IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STEVEN MENZIES

Plaintiff,

v.

SEYFARTH SHAW LLP, GRAHAM TAYLOR, NORTHERN TRUST CORPORATION, CHRISTIANA BANK & TRUST COMPANY

No. 1:21-cv-00249-SB

Defendants.

Daniel Charles Herr, LAW OFFICE OF DANIEL C. HERR LLC, Wilmington, Delaware; Jeffrey B. Charkow, HARRIS WINICK HARRIS LLP, Chicago, Illinois.

Counsel for Plaintiff.

Renee Mosley Delcollo, Richard Philip Rollo, Travis Steven Hunter, RICHARDS, LAYTON & FINGER, PA, Wilmington, Delaware; H. Nicholas Berberian, Kyle D. Rettberg, NEAL GERBER EISENBERG, Chicago, Illinois; Jennifer Marie Kinkus, William Edward Gamgort, YOUNG, CONAWAY, STARGATT & TAYLOR LLP, Wilmington, Delaware; Peter F. O'Neill, SHOOK HARDY & BACON, Chicago, Illinois.

Counsel for Defendants.

MEMORANDUM OPINION

November 10, 2021

BIBAS, *Circuit Judge*, sitting by designation.

Fraud charges are serious. So anyone alleging fraud must explain specifically how each defendant defrauded him. Steven Menzies has not. He describes a tax-fraud scheme but does not explain how Christiana Bank defrauded him. So all of his fraud claims against the Bank fail.

But he also says Christiana Bank violated its fiduciary duties as his trustee. That claim need not be as specific. Because it is plausible, I will not dismiss it.

I. BACKGROUND

Menzies cofounded an insurance firm and later sold some of his stock. Second Am. Compl., D.I. 165 ¶ 1. But he wanted to avoid taxes on the sale, so he hired Northern Trust, a tax-planning firm. Northern Trust proposed a complex tax shelter developed by Euram Bank. *Id.* ¶¶ 16–17, 43. Northern Trust and Euram assured Menzies that the shelter was legal, as did a tax lawyer at Seyfarth, Shaw LLP. *Id.* ¶¶ 59, 100.

The strategy involved trusts. *Id.* ¶ 43. Menzies needed a trustee who would authorize the trust to take part in prearranged transactions. Northern Trust nominated Christiana Bank, which had experience with similar schemes. *Id.* ¶¶ 50–51.

Menzies agreed. But he never communicated with Christiana directly. D.I. 267, at 8; D.I. 269, at 4. Instead, Euram Bank sent Christiana documents to sign, plus a list of transactions to perform. Second Am. Compl. ¶¶ 65, 69, 78, 82. Christiana complied. *Id.* ¶ 75. Yet it failed to report a large stock transaction when it filed tax returns for the trust. *Id.* ¶ 136. And it did not tell Menzies when it consulted a lawyer about those tax returns. *Id.* ¶ 94.

The IRS eventually discovered the shelter and audited Menzies's tax returns. *Id.* ¶ 137. It found that the shelter was illegal. *Id.* ¶¶ 139, 143. Facing stiff penalties, Menzies settled with the IRS for $10 million. *Id.* ¶ 144.

Aggrieved, Menzies sued Seyfarth, Northern Trust, and Christiana. He says they conspired to induce him into a tax-shelter scheme that they knew was unlawful. *Id.* ¶ 1.

Now Christiana moves to dismiss Menzies's claims against it: fraudulent misrepresentation, civil conspiracy, joint enterprise liability, negligent misrepresentation, unjust enrichment, and breach of fiduciary duty. Christiana says these claims are time-barred, released, and inadequately pleaded. In support of its motion, Christiana attaches several exhibits, which Menzies urges us to ignore.

On this motion to dismiss, I take all facts in the complaint as true and can consider only the attached trust certificates. Menzies's tort and unjust-enrichment claims were inadequately pleaded, but Menzies's claim for breach of fiduciary duties survives.

II. I CAN CONSIDER ONLY THE ATTACHED TRUSTS

Christiana asks me to consider several exhibits:

- Three trust certificates, D.I. 267, Ex. A–C;
- Three agreements releasing Christiana from certain claims, *id.*, Ex. D–F; and
- IRS letters that might relate to a statute-of-limitations defense, *id.*, Ex. G–I.

At this stage, I can consider these exhibits only if they are "integral to or explicitly relied upon" in Menzies's complaint. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (internal quotation marks omitted). Only the trust certificates are.

1. IRS letters. Menzies never mentions the IRS letters. Nor are they integral to his claims. True, the letters might support Christiana's *defense*. But Christiana's defense is not Menzies's claim. So I cannot consider the letters now. *See Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014).

2. The release agreements. The same goes for the agreements releasing Christiana from liability. Those releases are not the basis for Menzies's claims but merely "relevant to a potential affirmative defense." *Mesta v. RBS Citizens N.A.*, 2014 WL 7272270, at *4 (W.D. Pa. Dec. 18, 2014). Thus, I may not consider them either.

