STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

INTER-COMMUNITY MEMORIAL HOSPITAL OF NEWFANE, INCORPORATED and INTEGRATED CARE SYSTEMS, LLC d/b/a NEWFANE REHABILITATION & HEALTH CARE CENTER

Plaintiffs

vs

MEMORANDUM DECISION

THE HAMILTON WHARTON GROUP, INC., WALTER B. TAYLOR, as Managing Director of THE NEW YORK HEALTH CARE FACILITIES WORKERS' COMPENSATION TRUST and Individually, CATHY MADDEN, LINDA VILLANO, PHYLLIS ETTINGER, PATRICIA HUBER, CAROL THOMAS, ROSA BARKSDALE, SUSAN OLIVET, SAM HARTE, DANIEL MUSHKIN, TIMOTHY FERGUSON, JANE DOE, JOHN DOE, as Trustees of the New York Health Care Facilities Workers' Compensation Trust, MATTHEWS, BARTLETT & DEDECKER, INC., n/k/a M&T INSURANCE AGENCY, INC., M&T INSURANCE AGENCY, INC., MANUFACTURERS AND TRADERS TRUST COMPANY, M&T BANK CORPORATION, M. CHRISTOPHER O'DONNELL, as agent of Matthews, Bartlett & Dedecker, Inc., n/k/a M&T Insurance Agency, Inc. and Individually,

Index No. 133991

Defendants.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

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CURRAN, J.

All of the defendants other than Matthews, Bartlett & Dedecker, Inc., n/k/a M&T Insurance Agency, Inc., Manufacturers & Traders Trust Company, M&T Bank Corporation and M. Christopher O'Donnell (hereinafter referred to as the "M&T Bank defendants") have moved to dismiss pursuant to CPLR § 3211(a)(1), (5) and (7) and/or for summary judgment pursuant to CPLR § 3212. Plaintiffs have cross-moved pursuant to CPLR § 2101 and 3025(b) to amend the caption of this action and to approve service of the Amended Verified Complaint on certain defendants.

These motions were initially returnable on July 23, 2009, at which time the Court requested that the parties provide additional briefing on certain issues. A copy of the transcript describing the issues raised by the Court is attached hereto as Appendix A. Further briefing was submitted and the motions were heard on September 24, 2009, at which time decision was reserved.

FACTUAL BACKGROUND

Plaintiffs operate health care facilities in Niagara County, New York. Plaintiffs are required under law to maintain workers' compensation insurance for their employees or participate in a self-insurance plan. Effective October 1, 1998, plaintiff Inter-Community Memorial Hospital of Newfane, Inc. ("ICH") became a member of the New York State Health Care Facilities Workers' Compensation Trust (hereinafter the "Trust"), a group self-insurance

trust ("GSIT") formed in 1997 pursuant to Workers' Compensation Law ("WCL") § 50 former [3-a]).[1] Effective December 13, 1998, plaintiff Integrated Care Systems, LLC d/b/a Newfane Rehabilitation and Health Care Center (hereinafter "Newfane Nursing Home" or "NNH") became a member of the Trust (Haar Aff., ¶'s 1-2, 6 & 8).

Defendant, The Hamilton Wharton Group, Inc. ("HWG"), was the Trust's Program Administrator. Defendant, Walter B. Taylor ("Taylor"), is an officer of HWG and served as the Managing Director of the Trust (Taylor Aff., ¶'s 3 & 9). All of the other defendants, except the M&T Bank defendants, have been sued as officers and/or trustees of the Trust (Amended Complaint, ¶'s 24-34).

Under former subsection (3-a)(2), "the group shall assume the liability of all the employers within the group and pay all compensation for which the said employers are liable"(WCL § 50 [former (3-a)(2)]). The members obligate themselves to pay contributions and assessments consistent with appropriate classifications and rates to the Trust which are held in a cash reserve and distributed to pay proper workers' compensation claims and awards (Haar Aff., Ex. A, p. 2).

There is no dispute in this record that plaintiffs fulfilled all of their duties and obligations as members of the Trust, including payment of their "estimated annual contributions" (Haar Aff., ¶ 13). Plaintiffs submitted approximately 145 claims to the Trust (Haar Aff., ¶ 12).

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[1] WCL § 50 (3-a) was amended effective January 1, 2009, and it is therefore the prior version of subdivision 3-a that applies to the facts at issue here.

