181.50 to be donated to the defendant as a gift; $41,182 to be received by the decedent as a cash payout; and $41,181.50 to be given to the defendant as a charitable gift annuity, whereby the defendant, for the life of the decedent and Perzanoski, would pay to either of them $219.64 per month.

At all times pertinent, based on financial disclosure forms that the decedent provided to the defendant at the defendant's request, the defendant knew or should have known that the decedent and Perzanoski's income did not cover all of their expenses, and that the decedent experienced significant health problems. Moreover, the defendant knew or should have known the various tax and financial planning issues involved with and caused by annuities, especially with respect to Medicaid eligibility.

Nevertheless, the defendant did not make any attempt to analyze or understand the decedent's or Perzanoski's finances or to determine whether an annuity was appropriate for them. In persuading the decedent to enter into the agreement, the defendant represented that the annuity was a far more valuable product than it actually was. These representations were based on factual predicates that the defendant knew or should have known to be untrue. Furthermore, the defendant informed the decedent that he would receive “important benefits” with explaining what those benefits were, and that the agreement was a “good deal” for the decedent and Perzanoski, despite knowing that the factual basis for those statements was untrue.

\*2 The plaintiffs further allege that the annuity was unsound in ways including but not limited to the following: the annuity generated more taxable income than had been represented to the decedent; the charitable deduction that would be available was of little value due to the decedent's tax bracket; the annuity caused the decedent and Perzanoski to become ineligible for Medicaid, and/or put Perzanoski at risk of receiving a penalty if she applied for Medicaid; and the annuity was not actuarially sound. Ultimately, on September 30, 2012, the decedent entered into the agreement with the defendant.

The plaintiffs' eight-count amended complaint sounds in negligence, negligent representation, recklessness, breach of fiduciary duty, fraudulent misrepresentation, civil theft, tortious interference with inheritance, and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42–110a, et seq. On May 20, 2015, the defendant filed a motion to strike the amended complaint in its entirety, along with a supporting memorandum of law. On June 30, 2015, the plaintiffs filed a brief in opposition to the motion to strike, to which the defendant filed a reply on July 21, 2015.

Argument was heard at the short calendar on September 21, 2015.

DISCUSSION

“A motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof to state a claim upon which relief can be granted ...” Practice Book § 10–39(a). “[I]t is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted ... The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action.” (Citation omitted; internal quotation marks omitted.) Coe v. Board of Education, 301 Conn. 112, 116–17, 19 A.3d 640 (2011). “Moreover [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged.” (Internal quotation marks omitted.) Connecticut Coalition for Justice in Education Funding, Inc. v. Rell, 295 Conn. 240, 252, 990 A.2d 206 (2010). “[P]leadings are to be construed broadly and realistically, rather than narrowly and technically ...” (Internal quotation marks omitted.) Downs v. Trias, 306 Conn. 81, 92, 49 A.3d 180 (2012). “If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action ... the complaint is not vulnerable to a motion to strike.” Bouchard v. People's Bank, 219 Conn. 465, 471, 594 A.2d 1 (1991).

I

NEGLIGENCE AND RECKLESSNESS

In support of striking Counts One and Count Three, the defendant argues that it does not owe a duty of care to protect the financial well-being of its residents, such that the duty-based claims of negligence and recklessness must be stricken. In opposition, the plaintiffs contend that, a duty of reasonable care arose here because the defendant undertook to advise the decedent concerning his finances.

\*3 “To recover on a theory of negligence, the plaintiff must establish that the [defendant] owed a duty to [the injured person] and breached that duty ... The existence of a duty is a question of law ... Only if such a duty is found to exist does the trier of fact then determine whether the [defendant] violated that duty in the particular situation at hand ... [A] count based on reckless and wanton misconduct must, like an action in negligence, allege some duty running from the defendant to the plaintiff.” (Citation omitted; internal quotation marks omitted.) Vitale v. Kowal, 101 Conn.App. 691, 698–99, 923 A.2d 778, cert. denied, 284 Conn. 904, 931 A.2d 268 (2007). “[T]here generally is no duty that obligates one party to aid or to protect another party ... One exception to this general rule arises when a definite relationship between the parties is of such a character that public policy justifies the imposition of a duty to aid or to protect another.” (Citation omitted) Ryan Transportation, Inc. v. M & G Associates, 266 Conn. 520, 526, 832 A.2d 1180 (2003).

