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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAHN Justice

PART 49

ALDRICH

- v -

MARSH & MCLENNAN

INDEX NO. 605336/99

MOTION DATE 4/1/07

MOTION SEQ. NO. 017

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 07 2007

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/4/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49
----------X

GEORGE ALDRICH, et al.,

Plaintiffs,

- against - Index No. 605336/99

MARSH & MCLENNAN COMPANIES, INC., MARSH, INC., GUY CARPENTER & CO., INC., C.T. BOWRING & CO. LIMITED, and SEDGWICK GROUP, PLC,

Defendants.
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CAHN, J.:

Defendants move to confirm the Report of Special Referee Louis Crespo, dated January 10, 2003 (Report), and the findings of fact and conclusions of law contained therein. Defendants also seek an order dismissing the sole remaining claim, for fraud, asserted in the amended complaint. Plaintiff opposes confirmation of the report, and, or dismissal of the claim for fraud.

Plaintiffs allege that, with one exception, they are all individual investors (Names) in insurance syndicates operating within the Lloyd's of London (Lloyd's) insurance market. Among the syndicates in which plaintiffs allegedly invested were those with which defendant Marsh & McLennan Companies, Inc. (M&M) and its defendant affiliates are alleged to have brokered multiple asbestos-laden policies without disclosing the risks involved. Plaintiffs allege that they lost many millions of dollars on those policies, as asbestos-related claims on the policies continued to accrue.

The only corporate plaintiff, R.H.M. Outhwaite (Underwriting Agencies) Ltd. (Outhwaite), is, allegedly, a now-defunct underwriting agency at Lloyd's, which operated a syndicate that also alleges losses in the millions of dollars on asbestos-laden policies brokered by defendants.

Plaintiffs are members of The Names Legal Committee, Inc. (NLC), a corporation formed by Elizabeth Luessenhop (Luessenhop) to organize and administer a suit against defendants. Although Luessenhop was, at one time, herself a Name, she is not a party to this action.

Defendants are insurance brokers who were involved, 20 years ago, in asbestos coverage litigation, which also involved Lloyd's.

On May 7, 2002, the Court issued an order dismissing the action as against several defendants based on improper service and dismissing a claim for negligent misrepresentation based on the expiration of the statute of limitations. The issue of whether or not plaintiffs' claim for fraud was timely commenced within the two-year discovery rule was held to present a mixed question of law and fact and was referred to a Special Referee to hear and report with recommendations.

After two and one-half days of hearings, the parties submitted post-trial briefs and the matter was marked submitted. The transcript of the hearings, the exhibits marked as evidence and the referee's 33-page Report were filed with the County Clerk.

Familiarity with the substance of the claims, and the relationship of the parties to

those claims, is presumed.

The gravamen of plaintiffs' allegations of fraud is that, by 1976, the defendant-insurance brokers had information that asbestos-related personal injury claims against the Johns-Manville Corporation (Johns-Manville) would "skyrocket" in the near future, but failed to disclose that information to various Lloyd's syndicates when placing insurance for Johns-Manville. V Am Compl, ¶¶ 50 - 55.

The referee reported that, since the Court had already found the six-year limitations period to have expired, the burden had shifted to the plaintiffs to establish that their fraud claim fell within the two-year discovery period exception to the six-year statute of limitations set forth in CPLR 213 (8) and 203 (f). Report, at 26-27. The referee noted that the scope of the reference was to report whether plaintiffs proved that it was only until after November 24, 1997, two years prior to commencement of this action, that a person of ordinary intelligence could have possessed facts which should have caused him or her to investigate and discover the alleged fraud. Report, at 24-25. If such person could have possessed facts which would alert him or her to investigate the alleged fraud earlier, then the action must be dismissed on statute of limitation grounds

The referee reported that some of the plaintiffs were aware that they were incurring significant losses, which might have been asbestos-related, as early as the 1980's. Other plaintiffs were aware that insurance brokers may have engaged in improper conduct with Lloyd's of London in the 1980's. Report, at 16-22. Further,

information about asbestos-related coverage litigation, which had been instituted against the brokers who placed the risks with Lloyd's, had been in the public domain prior to November 1997. Report, at 23. Luessenhop's research of publicly available information led her to conclude, by 1995, that insurance brokers, and American brokers in particular, may have shared responsibility for the Names' asbestos-related losses. According to the referee, Luessenhop's book, *Risky Business: An Insider's Account of the Disaster at Lloyd's of London,* drew conclusions about the brokers' responsibility for the Names' asbestos-related losses in 1995, several years prior to the commencement of this action. Report, at 3. Thus, the referee concluded that there was public information available prior to November 1997 that would have placed a person of ordinary intelligence on inquiry notice of the claims asserted in this matter no later than the end of 1996, and that with reasonable diligence the alleged fraud could have been discovered much earlier. Report, at 30-31. The referee further found that plaintiffs made no effort to investigate the alleged fraud, despite having been put on inquiry notice, and that plaintiffs relied entirely on what was told to them or brought to them by Luessenhop in deciding to prosecute this case. Report, at 27.