In 2001, plaintiffs elected to withdraw from the Trust due to their "misgivings over the lack of information" they were provided about Trust operations and "on the basis of the information" they were in fact able to obtain (Haar Aff., ¶ 20). ICH withdrew from the Trust effective September 15, 2001, and NNH withdrew effective November 15, 2001 (Haar Aff., ¶ 20). Plaintiffs still had open claims pending with the Trust at the time of the withdrawal and, as recently as January of 2008, plaintiffs had at least fifteen (15) open claims pending that had been submitted to the Trust during the term of plaintiffs' membership therein (Haar Aff., ¶'s 20 & 33).

Plaintiffs' indemnity agreements permitted them to withdraw from participation in the Trust (Haar Aff., Ex. A, Art. III § 4). In such event, the WCL now provides that each member remains responsible, jointly and severally, for all liabilities of the group "occurring during its respective period of membership" (WCL § 50 [3-a][3]; *cf.* WCL § 50 [former (3-a)(3)] ["An employer participating in group self-insurance shall not be relieved from the liability for compensation . . .except by the payment thereof by the group self-insurer or by himself"]). The documents governing member participation in the Trust embody this obligation as well (Haar Aff., Exs. A & C, Art. III, § 4; Lilling Aff., Ex. E, Art. VII, § 7.1; Lilling Aff., Ex. G, Art. III, § 7). The record indicates plaintiffs were cognizant of the implications of this obligation (Haar Aff., ¶ 20) ("[t]here was the possibility of additional assessments if the Trust was not properly run going forward.").

The regulations promulgated pursuant to WCL § 50 (3-a) provide that a group self-insurance trust whose assets do not exceed its liabilities is deemed to be "under-funded" (12 NYCRR Part 317.6 [b]). A group self-insurance trust the WCB determines is "under-

funded" may be required to levy an assessment upon group members in order to make up the funding deficiency (12 NYCRR Part 317.9 [b] [7]). The Trust documents also reflect this obligation (Haar Aff., Exs. A & C, Art. III, § 4).

By letters dated June 30, 2005, more than three (3) years after plaintiffs had withdrawn from their participation in the Trust, plaintiffs were advised by the Trust that the WCB had requested that the Trust "increase its current level of funding" (Haar Aff., Exs. L & M). The letters from the Trust further advised that "[a]ll active and terminated members of the Trust (from its inception in 1997 through 2003) are being assessed for their pro-rata share of the total deficit during the period of their membership in the Trust" (Haar Aff., Exs. L & M). The WCB authorized the Trust to initially collect only 50% of the necessary funding increase (Haar Aff., Exs. L & M). This amount could be paid interest-free during the first year, with interest at the prime rate to be assessed on the remaining balance after that time. Plaintiffs' respective 50% shares were $78,597.30 for ICH and $84,973.74 for NNH (Haar Aff., Exs. L & M).

In April of 2006, the WCB concluded that the Trust's financial stability could not be sustained and elected to dissolve the Trust effective July 31, 2006, pursuant to 12 NYCRR Part 317.9 (c). The WCB also assumed the administration of and responsibilities for final distribution of the Trust's assets and liabilities as provided by 12 NYCRR Part 317.20. Members of the Trust were advised at that time of this action and the WCB reiterated that all members remained jointly and severally liable for all obligations incurred by the Trust (Zdarsky Aff., Ex. E, ¶'s 167-172).

By letters dated March 31, 2008, the WCB advised plaintiffs and the other members of the Trust that they were being billed additional amounts representing their "pro rata

deficit associated with your period of participation in the Trust" (Haar Aff., Exs. N & O). The new invoices totaled (inclusive of the 2005 assessments) $275,843.00 for ICH and $306,487.00 for NNH (Haar Aff., ¶ 29 & Exs. N & O). The billing package received by plaintiffs included information about the WCB's methodology in calculating the "pro rata deficit." This information revealed that the amount billed to Trust members included "administrative expenses of $260,000" incurred by the WCB in calculating the amounts owed (Haar Aff., ¶'s 30 & 31). The billing package also offered plaintiffs and the other Trust members optional payment plans (including provisions for interest) as specified in the proposed repayment contract (Haar Aff., Exs. N & O). Members of the Trust were advised by the WCB that, if they did not complete the contracts and return them on a timely basis with an appropriate payment, then their "pro rata deficits" would be referred for collection, including statutory interest and collection fees owed under State Finance Law § 18 (Zdarsky Aff., Ex. E, ¶ 185).

Plaintiffs commenced this action on June 27, 2008, "to protect [their] rights with respect to potential liability resulting from [their] participation in the Trust" (Haar Aff., ¶ 34). In November of 2008, the WCB commenced suit against plaintiffs and other Trust members who had failed to execute the payment contracts and remit payment (Zdarsky Aff., Ex. E, ¶ 186).

On the 2005 assessments, as of March 2008, ICH had paid $67,681.06 and NNH had paid $68,451.02 (Haar Aff., Exs. N & O). The record does not reflect whether plaintiffs have made any of the payments sought by the letters sent in 2008. The Amended Complaint in this action seeks in every cause of action the total amount of all assessments billed to the

plaintiffs ($582,330.00), plus punitive damages under the second, third, fifth, sixth, eighth and ninth causes of action.

THE AMENDED COMPLAINT

The Amended Complaint contains nine (9) causes of action. The first cause of action is against the M&T Bank defendants for negligence. As indicated, the M&T Bank defendants have not moved at the present time and the first cause of action is not the subject of this decision. The second and eighth causes of action are for negligence against all of the other defendants. The third and ninth causes of action are for gross negligence against all of the other defendants. The fourth and seventh causes of action are for breach of contract against all of the other defendants. The fifth and sixth causes of action are for breach of fiduciary duty against all of the other defendants.

THE PARTIES' CONTENTIONS

Defendants' primary argument is that the statute of limitations has expired for all of the causes of action alleged in the Complaint and the Amended Complaint. Defendants urge that the statute of limitations began to accrue no later than the time plaintiffs withdrew from participation in the Trust and that, under any theory, all of the statutes of limitations pertinent to the alleged causes of action have expired. Defendants also argue that there are various bases for concluding that the Complaint and Amended Complaint fail to state causes of action against any of the moving defendants. Defendants further point to provisions in the Trust documents to assert that documentary evidence precludes some of plaintiffs' claims. The individual defendants who served as officers and/or trustees of the Trust also assert that, for some of them, they have no liability because they withdrew as officers and/or trustees before the plaintiffs

became members of the Trust while others argue that they have no liability to the plaintiffs because they became officers and/or trustees of the Trust after the plaintiffs withdrew their membership from the Trust. Still, other individual defendants who served as officers and/or trustees of the Trust assert that they are entitled to immunity under the Not-For-Profit Corporation Law while two of the individual defendants who served as officers and/or trustees (Edmunds and Rosenberg) assert that they have been improperly named under CPLR 1024.

Plaintiffs counter these arguments primarily claiming that their causes of action could not have accrued until the harm had been fully inflicted upon them by virtue of the assessments imposed in 2005 and 2008. Thus, they argue, all of the causes of action alleged in the Complaint and the Amended Complaint are timely because those assessments were made within three (3) years of the commencement of this litigation. Plaintiffs further urge the Court that no discovery has been taken and therefore it is premature to determine whether dismissal is appropriate.

ANALYSIS

A. Negligence/Gross Negligence

The second, third, eighth and ninth causes of action alleging negligence and gross negligence are founded on the central allegation that the defendants owed a duty to plaintiffs to exercise reasonable care and skill in performance of their duties (Amended Complaint, ¶'s 160, 166, 199 & 205). The record reflects that the relationship between plaintiffs and defendants is founded on the Trust documents and the agreements between HWG/Taylor and the Trust. In fact, the Amended Complaint is replete with references to defendants' failure to perform their duties under those Trust documents and agreements.

Accordingly, the duties plaintiffs are alleging were breached are rooted in the agreements entered into between the defendants and the Trust.

By alleging that the defendants negligently performed their duties and performed their duties in a grossly negligent manner, the Amended Complaint alleges only that the contractual duties assumed by the defendants were negligently performed. This is nothing more than an allegation that the agreements were negligently performed. A cause of action for negligent performance of a contract does not exist under New York law (*Megaris Furs, Inc. v Gimble Bros., Inc.*, 172 AD2d 209, 211 [1st Dept 1991]). Further, merely charging a breach of a "duty of care," employing language familiar in tort law, does not, by itself transform a simple breach of contract claim into a tort claim (*Clark-Fitzpatrick, Inc. v Long Island RR. Co.*, 70 NY2d 382, 390 [1987]). The Court therefore concludes that the second, third, eighth and ninth causes of action fail to state a cause of action and must be dismissed pursuant to CPLR 3211 (a)(7).

