

October 5, 2011

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

KRISTOFER THOMAS KASTNER,
individually, as Representative of the
Estate of Jessie I. Brooks and as
beneficiary of Jessie I. Brooks trust,

Plaintiff-Appellant,

v.

ROBERT I. GUENTHNER,
individually and as President, Morris,
Laing, Evans, Brock and Kennedy;
MORRIS, LAING, EVANS, BROCK
AND KENNEDY, CHARTERED, a
Professional Association,

Defendants-Appellees.

No. 11-3002
(D.C. No. 6:10-CV-01013-EFM-KMH)
(D. Kan.)

ORDER AND JUDGMENT*

Before **LUCERO, BALDOCK, and TYMKOVICH**, Circuit Judges.

Kristofer Thomas Kastner, pro se, appeals from the district court’s order granting defendants’ motion for judgment on the pleadings and its order denying

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Mr. Kastner's post-judgment motions for reconsideration. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

Mr. Kastner's grandmother, Jessie I. Brooks, executed a revocable trust on June 5, 1996. The trust was prepared by defendant Robert I. Guenthner, an attorney, in the course of his employment with defendant law firm Morris, Laing, Evans, Brock & Kennedy Chartered. The trust provided that distributions would be made to Ms. Brooks during her lifetime and thereafter to her daughter, Nola Mae Wills. The trust further provided that upon Ms. Wills's death, distributions would be made to her son, Mr. Kastner.

Ms. Brooks died in 2000. In January 2009, Mr. Kastner received a letter from the trustee, Intrust Bank, showing that the trust had lost significant money since Ms. Brooks's death. In January 2010, with Ms. Wills surviving as the trust beneficiary, Mr. Kastner filed this diversity action, claiming that the devaluation of the trust was due to provisions waiving the prudent investor standard and protecting Intrust from liability for negligence.¹ Mr. Kastner alleged that "[n]o reasonable lawyer would advise their client to invest their entire estate in a trust

¹ Mr. Kastner brought suit on behalf of himself as representative of his grandmother's estate and as beneficiary of the trust, but he also named as plaintiffs the Estate of Jessie I. Brooks and Jessie I. Brooks. However, only Mr. Kastner has taken this appeal. *See R.*, Vol. 4 at 5 (notice of appeal). Because Mr. Kastner is a pro se litigant, we view his pleadings liberally, but we do not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

with these types of provisions.” R., Vol. 1 at 15. Mr. Kastner further alleged that Ms. Brooks lacked capacity to understand the trust: she possessed no formal education, was eighty-six years old when she executed the trust, and “suffered from dementia and occlusion of blood flow to her brain.” *Id.* at 16. He raised six specific claims arising under Kansas law: negligent misrepresentation, fraud by silence, fraud, breach of fiduciary duty, legal malpractice, and breach of contract. Mr. Kastner calculated that from 2000 through 2008, the trust lost over \$40,000 due to defendants’ allegedly poor advice and the inclusion of the waiver provisions. He contended that the trust should be worth \$1.4 million rather than approximately \$847,000 had its assets earned an 8% rate of return during that time period. He further alleged that the discovery of his cause of action was delayed by, among other things, the conduct of the defendants and Intrust.

Defendants filed an answer and a motion to dismiss on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that Mr. Kastner’s claims were time-barred by applicable Kansas statutes. The district court granted the motion, holding that Kansas’s ten-year statute of repose, Kan. Stat. Ann. § 60-513(b), barred all claims.² Section 60-513(b) applies to fraud and tort claims and, in relevant part, provides that such claims

² It is undisputed that the limitations law of the forum state, Kansas, applies in this case.

shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, *but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.*

Kan. Stat. Ann. § 60-513(b) (emphasis added).³

The district court first noted that a statute of repose “usually runs from an act of a defendant” and “bars the cause of action after the 10-year period even though the action may not have yet accrued.” R., Vol. 1 at 222 (quoting *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 967, 968 (Kan. 1992)). The court then determined that the statute of repose ran from no later than June 5, 1996, the date the trust was executed. Because Mr. Kastner did not file his action until 2010, the court determined that all of his claims, which were premised on the same alleged conduct, were barred by § 60-513(b). Accordingly, the court rejected Mr. Kastner’s arguments that he had no cause of action prior to his grandmother’s death in 2000 and that he was unaware of defendants’ alleged fraud until he received the letter from Intrust in January 2009 regarding the trust’s performance.

The court also rejected Mr. Kastner’s argument that the statute of repose was inapplicable to his fraud claims. The court observed that although the complaint contained general allegations, Mr. Kastner had not alleged sufficient

³ Section 60-513(a)(3) also provides that “a cause of action [on the ground of fraud] shall not be deemed to have accrued until the fraud is discovered.”

particular facts showing that defendants committed fraud or fraudulent concealment against his grandmother or him, as required under *Hemphill v. Shore*, 239 P.3d 885, 892 (Kan. App. 2010). For these same reasons, the court concluded that the statute of repose should not be tolled based on defendants' allegedly fraudulent conduct. Finally, the court determined that Mr. Kastner's breach of contract claim was based on an alleged breach of a legal duty and consequently was a tort claim under *Canaan v. Bartee*, 72 P.3d 911, 921 (Kan. 2003), and *Hunt v. KMG Main Hurdman*, 839 P.2d 45, 47 (Kan. App. 1992). Therefore, the court concluded, the contract claim also was barred by the statute of repose.