Although a retirement community may, in some respects, provide care and support for its residents, that relationship does not create a common-law duty of care with respect to providing financial or insurance advice to residents. See Riverside Healthcare Center, Inc. v. Romaniello, Superior Court, judicial district of Tolland, Docket No. CV–10–6001234–S (May 17, 2011, Sferrazza, J.) (51 Conn. L. Rptr. 603). Indeed, no such duty arose here. Thus, as a matter of law, there is no duty of care supporting the plaintiffs' negligence and recklessness claims. The defendant's motion to strike is granted as to Count One and Count Three.

II

FIDUCIARY DUTY

With respect to Count Four, the defendant argues that no fiduciary relationship existed between the defendant and the decedent. In opposition, the plaintiffs argue that a fiduciary relationship arose because of the degree to which the decedent was dependent on the defendant in entering the agreement.

“[S]ome actors are per se fiduciaries by nature of the functions they perform. These include agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians ... Beyond these per se categories, however, a flexible approach determines the existence of a fiduciary duty, which allows the law to adapt to evolving situations wherein recognizing a fiduciary duty might be appropriate ... This court has instructed that, [a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other ... The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him ... With these principles in mind, we have recognized that not all business relationships implicate the duty of a fiduciary.” (Citations omitted; internal quotation marks omitted.) Iacurci v. Sax, 313 Conn. 786, 800, 99 A.3d 1145 (2014). “This court has, however, specifically refused to define a fiduciary relationship in precise detail and in such a manner as to exclude new situations, choosing instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.” (Internal quotation marks omitted.) Alaimo v. Royer, 188 Conn. 36, 41, 448 A.2d 207 (1982) (fiduciary relationship found where defendant-real estate investor held himself out to plaintiff as investment counselor, represented that he would take care of plaintiff financially, that he would safeguard plaintiff's money, and that plaintiff could place her trust in him).

\*4 “The fact that one business person trusts another and relies on [the person] to perform [his obligations] does not rise to the level of a confidential relationship for purposes of establishing a fiduciary duty ... [N]ot all business relationships implicate the duty of a fiduciary ... In the cases in which this court has, as a matter of law, refused to recognize a fiduciary relationship, the parties were either dealing at arm's length, thereby lacking a relationship of dominance and dependence, or the parties were not engaged in a relationship of special trust and confidence ... Accordingly, a mere contractual relationship does not create a fiduciary or confidential relationship. (Citations omitted; internal quotation marks omitted.) Saint Bernard School of Montville, Inc. v. Bank of America, 312 Conn. 811, 836, 95 A.3d 1063 (2014).

Generally, no fiduciary duty arises in a nondiscretionary contract to procure an annuity. See Macomber v. Travelers Property & Casualty Corp., 261 Conn. 620, 640–41, 804 A.2d 180 (2002) (procurement of annuity lacked traits typically associated with fiduciary relationship); Jeaninne Childree, Conservator of Donald R. Luster v. New Alliance Investment, Inc., Superior Court, judicial district of Tolland, Docket No. CV–09–5005036–S, (January 6, 2010, Sferrazza, J.) (49 Conn. L. Rptr. 136, 136–37) (purchase of annuity did not create fiduciary duty between defendant-investment company and plaintiff suffering from Alzheimer's when defendant had no knowledge of plaintiff's condition). Although there may be no fiduciary duty between two parties at the outset of their business relationship, one may arise if one of the parties takes on additional responsibilities characteristic of a fiduciary. See Southbridge Associates, LLC v. Garofalo, 53 Conn.App. 11, 18, 728 A.2d 1114, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999) (bank, as mortgagee lender, may be fiduciary of mortgagor borrower if bank becomes borrower's financial advisor).

Moreover, a fiduciary relationship may arise from a nondiscretionary transaction when there are “special circumstances” that render a client dependent on the broker. de Kwiatkowski v. Bear, Stearns & Co., Inc., 306 F.3d 1293, 1308 (2d Cir.2002). “The transformative ‘special circumstances' recognized in the cases are circumstances that render the client dependent—a client who has impaired faculties, or one who has a closer than arm's-length relationship with the broker, or one who is so lacking in sophistication that de facto control of the account is deemed to rest in the broker. The law thus imposes additional extra-contractual duties on brokers who can take unfair advantage of their customers' incapacity or simplicity.”1 Id. “In order to take advantage of these special circumstances, however, the plaintiffs must plead and prove that the defendants had actual or constructive knowledge of [the investor's] diminished capacity. In both civil and criminal cases, competency is presumed ... No lesser standard ought to apply as to business relationships, and the defendants were entitled to assume that [the investor] possessed the mental acuity to handle his own affairs in the absence of evidence to the contrary.” (Citation omitted.) Childree v. New Alliance Inv., Inc., supra, 49 Conn. L. Rptr. 137) (purchase of annuity did not create fiduciary duty absent transformative factors).

