

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,

Justice

TRIAL/IAS, PART 13
NASSAU COUNTY

**WEN MANAGEMENT CORP., 590-560
ASSOCIATES, ALLERTON ASSOCIATES, ARLEN
CONTRACTING CO. OF DOVER IL, INC., ARLEN
CONTRACTING COMPANY OF CENTRAL ISLIP
INC., ARLEN CONTRACTING CORP., ARLEN
SENIOR CONTRACTING COMPANY OF
CENTRAL ISLIP LLC, BENJAMIN DEVELOPMENT
CO., INC., BENROAL REALTY ASSOCIATES LP,
COURTHOUSE CORPORATE CENTER LLC,
CUNNINGHAM ASSOCIATES LP, DOVER
KNOLLS DEVELOPMENT CO LI, LLC,
GREENWICH GARDENS ASSOCIATES, JACKSON
TERRACE ASSOCIATES OF LI, LLC KNOLLS
SALE CORP., MARINE TERRACE ASSOCIATES
LLC, METROPOLITAN RENOVATIONS, INC.,
MITCHEL FIELD SENIOR CITIZENS
REDEVELOPMENT COMPANY LP, THE ALLEN
CATHEDRAL SENIOR RESIDENCE L.P., and WEN
EXTENDED CARE FACILITIES MANAGEMENT
CORP.,**

Plaintiffs,

-against-

**TREIBER GROUP LLC and ARTHUR J.
GALLAGHER & CO.,**

Defendants.

Decision and Order

MOTION SUBMITTED:

January 21, 2015

MOTION SEQUENCE: 01

INDEX NO.:601106-14

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Support	2
Affirmation in Opposition	3
Memorandum of Law in Opposition	4
Reply Affirmation	5
Memorandum of Law in Reply	6

Motion by defendants Treiber Group, LLC and Arthur J. Gallagher & Co. (collectively Treiber), for an order, *inter alia*, pursuant to CPLR 3211(a)(1) and (a)(5) to dismiss the complaint, is denied.

BACKGROUND

In this action, plaintiffs, twenty-two related companies involved in real estate development and management, seek to recover damages arising from the alleged negligence and breach of contract of their insurance broker, defendant Treiber, in recommending a risky insurance product to plaintiffs and failing to properly advise them, on an ongoing basis, as to their insurance needs, including workers' compensation insurance coverage.

According to the complaint which was filed in March 2014, in or about August 2002, based upon defendant Treiber's recommendation, plaintiffs shifted their workers' compensation insurance to a group self-insurance trust named the Real Estate Management Trust of New York (Trust). The individual plaintiffs, with the exception of plaintiff Arlen Contracting Company of Central Islip, Inc., a subsidiary of The Benjamin Companies which are located at 377 Oak Street, Garden City, New York, executed separate Joinder and Indemnification Agreements pursuant to which members were allowed to operate as a self-insured group with respect to payments made under New York's Workers' Compensation Law.

In its effort to convince them to join the Trust, plaintiffs contend that defendant Treiber allegedly represented, *inter alia*, that:

The Trust structure was adequate for plaintiffs' needs and

would serve to reduce potential costs, liability and risk;

the Trust administrators were competent and had the requisite expertise to administer the Trust on behalf of the members;

the Trust was financially sound and membership in the Trust would provide coverage equal or superior to workers' compensation insurance policies, but with much lower premiums.

Plaintiffs allege that, in addition to the aforementioned misrepresentations made by defendant Treiber about the supposed benefits of the Trust, defendant Treiber failed to adequately advise them of the risks inherent in insuring their workers' compensation risk through a self-insured trust including the fact that:

- 1) retroactive adjustments or assessments could substantially increase plaintiffs' liability for increased premiums;
- 2) plaintiffs' individual liability could substantially increase if other members of the Trust failed to maintain their financial obligations to the Trust;
- 3) plaintiffs would be jointly and severally liable for any losses that the Trust incurred while members of the Trust.

Plaintiffs allege that in the course of its periodic reviews of plaintiffs' insurance coverage strategies, including membership in the Trust, defendant Treiber failed to advise them that there were problems with the administration of the Trust. Although plaintiffs performed all of their obligations, in or about July 2008, the New York State Workers' Compensation Board (Board) determined that the Trust was in a deficit position and took over administration of the Trust. In or about December 2011, plaintiffs paid \$48,988.23 to reimburse the Board for certain compensation claims that the Board had paid on plaintiffs' behalf.

On or about October 2013, plaintiffs entered into a settlement agreement with the Board pursuant to which plaintiffs paid \$224,025 in full settlement of its obligations as a Trust member.

Defendant Treiber seeks to dismiss the complaint on statute of limitations grounds

arguing that plaintiffs' negligence cause of action, accrued as early as July 2008, when the Board determined that the Trust was in a significant deficit position and plaintiffs became jointly and severally liable for the deficits; and plaintiffs' breach of contract claim accrued on or before August 27, 2002 when plaintiffs joined the Trust, based on representations made by defendant Treiber in or about 2000. Treiber seeks dismissal of "the first cause of action * * * for professional malpractice"—which, is not denominated by a heading, on the basis that no cause of action lies for broker malpractice (CPLR 3211[a][7]). In addition, Treiber asserts that the complaint should be dismissed pursuant to CPLR 3211(a)(1) based on the terms of the Trust Agreement executed by the plaintiffs in which they, *inter alia*, acknowledged their joint and several liability for trust fund expenses and obligations.

ANALYSIS

Treiber seeks dismissal of "the first cause of action * * * for professional malpractice" pursuant to CPLR 3211(a)(7). It is axiomatic that no cause of action for professional malpractice may be advanced against insurance brokers in New York (*see Chase Sci. Research v NIA Group*, 96 NY2d 20 [2001]; *see also Health Acquisition Corp. v Program Risk Mgmt., Inc.*, [2d Dept 2013]). Although the first cause of action in the complaint is undenominated by a heading, it contains a reference within it to "malpractice" and otherwise closely mirrors the first cause of action in an action filed by the same attorneys, entitled *Rockaway Beach Boulevard Construction Co., LLC v Treiber Group LLC*, Ind. No. 601105/2014. That action involves virtually identical allegations against Treiber Group LLC and Arthur J. Gallagher & Co. which are set forth in a near identical complaint, that is itself the subject of a pending and virtually identical motion (decided herewith). The court notes that the first cause of action therein is denominated "malpractice".

Accordingly, to the extent that the first cause of action seeks recovery on a malpractice theory, it is dismissed.¹

¹The plaintiffs have not challenged or opposed the branch of the defendants' motion seeking dismissal of the first cause of action; nor have the plaintiffs sought to clarify, amend, articulate or supplement the first cause of action or to define it as something other than malpractice. Neither have the defendants, in their motion, addressed the sufficiency of other legal theories which are or may be asserted in this cause of action or in the balance of the complaint.

However, the court rejects Treiber's argument that the complaint is time-barred, at least in part. Where, as here, a party seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, the movant bears the initial burden of proving, *prima facie*, that plaintiffs' time to sue expired prior to commencement of the action (*Livingston v En-Consultants, Inc.*, 115 AD3d 650, 651 [2d Dept 2014]; *Gravel v Cicola*, 297 AD2d 620 [2d Dept 2002]).

It is true that plaintiffs' breach of contract claims, to the extent that they may assert a breach of contract occurring more than six years before commencement of the action, are time-barred (*see* CPLR 213[2]; *Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399 [1993] [breach of contract cause of action accrued at time of breach]), but the balance of any such claims are timely.

Regarding the negligence claim, the parties agree that a three-year limitations period applies (CPLR 214[4]; *United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408 [1st Dept 2014]; *Bonded Waterproofing Servs., Inc. v Anderson-Bernard Agency, Inc.*, 86 AD3d 527 [2d Dept 2011]). Because the elements of a cause of action for negligence include allegations of injury suffered by the plaintiffs (*eg Bonded Waterproofing Servs., Inc. v Anderson-Bernard Agency, Inc.*, *supra*), the cause of action accrued when the plaintiffs sustained injury – here, when plaintiffs paid monies owing to Treiber's alleged misconduct (*see generally State of New York Workers' Compensation Board v A & T Healthcare LLC*, 85 AD3d 1436 [3d Dept 2011] ["Considering the continuing an open-ended nature of benefits and the complexity of this niche insurance area, the precise liabilities were not necessarily known each year."]).²

Given the relevant dates of payment (that is, actual injury suffered by the plaintiffs), in 2011 and 2013, the cause of action for negligence is timely.

The branch of Treiber's motion seeking dismissal pursuant to CPLR 3211(a)(1) is also without merit, as the allegedly wrongful conduct on the part of plaintiffs would not, on the facts

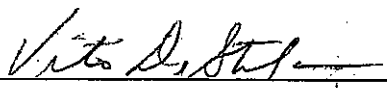
²The court rejects Treiber's arguments as to the date of accrual and notes that no arguments or facts have been presented concerning assessments, if any were made, against trust fund members and the dates on which such assessments were levied, which arguably could alter accrual dates.

presented, absolve them of their own misconduct (*American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730 [2012]; *Biro v Roth*, 121 AD3d 733, 734-735 [2d Dept 2014]).

Accordingly, it is ordered that defendants' motion: pursuant to CPLR 3211(a)(7) is granted to the extent that the first cause of action states a claim for malpractice and it is dismissed to that extent; pursuant to CPLR 3211(a)(5) is granted to the extent that the third cause of action advances any breach of contract claims that accrued more than six years prior to the commencement of the action and such claims are dismissed; and is denied in all other respects.

This constitutes the decision and order of the court.

Dated: April 2, 2015



Hon. Vito M. DeStefano, J.S.C.

ENTERED

APR 06 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE