

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,  
Justice

TRIAL/IAS, PART 13  
NASSAU COUNTY

ROCKAWAY BEACH BOULEVARD  
CONSTRUCTION CO., LLC, ARVENE BY THE  
SEA CONSTRUCTION CO., LLC, ARVENE  
ROCKAWAY FREEWAY LLC, BENJAMIN  
BEECHWOOD MANAGEMENT LLC, and  
BENJAMIN BEECHWOOD, LLC,

Decision and Order

Plaintiffs,

MOTION SUBMITTED:

January 21, 2015

MOTION SEQUENCE: 01

INDEX NO.:601105/14

-against-

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

Defendants.

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, five 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 filed in March, 2014, in or about July 2002, based upon defendant Treiber's recommendation, plaintiffs shifted their workers' compensation insurance to a group self-insurance trust named the Elite Contractors Trust of New York (Trust). The individual plaintiffs, 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 2010, the New York State Workers' Compensation Board (Board) determined that the Trust was in a deficit position and took over administration of the Trust.

On or about November 2013, plaintiffs paid \$178,028.87 pursuant to a settlement agreement with the Board to satisfy 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 April 2010, 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" 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]). Accordingly, to the extent that the first cause of action seeks recovery on a malpractice theory, it is dismissed.<sup>1</sup>

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<sup>1</sup>The 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

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 [1<sup>st</sup> 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."])<sup>2</sup>

Given the relevant date of payment (that is, actual injury suffered by the plaintiffs), in 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 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]).

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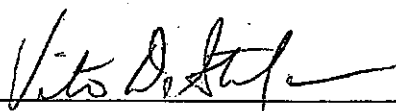
defendants, in their motion, addressed the sufficiency of other legal theories which are or may be asserted in this cause of action or in the balance of the complaint.

<sup>2</sup>The 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.

Accordingly, it is ordered that defendant's 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