\*5 Given the special circumstances required for a fiduciary duty to arise from the purchase of an annuity—a transaction that does not otherwise bear the hallmarks of a fiduciary relationship—the plaintiff must plead facts indicating the decedent's incompetence and the defendant's knowledge thereof. “In a criminal proceeding, the law presumes that a defendant is competent and places the burden to show otherwise on the party alleging incompetence ... The courts have followed this presumption of competence in the civil arena.” (Citation omitted.) McLaughlin v. Smoron, 62 Conn.App. 367, 374, 771 A.2d 201 (2001). “As this court has observed, the mere use of clinical terms related to mental impairment, without adequate accompanying information, does not constitute ‘evidence of the effects' of such conditions ... While a jury is entitled to infer impairment from intoxication because it is an effect which is common knowledge and is an inference which is clearly within the ability of the jurors, as laypersons, to draw based on their own common knowledge and experience ... a jury should not be allowed to make a similar leap in reasoning when dealing with diminished capacity. Unlike the effects of intoxication, the effects of complex mental disorders are not commonly known to laypersons.” (Citation omitted; internal quotation marks omitted.) State v. Bharrat, 129 Conn.App. 1, 14–15, cert. denied, 302 Conn. 905, 23 A .3d 1243 (2011). Thus, a party cannot meet its burden of showing incompetence by mere implication.

Whether or not an individual has the capacity to contract calls for a legal conclusion.2 Hayes, Conservator v. Candee, 75 Conn. 131, 138, 52 A. 826, 828 (1902). “A motion to strike admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings.” (Emphasis omitted; internal quotation marks omitted.) Faulkner v. United Technologies Corp., 240 Conn. 576, 588, 693 A.2d 293 (1997). “A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged.” (Internal quotation marks omitted.) Santorso v. Bristol Hospital, 308 Conn. 338, 349, 63 A.3d 940 (2013). Thus, a plaintiff seeking to disclaim a contract because of incapacity must plead facts that would support such a conclusion.

The plaintiff's allegations concern a single set of transactions: the withdrawal, donation, and investment of the decedent's entrance fee so as to purchase a lifetime charitable gift annuity. In the revised amendment complaint, the plaintiff alleges that the decedent “experienced significant health problems” (Amended Complaint, ¶ 30), had a “diminished capacity to care for himself and make decisions” (¶ 52), and that he “lacked the capacity to understand the tax and financial-planning issues having to do with annuities ...” (¶ 56.) Although the plaintiff alleges that the decedent suffered from diminished capacity or incapacity when entering into the transactions, there are no allegations that the defendant had actual or constructive knowledge of the decedent's diminished capacity or incapacity, as is required to demonstrate that the transaction was closer than arm's length or characterized by a unique degree of trust and confidence.

\*6 The plaintiff does allege that the decedent “relied upon and became completely dependent on [the defendant] for [the decedent's] daily needs and support” (¶ 53), and that the defendant knew as much (¶ 54). The parties did not provide, and the court has not discovered, any authority that discusses whether one may infer that a party with knowledge that an individual is “completely dependent” on that party also has knowledge that the individual has a diminished capacity or incapacity to contract.

In light of the heightened level of specificity required to support a fiduciary duty arising from transformative special circumstances, in particular, one founded on the decedent's alleged diminished capacity or incapacity, the plaintiffs have not alleged facts sufficient to demonstrate a fiduciary relationship. Therefore, because the defendant did not owe the decedent a fiduciary duty, the plaintiffs' claim must fail as a matter of law. The defendant's motion to strike is granted as to Count Four.

III

MISREPRESENTATION

In seeking to strike Count Two and Count Five, the defendant argues that the plaintiffs have failed to allege that the misrepresentations were statements of fact, as opposed to opinion or puffery. “[A]n action for negligent misrepresentation requires the plaintiffs ... to prove that [the defendant] made a misrepresentation of fact, that [the defendant] knew or should have known that it was false, that the plaintiff reasonably relied upon the misrepresentation, and that the plaintiffs suffered pecuniary harm as a result thereof.” Glazer v. Dress Barn, Inc., 274 Conn. 33, 73, 873 A.2d 929 (2005). Similarly, “[t]he elements comprising an action in fraud or fraudulent misrepresentation are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury.” (Internal quotation marks omitted.) Statewide Grievance Committee v. Egbarin, 61 Conn.App. 445, 454, 767 A.2d 732, cert. denied, 255 Conn. 949, 769 A.2d 64 (2001).

