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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

BARBARA BARTINDALE et al., Plaintiffs and Appellants, v. PENSCO TRUST CO., INC., Defendant and Respondent.	A135392 & A136524 (San Francisco City & County Super. Ct. No. CGC-10-505549)

Defendant PENSCO Trust Co., Inc. (PENSCO) served as custodian for plaintiffs' self-directed individual retirement accounts (IRA's). As an IRA investment, each plaintiff elected to purchase a share in secured promissory notes originated by a business known as "Cedar Funding." Before releasing funds from a plaintiff's IRA in connection with these investments, PENSCO required Cedar Funding to submit a letter of instructions signed by the plaintiff, along with documents associated with the transaction.

Cedar Funding ultimately went bankrupt, and an investigation revealed it had generally failed to execute the assignments under which its investors were to receive their shares in the promissory notes. When plaintiffs examined the communications between Cedar Funding and PENSCO, they found Cedar Funding had regularly submitted unsigned versions of such documents to PENSCO in connection with their own investments. PENSCO had released the IRA funds to Cedar Funding without ever notifying plaintiffs of the submission of unsigned documents.

Plaintiffs sued PENSCO, contending its release of funds in response to the submission of unsigned documents constituted, among other claims, a breach of the agreement between PENSCO and its clients. The trial court granted summary judgment for PENSCO, concluding PENSCO was under no obligation under its agreement to detect the omission and notify plaintiffs. Concluding a trier of fact could find a breach of the agreement on the basis of the limited evidence submitted in connection with the summary judgment motion, we reverse.[1]

I. BACKGROUND

Twenty-one individual plaintiffs filed a complaint against PENSCO on November 22, 2010. The complaint alleged each plaintiff had retained PENSCO, which is in the business of "managing self directed Individual Retirement Accounts," to manage his or her IRA. As part of that management function, each plaintiff had instructed PENSCO to purchase on his or her behalf "interests in fractionalized deeds of trust brokered by David A. Nilsen, dba Cedar Funding and or Cedar Funding, Inc." (collectively Cedar Funding). PENSCO, it was alleged, failed properly to carry out the purchases, which were later ruled invalid during Cedar Funding's bankruptcy proceeding. The complaint alleged causes of action for breach of fiduciary duty, negligence, breach of contract, consumer fraud, and unfair competition. Plaintiffs sought compensatory and punitive damages, reimbursement of certain fees, statutory penalties, and attorney fees. A year later, PENSCO filed a motion for summary judgment, arguing it did not violate its limited contractual duties to plaintiffs in its dealings with Cedar Funding.

A. *The Parties' Agreements*

The evidence submitted by the parties in connection with the motion demonstrated each plaintiff executed a preprinted "IRA Application" (application) with PENSCO, establishing an IRA authorized to hold "[a]ll IRS eligible assets."[2] Under "DEPOSITOR'S REPRESENTATIONS," the application required the plaintiffs to

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[1] This decision is rendered in both case No. A135392 and case No. A136524, which were consolidated by order of October 30, 2012. The appeal in case No. A136524 is directed solely at the trial court's award of attorney fees and costs, which stands or falls with decision on the summary judgment motion.

[2] The plaintiffs signed different, evolving account documents at different times, but the material terms of their agreements with PENSCO were the same.

acknowledge "PENSCO'S duties to me are substantially limited . . . to non-discretionary, ministerial matters." A further series of disclaimers made clear PENSCO's intent to act solely in the role of an agent for the plaintiffs, rather than an advisor. Typical, both in their content and their overlapping nature, are the following "representations": "PENSCO will rely on my instructions or the instructions of my Designated Representative without making any inquiry concerning the investment"; "PENSCO renders no advice with respect to any investment and will act solely at my direction or that of my Designated Representative in purchasing assets for my account"; "PENSCO does not act as a fiduciary except in respect to its custodial duties and has no duty to evaluate any investment, investigate, evaluate or report to me any information regarding any investment opportunity or any investment that I have directed it to make or to inquire into its suitability"; and "PENSCO has no duty to report to me any information it may learn concerning any investment other than information provided by the Issuer for my benefit."

Pursuant to the terms of the application, the primary contract between the parties was an "Individual Retirement Account Custodial Agreement" (agreement). Under the heading "The Depositor's Responsibilities for Investment Decisions and Authorization," the most recent version of the agreement authorized the client to "direct PENSCO Trust to invest Custodial Account assets in any lawful investment acceptable to PENSCO Trust, in a format prescribed by PENSCO Trust," but it stated PENSCO "shall have no investment responsibility with respect to the investment of assets" and placed on the client the "SOLE right and responsibility" for directing the investment of funds. The client was also assigned sole responsibility for "determining the suitability, nature, prudence, value, viability, risk, safety, legality, tax consequences and merit of, and to perform any 'due diligence' or other investigation with respect to, any particular investment, strategy or transaction involving Custodial Account assets." PENSCO was assigned "the responsibility . . . only to acquire, hold and dispose of such investments as directed by the Depositor and/or the Depositor's Designated Representative . . . ."

Under another heading, "Limited Duties of PENSCO Trust," PENSCO assumed the duties, among others, to "purchase, sell, transfer, hypothecate, mortgage, encumber, take title to, record, and obtain title and other insurance for, real or personal property, anywhere situated, according to the instructions of . . . the Depositor or Depositor's Designated Representative," to pay insurance premiums and taxes associated with account assets, and to make periodic reports. Again, PENSCO disclaimed any duty to determine the wisdom and legal propriety of client investments, and it expressly disclaimed "ANY FIDUCIARY DUTY OR RESPONSIBILITY."

In addition to an annual maintenance fee, calculated according to the value of the account, PENSCO charged its clients for various specific activities and services, such as the "setup" of a secured or unsecured note, purchasing and selling real property, and safekeeping of documents. Among the many other provisions of the agreement were an attorney fees clause and a designation of New Hampshire law (in all but one version of the agreement) as the governing law.

B. *Operations of Cedar Funding*

Plaintiffs characterize the investments at issue here as "fractionalized interests in Notes and Deeds of Trust brokered by Cedar Funding." As explained in a report prepared by Cedar Funding's trustee in bankruptcy after the business's failure, Cedar Funding was a fictitious business name used by David Nilsen, a real estate broker. In 2003, Nilsen formed a corporation, Cedar Funding, Inc. (CFI), that "originated and serviced loans that were funded by third party investors who took fractionalized interests in CFI's notes and deeds of trust." (*In re Cedar Funding, Inc.* (2009) 408 B.R. 299, 304.) In other words, Cedar Funding arranged loans secured by deeds of trust to real property. It then sold to investors ownership interests in the promissory notes evidencing the loans, entitling the investors to receive the interest payments made on the notes. Rather than owning an entire promissory note, investors typically owned only a "fractionalized interest" in the note, with the fraction determined by the size of their investment.

Unfortunately, the trustee determined, by 2004 CFI "no longer executed or recorded the documents necessary to transfer fractional interests to its investors," leaving investors without enforceable documentation of their investment. (*In re Cedar Funding, Inc., supra*, 408 B.R. at p. 304.) In dealing with third party investors in the notes, "CFI generally transmitted to the investors copies of the original note and deed of trust, along with a Loan Servicing Agreement, a Lender/Purchaser Disclosure Statement, an unsigned Promissory Note Endorsement from CFI to the investor and an unsigned Assignment of Deed of Trust." (*Ibid.*) In this way, Cedar Funding was able to use the same note as the basis for multiple investments. The enterprise evolved into a classic Ponzi scheme, with funds from new investors used to pay obligations to existing investors. (*Id.* at pp. 305–308.) Nilsen was later indicted by a federal grand jury for his role in the scheme.

In the decision cited above, the bankruptcy court ruled that the typical Cedar Funding investor who did not receive executed documents transferring an interest in the underlying promissory note and deed of trust would not be granted an equitable lien in the real estate securing the promissory note. Such investors therefore became general, unsecured creditors of the Cedar Funding bankruptcy estate. (*In re Cedar Funding, Inc.*, *supra*, 408 B.R. at pp. 315–316.)