After the district court entered judgment, Mr. Kastner filed an amended complaint. The district court struck the amended complaint because Mr. Kastner failed to seek the court's leave to file it. Mr. Kastner also filed post-judgment motions, supporting briefs, and a multitude of attachments, most of which related to the trust's performance compared with other investment vehicles. The court denied the post-judgment motions because none of them met the standards for relief from judgment, explaining that Mr. Kastner did not address the grounds for dismissal (the statute of repose) but instead argued that he should be entitled to amend his complaint. The court further concluded that the proposed amended complaint it had struck also did not address the statute of repose. This appeal followed.

II. DISCUSSION

We review de novo a dismissal on the pleadings under Fed. R. Civ. P. 12(c). *Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999). “[W]e accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the non-moving party.” *Id.* Our review is governed by the same standards as a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Atl. Richfield Co. v. Farm Credit Bank*, 226 F.3d 1138, 1160 (10th Cir. 2000). Generally, to withstand dismissal under Rule 12(b)(6), a complaint must include “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 555. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘shown’—‘that the pleader is entitled to relief.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (brackets omitted) (quoting Fed. R. Civ. P. 8(a)(2)). As to any arguments regarding the district court’s denial of Mr. Kastner’s post-judgment motions, we review for an abuse of discretion. *See KT & G Corp. v. Att’y General*, 535 F.3d 1114, 1133 (10th Cir. 2008).

Because the resolution of Mr. Kastner’s appeal largely turns on whether the Kansas statute of repose should be tolled based on defendants’ alleged fraudulent conduct, the heightened pleading requirement for fraud claims set out

in Fed. R. Civ. P. 9(b) guides our analysis. *See Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335, 336-37 (10th Cir. 1994). Rule 9(b) requires a plaintiff to “state with particularity the circumstances constituting fraud or mistake.”

The prime thrust of Mr. Kastner’s tolling argument is his allegation that given proper legal advice, no one would execute a trust containing provisions waiving the prudent investor standard and exonerating the trustee from liability for negligence. Based on this premise, he concludes that defendants must have acted fraudulently in advising his grandmother about the trust. This argument is not only conclusory but pure speculation, both in its premise and conclusion. Mr. Kastner pleaded no facts showing a plausible claim based on fraud⁴ or fraud by silence.⁵

⁴ The elements of a fraud claim “include an untrue statement of fact, known to be untrue by the party making it, made with the intent to deceive or with reckless disregard for the truth, upon which another justifiably relies and acts to his or her detriment.” *Alires v. McGehee*, 85 P.3d 1191, 1195 (Kan. 2004).

⁵ To establish fraud by silence, the plaintiff must show by clear and convincing evidence the following elements: (1) that defendant had knowledge of material facts which plaintiff did not have and which plaintiff could not have discovered by the exercise of reasonable diligence; (2) that defendant was under an obligation to communicate the material facts to the plaintiff; (3) that defendant intentionally failed to communicate to plaintiff the material facts; (4) that plaintiff justifiably relied on defendant to communicate the material facts to plaintiff; and (5) that plaintiff sustained damages as a result of defendant’s failure to communicate the material facts to plaintiff.

Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman, 978 P.2d 922, 932

Mr. Kastner also maintains that under *Jennings v. Jennings*, 507 P.2d 241, 251 (Kan. 1973), the statute of repose is inapplicable to fraud claims. The district court questioned the continued viability of *Jennings*, but we need not resolve that issue; even assuming *Jennings* stands for the broad proposition Mr. Kastner advances, he has not, as discussed above, pleaded fraud with sufficient particularity so as to fall within its compass.

As for his other arguments, those claiming there are disputed issues of material fact are irrelevant; that standard applies to summary judgment motions under Federal Rule of Civil Procedure 56(a), but this case was dismissed on the pleadings, in which the court assumes all well-pleaded allegations are true. Mr. Kastner's argument that the statute of limitations on his breach of contract claim should be tolled fares no better. As the district court concluded, his contract claim sounds in tort because it is based on the breach of a duty defendants owed independent of any contract. Therefore, it too is barred by the statute of repose. Nor has Mr. Kastner demonstrated that discovery would be likely to lead to facts showing that defendants acted fraudulently toward his grandmother or him. He simply speculates that defendants provided incomplete responses to limited discovery requests authorized by the district court.

⁵(...continued)
(Kan. 1999).

Mr. Kastner further argues that his case should not have been dismissed because the trust would soon be broken or reformed in a separate action he brought against Intrust. However, the district court in that case has since determined that Mr. Kastner lacks standing to seek reformation of the trust. *See Kastner v. Intrust Bank*, No. 10-1012-EFM, 2011 WL 2149432, at *3 (D. Kan. June 1, 2011) (unpublished). Thus, this argument provides no basis for reversing the district court's judgment. Finally, it is for the Kansas legislature, not this court, to consider Mr. Kastner's contention that a statute of repose is bad public policy with regard to attorney malpractice and breach of fiduciary duty.

The judgment of the district court is AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge