IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 05-15704
D.C. No. CV-03-03231-SI

HEIDE BETZ,	*
	*
Appellant	*
	*
vs.	*
	*
TRAINER WORTHAM & COMPANY, INC., DAVID P. COMO, FIRST REPUBLIC BANK, a Nevada Corporation, and **ROBERT VILE**	*
	*
Respondents	*
	*

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APPELLANT'S REPLY BRIEF

On Appeal from the United States District Court, Northern District of California, San Francisco Division
The Honorable Susan Illston, District Judge

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I. RESPONDENTS' "FACTS" FAIL TO COMPLY WITH THE RULES ON SUMMARY JUDGMENT.

Respondents' ("Appellees'") brief is built upon a false foundation of "facts," because Respondents ignore the most important rule of summary judgment law. Respondents present only *their* version of what happened, just as if Respondents were presenting a closing argument to a jury. But this case is now before a court, not a jury, and the court's function is to determine whether, under the conflicting evidence in the record, a reasonable jury *could* (not *should*) rule for Appellant.

A court considering a motion for summary judgment focuses on the evidence that supports the party *opposing* the motion for summary judgment— and all reasonable inferences therefrom. *Anderson v. Liberty Lobby*, 477 U.S. 317, 242, 255 (1986). This cardinal rule stems from the very purpose of the motion: to determine whether there is one or more triable issues of fact that should be decided by a jury — and not which side is more believable. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ruling on a motion for summary judgment." *Id*. at 255.

Respondents' Brief makes no mention of this rule (even though at page 17 Respondents purport to summarize the rules on summary judgment). Instead, Respondents rely on evidence that supports *their* version of the facts, ignore evidence supporting Betz, and draw inferences that support Respondents when the same evidence might support a different inference.

Respondents act as if certain evidence did not exist. Respondents' "Statement of Facts," for example, makes no mention of the fact that Betz knew nothing about the stock market and told this to Respondents (ER 706:3-6; 713:21-23). And Respondents fail to acknowledge that Castro *told* Betz to follow Trainer Wortham's advice because "They're the experts" (ER 681:3-10), and that Betz did so because "I didn't think I had a choice" (ER 706:25-27; 680:9; 326:8-9). Respondents make no mention of the facts that Robert Vile assured Betz that the decline in the value of her portfolio "was temporary," that Vile told Betz that "he knew exactly what he was doing to bring this back up to at least 2.2, if not more, in no time," and that Vile told Betz that "We're taking care of everything. Don't worry about it." ER 707:4-6; 681:18-22; 696:16-24. Nor do Respondents acknowledge that David Como "continually advised" Betz that "there was nothing wrong with the portfolio and that the value would be back up very soon." ER 707:13-14; 693-8-11. And Respondents include no mention of the fact that Carmen

Castro "always" told Betz that "Robert Vile and David Como knew what they were doing and that I should not worry about my portfolio." ER 709: 19-26; 700:4-11.

Respondents are free to ignore or deny this evidence when arguing to the jury, but before this Court this evidence must be treated as established fact, and cannot simply be swept under a rug.

In addition to ignoring facts unfavorable to them, Respondents also draw *inferences* favorable to them when the same evidence is susceptible to contrary inferences.

On page 5, for example, Respondents list several pieces of evidence relating to Betz's experience as an art dealer and real estate investor – implying that Betz was in fact a sophisticated securities investor – when a jury might reasonably reject this inference and instead find that the time she spent on these activities left her no time to gain expertise in the more specialized field of securities investments.

And at page 7, Respondents quote paragraph 4.5 of the *written* agreement Betz signed, stating that success was not guaranteed. From this, Respondents would have this Court infer that Betz knew of the risks and therefore was not defrauded. Indeed, Respondents stress this point at pages 15 and 36. But it is at least as reasonable to draw a *contrary* inference

favorable to *Betz*: assuming Betz had read the written agreement, this language induced her to assume that the subsequent decline in the value of her portfolio was *not so unusual as to suggest that Respondents had lied to her from the outset* (even though Respondents had breached their promise to her). Both inferences might be reasonable, but Respondents present only the one that tends to *support* summary judgment. This is not proper, under the law.