In reaching this conclusion, the Court must note that plaintiffs are third parties to the agreements between HWG/Taylor and the Trust.[2] "[O]rdinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor" (*Church v Callanan Indus.*, 99 NY2d 104,111 [2002]). While there are three (3) recognized exceptions to this general rule (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), plaintiffs have made no attempt to fit the allegations of their Amended

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[2] As members of the Trust, plaintiffs became parties to the Trust documents (i.e., the Trust Agreement, Bylaws, Indemnity Agreement and Participation Agreement) (Zdarsky Aff., Ex. E, ¶ 140). The duties purportedly breached by the individual defendants as alleged in the eighth and ninth causes of action are premised on duties owed under the Trust documents, to which plaintiffs are parties.

Complaint into any of these exceptions, nor has any party raised this issue. Nevertheless, because the Court's function includes determining whether plaintiffs have a cause of action and not only whether they have properly stated one (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635-636 [1976]), the court will grant plaintiffs leave to replead the negligence-based theories as against HWG/Taylor (i.e. the second and third causes of action).

Because plaintiffs may elect to replead the negligence-based theories against HWG/Taylor in accordance with the above discussion, the Court also must address the statute of limitations. In so doing, it is critical to distinguish between the two (2) primary forms of damages allegedly suffered by plaintiffs. The first is the "pro rata deficit" calculated by the WCB for the amount the WCB (acting for the dissolved Trust) claims should have been paid by plaintiffs as part of their duly-owed contributions and assessments for the period of time during which plaintiffs were Trust members. The second includes any amounts above that "pro rata deficit" such as the amount plaintiffs have been charged for "administrative expenses" and may be charged for interest and collection fees. This second category also may include in the future any "pro rata deficit" amounts remaining unpaid by fellow Trust members for which plaintiffs might be held jointly and severally liable by the WCB (limited by the Trust documents and the WCL to the time period during which plaintiffs were Trust members).

To the extent plaintiffs may be harmed by having been billed for their duly-owed "pro rata deficit," the Court concludes that such harm could have been suffered by plaintiffs only while they were members of the Trust. If plaintiffs were under-billed by the Trust during their membership, all of the material facts relating to such events occurred during plaintiffs' Trust membership. For example, if the negligence of the HWG and/or Taylor caused the

amount of plaintiffs' "pro rata deficit" to be greater than it would have been in the absence of such negligence, all of the facts constituting negligence occurred while plaintiffs were members of the Trust. Although plaintiffs would not have been aware at that time of the precise amount of the under-billing, all of the facts causing it had occurred in that time. Thus, the court concludes that, as to the "pro rata deficit" described above, the three-year statute of limitations for negligence has expired (*see Ackerman v Price Waterhouse*, 84 NY2d 535, 541-542 [1994]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]).

With respect to the second category described above, the harm to plaintiffs could not have occurred until the amounts were incurred and charged to plaintiffs. Because all such harm either occurred within the last three (3) years or has yet to occur, any repleaded negligence-based causes of action alleging the second category of harm would be timely.

B. Breach of Contract

Plaintiffs have alleged in the fourth and seventh causes of action in the Amended Complaint that plaintiffs were either parties or intended third-party beneficiaries of the contracts entered into with the Trust. Irrespective of whether plaintiffs claim to be in direct privity with the defendants or possess the status of third-beneficiaries to agreements between the Trust and the defendants, the breach of contract causes of action are governed by a six-year statute of limitations (CPLR § 213[2]). Furthermore, it is well-settled that a cause of action for breach of contract accrues at the time of the breach (*Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

Plaintiffs' Amended Complaint seeks damages which represent plaintiffs' pro rata share of the under-funding assessments imposed by the WCB. As the record reflects, this

pro rata deficit pertains only to the period during which plaintiffs were members of the Trust. Thus, any breach of contract for which plaintiffs seek damages as a remedy occurred during the period of time when plaintiffs were members of the Trust. Since the breach must have occurred during the time of plaintiffs' membership, and because plaintiffs membership terminated more than six (6) years before this action was commenced, the fourth and seventh causes of action are untimely and must be dismissed pursuant to CPLR 3211 (a) (5).

C. Breach of Fiduciary Duty

Plaintiffs allege in the fifth and sixth causes of action of the Amended Complaint that defendants breached their fiduciary duties to plaintiffs. Plaintiffs also rightfully point out that those fiduciary duties may arise not just as a result of the Trust documents and the agreements entered into between plaintiffs and the moving defendants, but also may exist separately under the common law (*Davis v Dime Savings Bank of New York*, 158 AD2d 50, 52 [3rd Dept 1990]). The question remains, however, whether plaintiffs' allegations of breach of fiduciary duty, whether based on agreements or common law, have been interposed on a timely basis.

The parties agree that, because plaintiff is seeking damages for breach of fiduciary duty, the relevant statute of limitations is three (3) years. Defendants argue that the statute of limitations period with respect to breach of fiduciary duty claims accrues on the date of the acts or omissions that constituted the breach of duty at issue (*Cator v Bauman*, 39 AD3d 1263 [4th Dept 2007]). Under this analysis, according to defendants, all alleged breaches of fiduciary duty, just as with the acts constituting breach of contract, must have occurred during the period of plaintiffs' membership in the trust. Plaintiffs counter this argument by alleging

that New York law allows the limitations period for claims arising out of a fiduciary relationship to be tolled "until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" (*Golden Pacific Bancorp v Federal Deposit Ins. Corp.*, 273 F3d 509, 518 [2nd Cir 2001], *quoting Westchester Religious Institution v Kamerman*, 262 AD2d 131 [1st Dept 1999]).

Even if the Court were to afford plaintiffs the benefit of this tolling concept, the breach of fiduciary duty causes of action would be untimely. Plaintiffs terminated their membership in the Trust under WCL § 50 (former 3-a) upon the notices they gave in 2001. Although it is conceivable that defendants continued to owe fiduciary duties to plaintiffs to administer the claims still remaining under the administration of the Trust, plaintiffs do not allege a breach of that fiduciary duty but rather allege more general misconduct with respect to the management of the Trust. As to the global duties plaintiffs argue were breached, all of those breaches which resulted in harm to the plaintiffs occurred while plaintiffs were members of the Trust. Even under the tolling extension, the case law holds that the statute of limitations begins to accrue when the relationship is "otherwise terminated." Once plaintiffs terminated their participation in the Trust, the fiduciary duties upon which plaintiffs rely were no longer owed to plaintiffs and came to end by virtue of plaintiffs' withdrawal of their membership from the Trust (*Dubbs v Stribling & Assocs*, 96 NY2d 337, 340-342 [2001]; *Midcourt Bldrs. Corp. v Eagen*, 36 AD2d 90, 94 [4th Dept 1971], order aff'd 31 NY2d 728 [1972]). Based on the foregoing, the fifth and sixth causes of action in the Amended Complaint alleging breach of fiduciary duty are dismissed pursuant to CPLR 3211 (a) (5).

D. Leave to Replead

During the court appearance on July 23, 2009, the Court raised certain issues which pertained to whether plaintiffs have a cause of action as opposed to whether plaintiffs have properly stated one. The Court raised some of these issues in connection with its consideration as to whether plaintiffs ought to be afforded the opportunity to replead. Specifically, the Court raised issues concerning whether plaintiffs are asserting derivative or direct claims, and whether plaintiffs have causes of action for indemnity and/or contribution.

The Court has concluded that there would be no point in affording plaintiffs the opportunity to replead with respect to any potential derivative causes of action because plaintiffs terminated their membership in the Trust in 2001 and therefore any derivative claims for conduct while they were members of the Trust would be well outside any applicable statute of limitations. Nevertheless, the record demonstrates that plaintiffs may have a cause of action for indemnification that can be stated, although it also could be asserted in the litigation brought by the WCB in Albany County. It could even be asserted after that litigation concludes. Still, because the plaintiffs may have a cause of action for indemnification, the Court will afford plaintiffs an opportunity to replead and assert such a cause of action in this case.

Plaintiffs' opportunity to replead in accordance with this decision must be exercised within twenty (20) days of service of the Order premised on this decision, with notice of entry.

CONCLUSION

Based on the foregoing, the Complaint and Amended Complaint are in all respects dismissed as described herein. Defendants' counsel are directed to settle the Order with plaintiffs' counsel.

DATED: December 23, 2009

HON. JOHN M. CURRAN, J.S.C.