

DEPARTMENT 47 LAW AND MOTION RULINGS

Case Number: 19STCV14477 **Hearing Date:** July 14, 2020 **Dept:** 47

Adam Devone, et al. v. Morgan Stanley & Co., LLC, et al.

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MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

MOVING PARTY: Defendants Morgan Stanley & Co., LLC and John R. Privitelli

RESPONDING PARTY(S): Plaintiffs Adam Devone, Mario Frank Voce, and Julia Voce, as co-trustees; and Adam Voce, as personal representative to Maurice Voce

STATEMENT OF MATERIAL FACTS AND/OR PROCEEDINGS:

This is an action for breach of fiduciary duty and financial elder abuse.

Defendants Morgan Stanley & Co., LLC and John R. Privitelli move for summary judgment or, in the alternative, summary adjudication.

TENTATIVE RULING:

Defendants Morgan Stanley & Co., LLC and John R. Privitelli's motion for summary judgment is DENIED.

Defendants' alternative motion for summary adjudication is DENIED.

DISCUSSION:

Motion For Summary Judgment

As discussed in connection with Defendants' motion for summary adjudication below, Defendants have not demonstrated that they are entitled to prevail as to each cause of action asserted against them. Accordingly, the motion for summary judgment is DENIED.

Motion for Summary Adjudication

Plaintiffs' Meritorious Procedural Objections

Contrary to Defendants' characterization of Plaintiffs as "clamoring" about procedural deficiencies that do not exist, they do actually exist. As Plaintiffs point out, when seeking summary adjudication, "the specific cause of action . . . must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (CRC 3.1350(b).) The separate statement must "**separately**" identify "[e]ach cause of action . . . that is the subject of the motion." (CRC 3.1350(d)(1)(A), bold emphasis added.) The separate statement must also "**separately**" identify "[e]ach supporting material fact claimed to be without dispute with respect to **the** cause of action" – that is, *each* cause of action – "that is the subject of the motion." (CRC 3.1350(d)(1)(B), bold emphasis added.) That means that if the same facts relate to multiple causes of action, they must be **separately** set forth in the separate statement as to **each** cause of action as to which the moving party seeks summary adjudication. Rule 3.1350 would be meaningless under Defendants' interpretation.

Though Defendants did not clearly state the issues upon which they seek summary adjudication in the way modeled in CRC 3.1350(h), from what the Court can gather from their notice of motion, the third of defendants' "grounds" for summary adjudication also violates CCP § 437c(f)(1), which provides that a motion for summary adjudication "shall be granted only if it **completely disposes of a cause of action**, an affirmative defense, a claim for damages, or an issue of duty." (CCP § 437c(f)(1), bold emphasis added.) The third of Defendants' "grounds" for summary adjudication states that Plaintiffs have alleged "'separate and distinct wrongful acts' which are combined in both of Plaintiffs' causes of action for breach of fiduciary duty and financial elder abuse that are themselves time-barred, lack any basis to support tolling, and are otherwise inadequate as a matter of law." (Defendants' Notice of Motion, at p. 2.) The authority that Defendants refer to, however, allowing the Court to summarily adjudicate a subset of claims when they "involve[e] separate and distinct wrongful acts which are combined in the same cause of action" (*Ibid.*) predates the revision of CCP § 437c(f) – though Defendants misleadingly imply that their quote comes directly from the operative version of CCP § 437c(f) – and, importantly, it also predates the enactment of CCP § 437c(t), which describes the specific procedure that a party must follow to seek summary adjudication of a "legal issue . . . that does not completely dispose of a cause of action." (CCP § 437c(t).) Given Defendants' misunderstanding of the *current* statutory provisions governing summary adjudication, it is not surprising to find that they did not follow the procedure in CCP § 437c(t) to seek summary adjudication of less than a complete cause of action. Therefore, the Court will not consider the third of the "grounds" stated in Defendants' motion.