At page 36, Respondents claim that the purpose of the Securities Exchange Act is to protect the "innocent" investor, and not one "who loses his innocence and then waits to see how his investment turns out . . . ." And then, at pages 36-37, Respondents assert as established fact: Betz was *not* an "innocent" investor, because she "waited more than three years to file suit, waiting to see how her investments would fare following the stock market crash." Respondents provide no citation to the record to support this assertion — because there is *no* evidence in the record supporting it. Perhaps one might *infer* such deviousness, but one might equally infer that Betz is just what she claims she is: a naïve investor who trusted the experts Respondents told her to trust. The rules on summary judgment direct us to employ the latter inference, not the former. If this Court reverses the summary judgment, this case will go to trial, where Respondents will then

be free to ask the jury to infer that Betz was speculating at Respondents' expense. But that possible inference has no place in this appeal.

And finally, Respondents' Statement of Facts introduces almost every fact supporting Appellant's case with "Betz claims" or "Betz says" - a clever way of implying that Betz is lying. Credibility issues, of course, are for the jury, not the court.

Betz's Statement of Facts complies with the rules on summary judgment. Each stated fact is supported by a citation to evidence in the record on appeal, and Respondents make no contention that any of our stated facts is unsupported or that any inference we draw from those facts is unreasonable. Therefore, those facts — and not the "facts" asserted by Respondents — are the facts relevant to this appeal.

II. RESPONDENTS' POSITION DOES NOT COMPORT WITH "COMMON SENSE."

At pages 29-30, Respondents invoke "common sense." They contend that when an unsophisticated investor learns that the value of her portfolio is dropping, "common sense" says that she should realize that her financial advisors deliberated lied when they told her it would not drop.

We disagree. "Common sense" holds that when an established financial institution such as Trainer Wortham solicits the business of naïve, inexperienced investors and offers them — for a fee — the expert advice of experienced financial advisors and persuades those investors to rely on the expertise of these advisors in the arcane, complex field of securities markets, an investor who trusts such advice is behaving normally and rationally. When something goes wrong, "common sense" would indicate to such a novice that there was a mistake, perhaps negligence, but not deliberate fraud.

When a doctor promises but fails to cure an illness, a reasonable patient might blame fate or perhaps suspect negligence, but almost never suspect fraud or a conscious desire to harm the patient. When a lawyer promises but fails to win a case, a reasonable client would not suspect that the lawyer deliberately planned to lose the case. And when Castro suggested that Betz's account had been "mishandled," "common sense" would point

Betz towards negligence, but not deliberate fraud from the very beginning of their relationship. At a minimum, a reasonable jury could so find, and that is all that is needed to defeat summary judgment.

Respondents rely — over and over — on a trio of scattered cases to support their notion of "common sense." Two of the cited cases are district court opinions (one not even published) and two are from a different circuit: *Bull v. Chandler*, No. C-86-5710, 1992 WL 103686 (N.D. Cal. 3/12/92); *Addeo v. Braver*, 956 F.Supp. 443 (S.D.N.Y. 1997); and *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346 (2nd Cir. 1993).

Respondents assert at page 19 that "Those cases have consistently held that the statute of limitations begins to run for purposes of summary judgment when the plaintiff receives written materials that directly contradict a material part of the defendant investment advisor's alleged misrepresentations." But those cases cannot be reconciled with the quite different approach taken by this Court in *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434 (9th Cir. 1984), and *Davis v. Birr, Wilson & Co.*, 849 F.2d 1369-1370 (9th Cir. 1988), where this Court recognized the distinction between a sophisticated investor (*Davis*) and an unsophisticated investor (*Vucinich*). Respondents attempt to distinguish these cases on their particular facts, but that misses the point. In both cases,

this Court – unlike the courts that decided *Bull*, *Addeo*, and *Dodds* – recognized the real world fact that unsophisticated investors are not as able as sophisticated investors to decipher sophisticated prospectuses and other investment materials, or to infer fraud from declining stock values.