3. The trust certificates. But I can consider the attached trust certificates. Menzies says that Christiana breached its fiduciary duties as trustee. Fiduciary duties are often defined by the trust itself. *See, e.g.*, Del. Code Ann. tit. 12, § 3806(c); *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1112–13 (Del. Ch. 2008). So the certificates are integral to Menzies's breach-of-fiduciary-duty claim.

III. NEBRASKA LAW APPLIES TO MOST OF MENZIES'S CLAIMS

Next, the parties dispute which state's law applies to Menzies's claims: Delaware's or Nebraska's. Though the parties agreed to Delaware law in their trusts, Nebraska law governs Menzies's tort and unjust-enrichment claims.

The trusts say that Delaware law governs them. D.I. 267, Ex. A, ¶ 14; Ex. B, ¶ 5(b); Ex. C, ¶ 15. So Delaware law defines the scope of Christiana's fiduciary duties and

controls that claim. *See* Delaware Statutory Trust Act, Del Code Ann. tit. 12, §§ 3801–29.

But the trusts never say which law applies to Menzies's related tort and unjust-enrichment claims. *See Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 123–24 (Del. Ch. 2003). So I apply Delaware's conflict-of-law rules. *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941).

And those rules say that Nebraska law should apply. Delaware courts generally apply the law of the state in which a plaintiff received and relied on a misrepresentation. *Pa. Emp. v. Zeneca, Inc.*, 710 F. Supp. 2d 458, 472 (D. Del. 2010); Restatement (Second) of Conflict of Laws § 148, cmt. j. Here, that is Nebraska, so I apply its law to the tort and unjust-enrichment claims.

IV. MENZIES HAS NOT ADEQUATELY PLED MOST CLAIMS

Christiana also says Menzies does not provide enough facts to state his claims. Ordinarily, a plaintiff need plead only enough facts to make his claim plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). But plaintiffs alleging fraud must "state [their claims] with particularity." Fed. R. Civ. P. 9(b). The parties disagree about which standard applies. So I must resolve that dispute first, then see whether Menzies has met that standard.

A. Menzies's tort and unjust-enrichment claims must satisfy Rule 9(b)

Rule 9(b) applies to claims that "sound[ ] in fraud." *Republic Bank & Tr. Co. v. Bear Stearns & Co.,* 683 F.3d 239, 247–48 (6th Cir. 2012); *see also In re Fruehauf Trailer Corp.*, 250 B.R. 168, 197–98 & n.26–32 (D. Del. 2000). To decide which of Menzies's claims do, I look to state law.

Fraudulent misrepresentation and negligent misrepresentation are inherently fraud-based under Nebraska law. *See Zawaideh v. Neb. Dep't of Health & Hum. Servs. Regul. & Licensure*, 825 N.W.2d 204, 212–13 (Neb. 2013) (fraudulent misrepresentation); *Farr v. Designer Phosphate & Premix Int'l, Inc.*, 570 N.W.2d 320, 326 (Neb. 1997) (negligent misrepresentation). So Rule 9(b) applies to those claims.

Menzies's other claims are not inherently fraud-based. *See Eicher v. Mid Am. Fin. Inv. Corp.*, 748 N.W.2d 1, 15 (Neb. 2008) (conspiracy); *Winslow v. Hammer*, 527 N.W.2d 631, 636 (Neb. 1995) (joint enterprise liability); *Kanne v. Visa U.S.A. Inc.*, 723 N.W.2d 293, 302 (Neb. 2006) (unjust enrichment); *Estate of Eller v. Bartron*, 31 A.3d 895, 897 (Del. 2011) (breach of fiduciary duty). But federal courts still apply Rule 9(b) to these claims if they are based on fraudulent activity. *See, e.g.*, *Lum v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir. 2004).

Menzies's conspiracy, joint-liability, and unjust-enrichment claims allege fraud. Like a classic fraud claim, all allege that the defendants gave Menzies "the false impression" that the tax shelters were valid and "convey[ed] false, misleading, or omitted facts" to induce his reliance. Second Am. Compl. ¶¶ 230, 232–33, 240, 265. But his fiduciary duty claim does not. That claim focuses on "the negligence and carelessness of Christiana," rather than some misrepresentation. *Id.* ¶ 260. So it is not subject to the Rule 9(b) pleading requirements. *See Evans v. First Mt. Vernon, ILA*, 786 F. Supp. 2d 347, 357 (D.D.C. 2011).

So I will consider whether Menzies sufficiently pleaded his fraud-based claims under Rule 9(b), then whether he pleaded breach of fiduciary duty under the traditional pleading standard.

B. Menzies's fraud-based claims do not satisfy Rule 9(b)

I must first decide whether Menzies has alleged fraud specifically enough. Claims subject to Rule 9(b) must provide "the 'who, what, when, where, and how' of the events at issue." *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 217 (3d Cir. 2002) (quoting *In re Burlington*, 114 F.3d at 1422)). And claims against multiple defendants must "separately plead the fraudulent acts of each defendant," not merely allege that defendants' broader scheme was fraudulent. *MBIA Ins. Corp. v. Royal Indem. Co.*, 221 F.R.D. 419, 421 (D. Del. 2004).