Plaintiffs also correctly note that Defendants argue issue preclusion as a basis for their motion without including it in their notice of motion. Issue preclusion is one of Defendants' affirmative defenses. (Defendants' Answer to Plaintiffs' FAC, at p. 1.) If Defendants wanted to seek summary adjudication of one of their affirmative defenses, they needed to actually include it in the notice of motion. An affirmative defense cannot simply be lumped into the notice with the phrase "otherwise inadequate as a matter of law." (Notice of Motion, at p. 2.) That phrase refers to Plaintiffs' causes of action specifically when it is used in the Notice of Motion, not any affirmative defense. The notice must specify the "specific cause of action, **affirmative defense**, claims for damages, or issues of duty" sought to be adjudicated. (CRC 3.1350(b), bold emphasis added.) Defendants have not done so here, and therefore their arguments regarding issue preclusion cannot be considered.

Although Defendants' alternative motion for summary adjudication is therefore replete with procedural improprieties, Defendants could still potentially be entitled to summary judgment if they have shown that there is no genuine issue of material fact as to either cause of action against them. Therefore, the Court will discuss the "grounds" they identify as to each cause of action ("grounds" one and two).

Defendants' Request for Judicial Notice

Defendants request that the Court take judicial notice of (1) the January 29, 2019 FINRA arbitration award in *Mario Frank Voce, Julia Voce, et al. v. Morgan Stanley & Co., LLC*, Case No. 14-01954; (2) this Court's September 25, 2019 order in Case No. 19STCP02078 confirming the arbitration award; (3) the death certificate of Maurice J. Voce; and (4) a FINRA Broker Check report for Plaintiff Adam Devone (CRD No. 42186) maintained by the Central Registration Depository.

Request No. 2 is GRANTED per Evidence Code § 452(d) (court records). Request Nos. 1, 3 and 4 are GRANTED per Evidence Code § 452(h) (records not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy).

Plaintiffs' Request for Judicial Notice

Plaintiffs request judicial notice of (1) FINRA Code of Arbitration Procedure Rules 12206 and 12504; and (2) this Court's ruling on the demurrer in this matter.

Request No. 1 is GRANTED. (*Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1097 [noting that the Court had taken judicial notice of "several FINRA rules and related materials"].)

Request No. 2 is GRANTED per Evidence Code § 452(d) (court records).

Plaintiffs' Evidentiary Objections

Pursuant to CCP § 437c(q), the Court rules only upon objections to evidence that the Court deems material to the disposition of this motion.

Declaration of John R. Privitelli

No. 1: OVERRULED. Other than the statement "Maurice never had any discretionary brokerage accounts at Morgan Stanley that I am aware of," which at most establishes Privitelli's lack of knowledge of any discretionary brokerage accounts, the rest of the statement does not lack foundation and is not inadmissible opinion or conclusory. Nor is it irrelevant.

Analysis

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

When deciding whether to grant summary judgment or adjudication, the Court must consider all of the evidence set forth in the papers, except evidence to which the Court has sustained an objection, as well as all reasonable inferences that may be drawn from that evidence, in the light most favorable to the party opposing summary judgment. (*Ibid.*)

Issue No. 1: "The first cause of action for breach of fiduciary duty is time-barred, lacks any basis to support tolling, and is otherwise inadequate as a matter of law."

Defendants seek summary adjudication as to the first cause of action on the ground that it is time-barred without any basis to support tolling. Defendants argue that the three-year statute of limitations for a claim for breach of fiduciary duty based on fraud governs. (*Fuller v. First Franklin Fin. Corp.* (2013) 216 Cal.App.4th 955, 963.)

Plaintiffs allege that their claims began to accrue in August 31, 2012, “when the fiduciary relationship ended.” (1AC ¶ 44.) They allege that the claims were then tolled from July 15, 2014, when they filed their FINRA Statement of Claim, until January 29, 2019, the date of the FINRA ruling. (*Ibid.*) The 1AC also contains numerous allegations of Defendants’ wrongdoing through 2012. (*E.g.*, ¶¶ 21-28, 45-49, 64, 84-87.)