C. *Plaintiffs' Investments with Cedar Funding*

The summary judgment record reveals little about the manner in which plaintiffs' Cedar Funding investments came to be made. We know that in order to authorize the release of client funds to Cedar Funding, PENSCO required that it receive a completed form, entitled "Deed of Trust/Mortgage Direction Letter" (direction letter).[3] We assume the form of the direction letter was prepared by PENSCO, since it bore PENSCO's logo. The direction letter was in three parts. The top portion required information about the nature of the investment, including the name and account number of the PENSCO client making the investment, the dollar amount of the investment, the "Percentage of ownership," apparently referring to the percentage of ownership the client would have in the underlying note upon making the investment, the interest rate, date of maturity, and

[3] Over the course of the plaintiffs' dealings with PENSCO, five different versions of the direction letter were used. The description provided here is materially accurate for each of the five versions.

date of the underlying note, the name of the borrower on the note, and the borrower's monthly payment.

The second section of the direction letter contained PENSCO's requirements to authorize the transaction. The first line dictated to whom the "original note and deed of trust/mortgage, must be made payable," a combination of PENSCO, the name of the investor, and the investor's PENSCO account number.[4] Then were listed "Documents required by PENSCO," including a "Copy of note and deed of trust. (Originals if client is the sole beneficiary)."[5] Also required were copies of various documents relating to the underlying loan. Finally, this section required information about the loan servicer, which, for the letters in the record, was invariably Cedar Funding.

The final section was a series of printed "Client's Representations." These representations reiterated the type of warnings contained in the application and the agreement, essentially requiring the client to confirm his or her knowledge that PENSCO took no responsibility for the nature and wisdom of the investment. At the bottom, the client's signature was required.

The record includes all or most of the direction letters relating to the challenged investments made by plaintiffs with Cedar Funding. In each of the direction letters, the blanks are filled in by hand, rather than typewriter or computer. The record is silent on

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[4] This requirement assumes that the investor is acquiring an entire promissory note. Cedar Funding appears to have adapted it to the purchase of a partial interest by applying "payable designation" to the assignment creating a partial interest, rather than to the original note. There is a general and unexplained disconnect between the first and second sections of the direction letter. The first section anticipates the purchase of a fractionalized interest, while the literal requirements of the second section apply only to the purchase of an entire note.

[5] The direction to submit a "[c]opy of note and deed of trust" presumably referred to an executed copy of those documents. In order to act as custodian of an investment, PENSCO would have required documents reflecting the existence and nature of the investment—the final, necessarily executed version of the transaction documents. This presumption is reinforced by the parenthetical "(Originals if client is the sole beneficiary)," which demonstrates that, when only one beneficiary existed, PENSCO required submission not merely of a signed copy of the transaction documents, but of the copy bearing the parties' original signatures.

who completed the direction letters and how it was done, but given the nature of the information requested by the first section, it is likely the direction letters were completed by Cedar Funding. Each direction letter appears to have been accompanied by several documents: a "Promissory Note Endorsement," assigning to the investor a fractional interest in the particular promissory note described in the direction letter; an "Assignment of Deed of Trust," assigning to the investor a fractional beneficial interest in the deed of trust securing that promissory note; a copy of the promissory note; and a copy of the deed of trust.[6] Invariably, it appears, the promissory note endorsements and assignments of deed of trust sent to PENSCO by Cedar Funding were not signed, and therefore were presumptively unenforceable.

The PENSCO employee who received the direction letters and authorized the payments to Cedar Funding from plaintiffs' IRA's was Ignacio de Souza. At his deposition, de Souza testified that, with respect to the transactions at issue here, a completed direction letter would arrive at PENSCO by facsimile transmission. The transmissions always originated with Cedar Funding, rather than a client. Upon receiving the fax, de Souza would compare the amount of the investment requested with the available funds in the client's account to ensure the investment could be financed. He examined the direction letter to ensure it had been signed by the client, although he did not attempt to authenticate the client's signature. If the direction letter was in order, de Souza would issue a check to Cedar Funding from the client's account, after entering appropriate information into the computer records.

De Souza acknowledged he received other documents with the direction letter, including a copy of the underlying note and deed of trust, but he said they were "[not] important" to him, explaining, "These documents [were] normally supposed to go to the client, and the service center, and we normally get a copy." He did not "examine them at

[6] Although the promissory note endorsements and the assignments of deed of trust are critical documents in this action, the direction letter did not require Cedar Funding to submit a copy of them. There is no information in the record regarding when and why Cedar Funding began including those documents.

all." When shown a promissory note endorsement from one of the Cedar Funding direction letters, de Souza claimed not to know "what the document was for." He did not require that these documents be included in a transmission in order to authorize a payment to Cedar Funding, and he had never sought a signed copy of a promissory note endorsement or assignment of deed of trust from either Cedar Funding or plaintiffs.