Menzies has not met this standard. He does not identify any misleading statements or actions by Christiana—or indeed, any direct interaction with Christiana. And he does not explain how Christiana would have known that the tax shelters were fraudulent. *Cf. Trednnick v. Bone*, 647 F. Supp. 2d 495, 501 (W.D. Pa. 2007). All he says is that Christiana administered trusts and entered into transactions that someone else designed to be fraudulent.

That is not enough. So I dismiss Menzies's fraudulent-misrepresentation, negligent-misrepresentation, conspiracy, joint-enterprise, and unjust-enrichment claims. And because this is Menzies's third complaint, I will not let him amend.

C. Menzies's fiduciary-duty claim survives

Next, I consider whether Menzies has plausibly alleged that Christiana breached its fiduciary duties as trustee. Menzies says Christiana improperly failed to explain

the risks of the tax shelter. Second Am. Compl. ¶ 259. Plus, it did not tell him that it had consulted a tax lawyer about its duty to report one of the transactions. *Id.* ¶¶ 94, 259.

To plausibly show that Christiana breached its fiduciary duties by not providing him with tax advice or disclosing lawyer consultations, Menzies must show that Christiana had those duties in the first place. *Estate of Eller*, 31 A.3d at 897. Trustees like Christiana are subject to traditional fiduciary duties, unless otherwise specified by trust itself. Del. Code Ann. tit. 12, § 3806(*l*). So to determine Christiana's duties, I look to the trust and, if silent, to the common law.

Menzies claims that Christiana should have explained the risks of tax shelters. But the trusts do not impose a general duty on Christiana to provide tax advice. Neither does the common law. *See, e.g.*, *Jeffery Rapaport M.D., P.A. v. Robin S. Weingast & Assoc's, Inc.*, 859 F. Supp. 2d 706, 718 (D.N.J. 2012). Christiana would have that duty only if it presented itself as a tax expert. *Id.* at 718–19.

But the complaint never suggests that Christiana discussed taxes with Menzies, let alone that it claimed expertise. On the contrary, Christiana's only involvement in the tax shelter was at the direction of true tax experts. Thus, Christiana had no duty to discuss the risks of this shelter with Menzies.

Menzies also says Christiana should have told him that it had consulted with a lawyer about whether certain transactions were reportable. Again, the trust does not say whether Christiana had a duty to disclose this information. But the common law does. Generally, trustees must disclose the content of any legal advice related to trust

administration, at least when trust beneficiaries ask for that advice and trust funds paid for it. *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976). It follows that a trustee must disclose that it consulted a lawyer so that the beneficiaries can ask for more information. Second Am. Compl. ¶ 94 (alleging that trust paid for legal advice); *Christoff v. Unum Life Ins. Co. of Am.*, 2018 WL 1327112, at *2 (D. Minn. Mar. 15, 2018) (citing *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007)). So Menzies has plausibly pleaded a claim for breach of fiduciary duty.

V. MENZIES'S CLAIMS ARE NOT CLEARLY TIME-BARRED

Finally, Christiana says that Menzies's fiduciary duty claim is untimely. Because that claim is governed by Delaware law, the bar is straightforward. He must bring it within three years "even if [he was] ignorant of the cause of action." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004); Del. Code Ann. tit. 10, § 8106(a).

But there is an exception: if his injury was "inherently unknowable"—that is, there were no "observable or objective factors" suggesting something was awry—then the limitations period runs from when Menzies should have discovered the wrongful act. *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998); *Wal-Mart*, 860 A.2d at 319.

Here, the alleged breach of fiduciary duty occurred well over three years in advance. *See, e.g.*, Second Am. Compl. ¶¶ 94, 256. Thus, it is time-barred unless the inherently-unknowable-injury exception applies.

And it might. Determining when a person should have discovered a wrongful act is a fact-intensive inquiry. *See Isaacson, Stopler & Co. v. Artisan's Sav. Bank*, 330

A.2d 130, 133–34 (Del. 1974). But at this stage, I know only what Menzies says: that he began to suspect Christiana's breach only when he settled with the IRS, less than three years before filing this suit. Second Am. Compl. ¶¶ 94, 146. Taking this as true, Menzies's injury was inherently unknowable because information about the alleged breach "is within Christiana's exclusive control." Second Am. Compl. ¶ 94; *see Krahmer v. Christie's Inc.*, 903 A.2d 773, 782 (Del. Ch. 2006). So I will not dismiss this claim as time-barred. *See Wal-Mart*, 860 A.2d at 320–21.

* * * * *

Menzies has not pleaded enough facts to suggest that Christiana was part of a fraudulent conspiracy. But he has plausibly pleaded that Christiana violated its fiduciary duties to him. I thus let his fiduciary claim proceed but dismiss his other claims against Christiana with prejudice.