In support of the negligent misrepresentation claim, the plaintiffs allege that the defendant misrepresented the nature of the agreement with the decedent based on factual predicates that the defendant knew or should have known were untrue, and that the decedent relied on those misrepresentations to his detriment. (Amended Complaint, ¶¶ 33–35, 42–44.) In support of the fraudulent misrepresentation claim, the plaintiffs additionally allege that the defendant's statements were false and made knowing that the decedent would act on them. (¶¶ 33–35, 70–71.)

The plaintiffs' allegations are based on statements of fact by the defendant, not opinions or puffery. Reading the amended complaint broadly and realistically, the plaintiffs have sufficiently alleged claims of both negligent and fraudulent misrepresentation. The defendant's motion to strike is denied as to Count Two and Count Five.

IV

CIVIL THEFT

\*7 In seeking to strike Count Six, the defendant argues that the plaintiffs' allegations are insufficient to support a claim of civil theft. “The elements that the plaintiffs must prove to obtain treble damages under the civil theft statute, § 52–564, are the same as the elements required to prove larceny, pursuant to General Statutes § 53a–119 ... A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner ... It must be shown that (1) there was an intent to do the act complained of, (2) the act was done wrongfully, and (3) the act was committed against an owner ... The essential cause of action is a wrongful exercise of dominion over personal property of another.” (Internal quotation marks omitted.) Kosiorek v. Smigelski, 138 Conn.App. 695, 713, 54 A.3d 564 (2012), cert. denied, 308 Conn. 901; 60 A.3d 287 (2013).

“Under our case law, [m]oney can clearly be subject to conversion ... Similarly, money can be the subject of statutory theft ... The plaintiffs must establish, however, legal ownership or right to possession of specifically identifiable moneys .” (Citations omitted; internal quotation marks omitted.) Deming v. Nationwide Mutual Ins. Co., 279 Conn. 745, 771–72, 905 A.2d 623 (2006). General Statutes § 53a–119 further provides, in relevant part: “Larceny includes, but is not limited to: (1) Embezzlement. A person commits embezzlement when he wrongfully appropriates to himself or to another property of another in his care or custody. (2) Obtaining property by false pretenses. A person obtains property by false pretenses when, by any false token, pretense or device, he obtains from another any property, with intent to defraud him or any other person.”

The plaintiffs allege that when the decedent moved in to the defendant's facilities, the defendant took possession, but not ownership, of the entrance fee, which the defendant held in a refund account that was to be paid to the decedent's estate upon his death. The plaintiffs have further alleged that the defendant wrongfully and fraudulently appropriated the entrance fee from that account. These allegations are sufficient to support a claim for civil theft because the plaintiffs have alleged facts from which one could infer that the defendant committed theft by embezzlement or false pretenses. The defendant's motion to strike Count Six is denied.

V

TORTIOUS INTERFERENCE

The defendant argues that tortious interference with inheritance is not a valid cause of action. Alternatively, the defendant argues that the claim is insufficiently alleged. This court recognizes tortious interference with inheritance as a valid cause of action. As to whether it has been sufficiently alleged, the issue is whether there can be tortious interference based on misrepresentation if there is no duty, or, as here, the allegations of a duty have been stricken. A claim for tortious interference with inheritance requires a plaintiff to prove “(1) the existence of an expected inheritance; (2) the defendant's knowledge of the expectancy; (3) tortious conduct by the defendant; and (4) actual damages to the plaintiff resulting from the defendant's tortious conduct.” Hart v. Hart, Superior Court, judicial district of Windham, Docket No. CV–14–6007918–S (May 11, 2015, Calmar, J.) (60 Conn. L. Rptr. 399, 406).

\*8 “Our case law has recognized that not every act that disturbs a business expectancy is actionable. [A] claim is made out [only] when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself ... Accordingly, the plaintiff must plead and prove at least some improper motive or improper means ... [F]or a plaintiff successfully to prosecute such an action it must prove that ... the defendant was guilty of fraud, misrepresentation, intimidation or molestation ... or that the defendant acted maliciously ... In the context of a tortious interference claim, the term malice is meant not in the sense of ill will, but intentional interference without justification ... In other words, the [plaintiff] bears the burden of alleging and proving lack of justification on the part of the [defendant].” (Citations omitted; internal quotation marks omitted.) Reyes v. Chetta, 143 Conn.App. 758, 764, 71 A.3d 1255 (2013).