The trial court granted PENSCO's motion for summary judgment, holding, "Nothing in the Custodial Agreement obligated defendant to perfect the ownership interests of plaintiffs' investments or confirm that the transfer documents were signed and recorded. Nor was defendant required under the Custodial Agreement to notify plaintiffs that defendant had not received endorsed copies of notes or deeds." The court later denied plaintiffs' motion for a new trial and awarded attorney fees to PENSCO.

II. DISCUSSION

Plaintiffs contend PENSCO's release of their IRA funds upon receiving unsigned promissory note endorsements and assignments of deeds of trust constituted a breach of its contractual obligations.

" 'This case comes to us on review of a summary judgment. Defendants are entitled to summary judgment only if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Citation.] To determine whether triable issues of fact do exist, we independently review the record that was before the trial court when it ruled on defendants' motion. [Citations.] In so doing, we view the evidence in the light most favorable to plaintiffs as the losing parties, resolving evidentiary doubts and ambiguities in their favor.' " (*Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 606.)

The sole issue on this appeal is the scope of PENSCO's duty to plaintiffs under the agreement. " 'Because the proper interpretation of a contract is ultimately a question of law for this court, we review the trial court's interpretation of the contract *de novo*.' "

(*Lawyers Title Ins. Corp. v. Groff* (2002) 148 N.H. 333, 336 [808 A.2d 44, 48].)[7] "Where, however, there are disputed questions of fact as to the existence and terms of a contract, they should be resolved by the jury." (*Dillman v. N.H. College* (2003) 150 N.H. 431, 434 [838 A.2d 1274, 1276].)

" 'When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole.' [Citation.] 'Absent ambiguity, however, the parties' intent will be determined from the plain meaning of the language used in the contract.' " (*Lawyers Title Ins. Corp. v. Groff, supra,* 808 A.2d at p. 48.) " 'The language of a contract is ambiguous if the parties to the contract could reasonably disagree as to the meaning of that language.' [Citation.] If the agreement's language is ambiguous, it must be determined, under an objective standard, what the parties, as reasonable people, mutually understood the ambiguous language to mean." (*Crowley v. Town of Loudon* (2011) 162 N.H. 768, 771 [35 A.3d 597, 601].)

Outside the generalities of the agreement and the narrow circumstances relating to the Cedar Funding investments, the record is, so far as we can tell, silent as to the typical services PENSCO performed for its clients. Repeatedly in the agreement, however, PENSCO characterizes itself as the "custodian" of plaintiffs' self-directed IRA's, and the agreement is titled, "IRA Custodial Agreement." By the dictionary definition, a "custodian" is "one that guards and protects or maintains; *esp.* : one entrusted with guarding and keeping property or records . . . ." (Merriam-Webster's Collegiate Dict. (10th ed. 2000) p. 285, col. 2.) At a minimum, PENSCO appears to have agreed to maintain the IRA's and to safeguard the funds and other assets in those accounts, as well as to keep records regarding those assets.

[7] Given the choice of law provision in all but one version of the agreement, enforcement of which is "strongly favor[ed]" in California (*Harris v. Bingham McCutchen LLP* (2013) 214 Cal.App.4th 1399, 1404), we apply New Hampshire substantive law. Neither party, however, contends there is a material difference between New Hampshire and California law as they apply to these circumstances, and the parties have freely cited the law of both states.

The agreement, however, anticipates that PENSCO's duties would go beyond those of a custodian, as defined above. In addition to merely maintaining the accounts, PENSCO undertook to acquire assets for plaintiffs to hold in the IRA's. As noted above, the portion of the agreement that characterized PENSCO's duties authorized it to "purchase, sell, transfer, hypothecate, mortgage, encumber, take title to, record, and obtain title and other insurance for, real or personal property, anywhere situated, according to the instructions of . . . the Depositor or Depositor's Designated Representative." Reflecting this authorization, the fee schedule in the agreement contained potential charges to PENSCO clients for "Unsecured Note Setup," "Secured Note (i.e. Mortgage) Setup," "Purchase/Sale/Re-registration of Real Property," and "Foreign Real Estate Purchase," presumably performed by PENSCO.