This Court's approach, we submit, is the preferable one. It conforms to the most important purpose of our securities laws: protecting unsophisticated people from the predations of clever con men who promise the sun and the moon. To bar Betz's claim on the ground that she *should have* inferred fraud would employ the statute of limitations to "assure the success of [Respondents'] fraud." *Carruth v. Fritch*, 36 Cal.2d 426 (1950).

Like most naïve investors, Betz did not read her account statements carefully, because she lacked the training and experience to do so intelligently. She understood only the "bottom line," and she did not even know whether she had invested in stocks or bonds. She reasonably believed that she did not need to, because "Mr. Como told me that he was completely in charge and knew what he was doing. ER 691:5-18.

If, as Respondents contend, written materials are sufficient to put naïve investors on notice of *fraud*, we can expect con men to routinely send voluminous technical written materials to their victims, secure in the knowledge that this will trigger the statute of limitations for fraud while

raising no substantial risk of actually triggering a lawsuit for fraud. This cannot be the law.

At pages 24-25, Respondents contend that Betz could have sued them for fraud in February of 2000, immediately after she received the first written monthly statement showing that the value of her portfolio had dropped below its original value. Respondents cite this Court's opinion in *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999), for the proposition that "strong circumstantial evidence" of fraud may suffice. But as this Court well knows, "strong" means *very* strong — a barrier so high that securities fraud complaints of 100+ pages detailing circumstantial evidence of alleged fraud have been rejected time and again by this Court and by district courts in this Circuit. The notion that a promise that the price would not drop, followed by a price drop, constitutes *fraud* defies the "common sense" that Respondents invoke.

III. THERE IS A TRIABLE ISSUE OF FACT REGARDING WHETHER THE STATUTE OF LIMITATIONS HAD RUN ON BETZ'S STATE LAW CLAIM FOR *BREACH OF FIDUCIARY DUTY*.

At page 38-39 of their brief, Respondents claim that the "gravamen" of Count II of the SAC is really negligence, not breach of fiduciary duty, because ¶14 of the SAC alleges (at ER 44) that Respondents failed to adhere to industry guidelines for retirement portfolios. But Respondents omit the allegations that *immediately follow* the portion of ¶14 that they quote:

> Defendant's *willful and intentional failure* to follow industry accepted guidelines for a person in plaintiff's position resulted in defendants allocating 100% of plaintiff's investments in equities inviolation of the aforesaid accepted guidelines for retirement for persons in plaintiff's position of those equities purchased by defendants for plaintiff's retirement account, defendants *willfully and intentionally failed* to purchase dividend paying, blue chip stocks and Dow rated stocks but purchased unsuitable high-risk stocks in the volatile technology and telecommunications industry, none of which were paying any dividends nor were Dow components." [ER 44-46; emphasis added.]

This, we submit, is no allegation of negligence, but of "willful and deliberate" misconduct. It supports a claim for breach of fiduciary duty or fraud, either of which is not barred by the statute of limitations.

IV. THERE IS A TRIABLE ISSUE OF FACT ON BETZ'S CLAIM FOR UNFAIR BUSINESS PRACTICES.

At page 47 of Respondents' Brief, they claim that *Bowen v. Ziasun Technologies, Inc.*, 116 Cal.App.4th 777 (2004), bars this claim. Not so.

Bowen held that California's unfair competition statute does not apply to lawsuits for fraudulent sale of securities. This is not what happened here. Betz makes no claim that Respondents sold securities to her. She contends only that Respondents lied to her about how they would handle the $2.2 million she entrusted to them, and later mishandled that money.

CONCLUSION

The District Court's grant of summary judgment should be reversed.

Respectfully submitted,

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By:_____
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Date: _____

STATEMENT OF COMPLIANCE WITH RULE 32(A)(7)

This brief is 2,181 words long, which is less than the word limit imposed by Rule 32(A)(7).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14.

_____
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