Generally, the existence of a duty is not a prerequisite to a finding of tortious interference, which contains no explicit duty requirement. Downes–Patterson Corp. v. First National Supermarkets, Inc., 64 Conn.App. 417, 431, 780 A.2d 967 (2001) (defendant had no duty to release an already void restrictive covenant), cert. granted, 258 Conn. 917, 782 A.2d 1242 (2001) (appeal subsequently dismissed). Rather, a claim for tortious interference will require a showing of duty only when the claim is based on the tortfeasor's passive conduct or omission. Id., 430.

The tortious interference claim here is not based on passive conduct, but on specific acts by the defendant. Therefore, the plaintiffs need not allege a duty in support of the claim for tortious interference with inheritance, and that the claim may stand even if all of the counts alleging a duty are stricken. The claim for tortious interference with inheritance is sufficiently alleged. The defendant's motion to strike Count Seven is denied.

VI

CUTPA

The defendant argues that the plaintiffs failed to allege substantial aggravating circumstances, which are necessary to support a CUTPA claim. “CUTPA provides: ‘No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.’ General Statutes § 42–110b(a). It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1)[W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons] ... All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three ... Moreover, not every contractual breach rises to the level of a CUTPA violation.” (Citations omitted; internal quotation marks omitted.) Naples v. Keystone Building & Development Corp., 295 Conn. 214, 227–28, 990 A.2d 326 (2010).

\*9 A simple breach of contract is insufficient to establish a claim under CUTPA absent substantial aggravating circumstances. Lydall, Inc. v. Ruschmeyer, 282 Conn. 209, 247–48, 919 A.2d 421 (2007). “Depending upon the nature of the assertions, however, the same facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation ... That generally is so when the aggravating factors present constitute more than a failure to deliver on a promise.” (Citation omitted.) Greene v. Orsini, 50 Conn.Sup. 312, 315, 926 A.2d 708 (2007). Aggravating circumstances may be demonstrated by reckless or intentional conduct by one party to another's detriment. Tessmann v. Tiger Lee Construction Co., 228 Conn. 42, 55, 634 A.2d 870 (1993) (contractor's attempt to stonewall homeowners, make no substantive repairs to shoddy work, and otherwise take advantage of homeowners supported CUTPA claim). Likewise, allegations of fraud or intentional misrepresentation by a contracting party at the time the parties enter into an agreement may be sufficient to state a CUTPA claim arising from a breach of contract. See Lawrence v. Richman Group Capital Corp., 358 F.Sup.2d 29, 42 (D.Conn.2005) (discussing when misrepresentation may constitute aggravating circumstance).

The plaintiffs' allegations support more than a simple breach of contract claim. As discussed above, the plaintiffs allege facts that, if proven, would support claims of fraudulent misrepresentation and civil theft. Therefore, the plaintiffs have sufficiently alleged substantial aggravating circumstances in support of the CUTPA claim. The defendant's motion to strike Count Eight is denied.

CONCLUSION

Based on the foregoing, the defendant's motion to strike (# 109) Count One, Count Three, and Count Four of the amended complaint is granted.

The motion to strike is denied as to Count Two, Count Five, Count Six, Count Seven, and Count Eight.

It is so ordered.

All Citations

Not Reported in A.3d, 2015 WL 9871344

Footnotes

1

de Kwiatkowski is further instructive with respect to reasonable limitations on a broker's duty to give advice in a non-discretionary transaction. “A broker may be liable in tort ... for breach of a duty owed in respect of advice given. But if a broker had a broad duty to furnish a nondiscretionary customer with all advice and information relevant to an investment, then ... the customer could recover damages merely by proving nontransmission of some fact which, he could testify with the wisdom of hindsight, would have affected his judgment had he learned of it.” (Internal quotation marks omitted.) de Kwiatkowski v. Bear, Stearns & Co., Inc., supra, 306 F.3d 1308.

2

“Upon the question of sanity or insanity, or the degree of general mental capacity, in most of our courts the opinions of qualified witnesses, expert and non-expert, will be received in evidence; while upon the question of the existence of sufficient mental capacity to do certain legal acts, such as making a contract, a deed, or a will, the opinions of witnesses, however well qualified, in many, perhaps in most, of our courts, will not be received in evidence. The opinion of the witness in the first class of cases is said to be an inference of fact which is or may be helpful to the jury or other trier; while in the second class of cases the opinion is said to be or to involve an inference or conclusion of law, to be drawn by the court, or by the jury under the instructions of the court, and not by a mere witness. It is said that the distinction is between an opinion as to the mental condition of a party as a mere matter of fact and an opinion as to his legal capacity to do certain legal acts, which last is said to involve matter of law.” Hayes, Conservator v. Candee, 75 Conn. 131, 138, 52 A. 826, 828 (1902).