Having agreed to undertake these various functions at its clients' direction, PENSCO had a contractual duty to exercise reasonable care in their execution. New Hampshire law recognizes that parties who undertake to perform a service under a contract have "a general duty to use due care in the performance of their work." (*Morvay v. Hanover Ins. Cos.* (1986) 127 N.H. 723, 725 [506 A.2d 333, 334]; see also *Wood v. Greaves* (2005) 152 N.H. 228, 232 [876 A.2d 241, 244] [recognizing a contractual cause of action for failure to use due care in home construction]; *Robinson v. Colebrook Guar. Sav. Bank* (1969) 109 N.H. 382, 384–385 [254 A.2d 837, 839] [" 'The duty to use due care in rendering a service arises not from a right to receive the service, but from the relation between the parties which the service makes.' [Citation.] Thus, a relation created by contract may impose a duty to exercise care."].)[8] In a back-handed way, the application recognizes the existence of some type of duty, stating, "PENSCO does not act

[8] A contract cause of action for failure to exercise due care in the performance of a contractual duty must be distinguished from a tort cause of action for "negligent performance of a contract," a cause of action New Hampshire courts have consistently rejected. (See *Wong v. Ekberg* (2002) 148 N.H. 369, 375 [807 A.2d 1266, 1272] [distinguishing these causes of action].)

as a fiduciary *except in respect to its custodial duties*." (Italics added.) The same phrase was repeated in four of the five versions of the direction letter.[9]

Because evidence in the record with respect to the manner in which these transactions were initiated is scanty, it is not possible to define precisely PENSCO's role in handling the investments at issue. We have no information, for example, about the manner in which PENSCO was made aware of plaintiffs' intent to purchase fractional interests from Cedar Funding, the communications, if any, between and among Cedar Funding, PENSCO, and plaintiffs about PENSCO's handling of the investments, or the timing and nature of information given to plaintiffs about their investments by Cedar Funding. All of these might define more precisely the exact nature of PENSCO's involvement in the transactions. At a minimum, however, the evidence in the record demonstrates PENSCO was responsible for performing the final act in the acquisition of the investments: it approved and implemented the release of funds from the IRA's to compensate the "seller" of the investments, Cedar Funding. There is no evidence in the record plaintiffs played any role in the actual release of funds, beyond conveying the instructions contained in the direction letters through their respective signatures. The decision to pay Cedar Funding appears to have been, in the end, PENSCO's. In deciding to release the funds to Cedar Funding in response to the direction letters, PENSCO was required to exercise reasonable care.

On the record before us, a trier of fact could conclude PENSCO breached its duty of reasonable care in releasing funds in response to the faxed direction letters and their attendant documents. The purpose of each direction letter was to instruct PENSCO with respect to the acquisition for the plaintiff's IRA of a particular secured fractional interest

[9] This is somewhat contradicted by article IX, paragraph 3(d) of the agreement, which states: "NOTHING IN THIS AGREEMENT IS INTENDED TO OR SHALL IMPOSE OR CONFER, BY IMPLICATION OR OTHERWISE, ANY FIDUCIARY DUTY OR RESPONSIBILITY ON PENSCO TRUST." Because the remainder of paragraph 3(d) discusses the absence of a duty to act in the role of investment advisor, we construe the quoted sentence to be limited to the absence of a fiduciary duty in that respect, consistent with other provisions of the application.

in a particular secured promissory note, both of which were precisely specified in the direction letter. Four of the five versions of the direction letter expressly "authorize[d] [PENSCO] to purchase for my account the percentage interest in the note secured by a deed of trust/mortgage, as described above."[10] In order for such a purchase to take place, it was necessary for the IRA owner to obtain an executed assignment of that fractional interest and the deed of trust. In the absence of an executed copy of those documents, no transfer of an interest in the promissory note or its accompanying security had occurred, and nothing had been acquired by the IRA owner.