Even assuming that Defendants have met their initial burden, Plaintiffs have shown that there are genuine issues of material fact as to whether the delayed discovery rule applies here. Plaintiffs dispute that the “latest transactions Plaintiffs allege are at issue occurred in 1998,” pointing to evidence regarding transactions through 2012 at a minimum. (Plaintiffs’ Separate Statement No. 59.) In addition, as noted above, Plaintiffs specifically allege wrongdoing through 2012. (*E.g.*, 1AC ¶¶ 21-28, 45-49, 64, 84-87.)

Under the FINRA rules, when a “claimant files a statement of claim in arbitration, any time limits for filing of the claim in court will be tolled while FINRA retains jurisdiction of the claim.” FINRA Rule 12206(c). As they did in their 1AC, Plaintiffs argue here that their complaint is timely because the accrual of their cause of action was tolled from June 15, 2014, when the FINRA arbitration was filed, to January 29, 2019, when the arbitration was dismissed. (Plaintiffs’ Oppo., at p. 11.) There is at least a question of material fact as to whether the alleged breaches continued through 2012. (Plaintiffs’ Separate Statement Nos. 59, 64, 65.)

Accordingly, the motion for summary adjudication is DENIED as to Issue No. 1.

Issue No. 2: “The second cause of action for financial elder abuse is time-barred, lacks any basis to support tolling, and is otherwise inadequate as a matter of law.”

Although Defendants’ description of this “ground” for summary adjudication indicates that it is based on the second cause of action being untimely, Defendants do not support that argument in their motion. Rather, they appear to argue that it is “otherwise inadequate as a matter of law” because the elder abuse statute does not protect trusts and that the statute that applies to their claims had a narrower definition of financial abuse that required the pleading of bad faith or fraudulent intent.

As to whether Plaintiffs can maintain this action on behalf of the Voce Trusts, Plaintiffs specifically allege that “Maurice’s personal representative, Adam, asserts **Maurice’s rights** under the California’s [sic] elder abuse statute.” (1AC ¶ 103.) It is not the case, as Defendants claim with no support, that “it is the trusts, not Maurice, that were harmed.” (Motion, at p. 18.)

As to which version of the statute applies, Defendants have not cited any published authority, let alone binding authority, supporting their argument that the statute that applied at the time of the alleged violation is the one that applies now. But even if they had shown that this is the case, Plaintiffs have shown that there is a genuine issue of material fact as to intent to defraud. (*E.g.*, Plaintiffs’ Separate Statement Nos. 60, 61.)

Accordingly, summary adjudication is DENIED as to Issue No. 2.

Issue No. 3: “Plaintiffs have alleged ‘separate and distinct wrongful acts’ which are combined in both of Plaintiffs’ causes of action for breach of fiduciary duty and financial elder abuse that are themselves time-barred, lack any basis to support tolling, and are otherwise inadequate as a matter of law.”

As discussed above, summary adjudication is DENIED as to this issue. Summary adjudication must *completely* dispose of the cause of action to which it is directed. (CCP § 437c(f)(1).) This issue does not do so.

Had Defendants wanted to move for summary adjudication of a legal issue that “does not completely dispose of a cause of action,” there is a procedure for that. (CCP § 437c(t).) Defendants could have submitted a joint stipulation to have the issue or issues heard and sought permission to file the motion. (*Ibid.*) Defendants did not do so here.

Accordingly, Defendants' motion for summary adjudication is DENIED as to Issue 3.

Moving party to give notice, unless waived.

IT IS SO ORDERED.

Dated: July 14, 2020

Randolph M. Hammock
Judge of the Superior Court

Any party may submit on the tentative ruling by contacting the courtroom via email at Smcdept47@lacourt.org by no later than 4:00 p.m. the day before the hearing. All interested parties must be copied on the email. It should be noted that if you submit on a tentative ruling the court will still conduct a hearing if any party appears. By submitting on the tentative you have, in essence, waived your right to be present at the hearing, and you should be aware that the court may not adopt the tentative, and may issue an order which modifies the tentative ruling in whole or in part.