There is no indication in the record that plaintiffs were aware of the nature of the documents sent by Cedar Funding to PENSCO, much less that they had approved them as adequate. The documents submitted to PENSCO came directly from Cedar Funding, and although plaintiffs signed the direction letters, there is no indication in the record the plaintiffs were shown the documentation submitted to PENSCO to secure the release of funds. On that basis, it was PENSCO's role as custodian of account funds to use reasonable care in ensuring that appropriate documentation was submitted before releasing them to Cedar Funding. In these circumstances, for PENSCO to authorize a transfer of funds—to pay for the fractional interest—without obtaining an executed copy of the documents required to effect an acquisition of the fractional interest could be found by a trier of fact to constitute a breach of its duty of reasonable care in acting as custodian of its clients' accounts. The trial court erred in granting summary judgment to PENSCO on this record.

PENSCO argues it had no duty to advise plaintiffs it had received unexecuted assignments, citing the extensive and repetitive disclaimers in the application, agreement, and direction letter. PENSCO leans heavily on the broad language of these disclaimers, which state PENSCO has no duty, for example, to "report to me *any* information" about or to make any inquiry into the investments. (Italics added.) The language of those

[10] In its respondent's brief, PENSCO claims the direction letters are "simply an instruction to send client funds to a third party." This language directly contradicts that characterization.

disclaimers, however, must be read in its context, and the context of each relates solely to PENSCO's lack of duty to advise its clients with respect to the propriety of their investment. It is undisputed PENSCO had no duty to advise plaintiffs with respect to the wisdom, suitability, or legality of their investments, or otherwise to assist plaintiffs in making their investment decisions. Without more, however, the absence of executed contractual documents does not raise an issue of the wisdom or suitability of the investments. It is an issue of the very *existence* of the investments. As noted above, for a custodian of funds to release them without evidence of an actual investment could be found a failure to exercise reasonable care.

PENSCO also argues that to construe its duty in this manner would "lead to absurdity by requiring PENSCO to effectively serve as [plaintiffs'] lawyer." It hardly requires a lawyer to recognize that an unsigned contractual document does not convey an enforceable legal interest. In any event, PENSCO contractually bound itself to "purchase" interests for plaintiffs, even to the extent of charging them for the service. Purchasing an investment in a nontangible asset presupposes the receipt of enforceable legal documentation of the investment. To the extent PENSCO was required to serve as plaintiffs' lawyer to this degree, it had agreed to do so.

In finding no breach of duty, the trial court relied primarily on *Brown v. California Pension Administrators & Consultants, Inc.* (1996) 45 Cal.App.4th 333 (*Brown*). The defendants in *Brown* included an IRA custodian like PENSCO, operating under contractual documents materially identical to those found here. The plaintiffs in *Brown* instructed the defendant custodian to invest their IRA funds in unsecured promissory notes issued by one Lewis. (*Id.* at p. 338.) In 1988, Lewis defaulted on notes held by two of the custodian's clients, and he later declared bankruptcy. The complaint alleged the custodian breached its duty to the plaintiffs by failing to inform them of Lewis's default in 1988, which, they argued, would have prevented them from continuing to invest with him. (*Id.* at pp. 338–339.) The court affirmed summary judgment to the defendants, concluding the parties' agreement "unambiguously limited [defendants'] contractual and common law duties to appellants, absolving them of any duty to investigate, select or monitor appellants' IRA investments. . . . The documents repeatedly advised that appellants were to make their own investment choices, and that respondents would carry out direct written investment instructions and account for appellants' funds in their possession, but undertook no responsibility for the soundness of the investment choice or the performance of the investment." (*Id.* at p. 343.)

For reasons the discussion above should have made clear, we find *Brown* distinguishable. The plaintiffs in *Brown* contended the defendants were under a duty to reveal to them information in the defendants' possession about the advisability of their investments. The *Brown* court held the IRA custodian was under no duty to reveal that type of information. We agree with respect to PENSCO. The breach of duty alleged by plaintiffs, however, is qualitatively different, relating as it does to the acquisition of the investments, rather than their advisability.

PENSCO also discusses *Lawyers Title Ins. Corp. v. Groff, supra,* 808 A.2d 44, but we find that case unhelpful, since it deals primarily with issues of liability for the conduct of a third party that have no application here. (*Id.* at pp. 47–49.)

III. DISPOSITION

The judgment of the trial court, including its order awarding attorney fees and costs to PENSCO, is reversed, and the matter is remanded for further proceedings.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.