Plaintiffs oppose confirmation of the Report on three grounds: (1) jurisdiction of the referee to determine factual issues, and usurp the role of a jury or other finder of fact; (2) the referee's interpretation of CPLR 213 (8) and persons under whom plaintiffs claim, in arriving at the finding that plaintiffs knew or should have known of the alleged fraud

when Luessenhop learned of it; and (3) the referee's interpretation of the record as supporting a finding that plaintiffs could have known of the fraud before the two-year discovery period contained in the statute.

Plaintiffs argue that the question of whether a plaintiff could with reasonable diligence have discovered the alleged fraud prior to the expiration of the statute of limitations is a mixed question of law and fact that should be determined by a jury, citing *Trepuk v Frank* (44 NY2d 723, 724-25 [1978]).

CPLR 4301 states, in relevant part: "A referee to determine an issue or to perform an act shall have all the powers of a court in performing a like function." A referee must conduct a trial in the same manner as a court trying an issue without a jury and must submit a report containing findings of fact and conclusions of law. CPLR 4318, 4320 (a), (b). Upon the motion of any party, or sua sponte, the judge may confirm or reject the Report, in whole or in part, may make new findings with or without additional testimony, and may order a new trial or hearing. CPLR 4403. Only where no issues remain to be tried shall the court render a decision directing judgment in the action. *Id.*

The determination of whether an action was timely commenced under the discovery rule can be, and frequently is, made by the Court, without a jury trial. *See Anthoine v Lord, Bissell & Brook*, 284 AD2d 233, 233 (1st Dept 2001); *Shapiro v Hersch*, 182 AD2d 403, 404 (1st Dept 1992).

Trepuk, relied upon by plaintiffs, came before the Court on a motion to dismiss for

failure to state a cause of action. The Court declined to dismiss the complaint, after discovery had been completed because the facts did not justify a finding that, as a matter of law, the plaintiffs could not have discovered the fraud that had been alleged in the complaint. *Trepuk,* 44 NY2d at 725. The Court went on to explain that where it does not conclusively appear that a plaintiff had knowledge of the facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion, and the question should be left to the trier of fact. *Id.* at 725. The Court, however, did not address the authority of a Special Referee to determine the facts in a particular case and for that reason, *Trepuk* is not relevant to the jurisdictional issue raised by plaintiffs.

The Court finds that Special Referee Crespo's jurisdiction to hear and report was authorized by statute and by order of the Court and did not violate plaintiffs' right to a jury trial.

Plaintiffs further argue that the referee misinterpreted CPLR 213 (8) and improperly imputed Luessenhop's receipt of knowledge of the substance of the Curtner documents, to plaintiffs, for the purpose of computing the discovery period under the statute of limitations. Plaintiffs do not dispute that they learned of the information contained in the Curtner box of documents from Luessenhop, or that none of the plaintiffs independently discovered the defendants' alleged fraud. Nor do they dispute that Luessenhop incorporated the NLC, for the purpose of bringing this lawsuit and thereafter solicited individuals who may have been interested in commencing a lawsuit against

M&M. Plaintiffs complain that the Report contains no legal support for the referee's belief that the phrase "the person under whom he claims" refers to any individual who discovered the fraud and then informed the plaintiffs, regardless of whether that individual had a legal relationship with the plaintiffs at the time of discovery.

The referee found that plaintiffs' fraud claim was premised entirely on what had been told to them by Luessenhop. "Their testimony reveals no effort on their part in investigating the alleged fraud. In short, they have relied entirely on what was told to them and brought to them by Luessenhop." Report, at 27. Further, the referee reported that there was clear evidence that the statute of limitations expired before November 24, 1999, since Luessenhop had facts which were sufficient to have caused discovery of the alleged fraud long before November 24, 1997. Report, at 28.

> It is of no significance that Luessenhop is not a party to this action as the plaintiffs' testimony reveal that they relied solely on what was told to them by Luessenhop. They never saw a material document or conducted their own investigation to conclude that an alleged fraud was committed, they simply relied on what was told to them by Luessenhop. The fraud statute contemplates this very scenario under CPLR 213(8), wherein it is provided that an action of fraud "shall be computed from the time the plaintiff *or the person under whom he claims discovered the fraud* or could with reasonable diligence have discovered it." There is no basis in law or logic to reach a different result

Report, at 28 (emphasis in the original).

While the referee's imputation of Luessenhop's knowledge of the defendants' alleged fraud to plaintiffs is at the outer limits of what is meant by "the person under whom he claims" in CPLR 213 (8), the referee's weighing of the credibility of the witnesses and his interpretation of the facts in these circumstances is deserving of great deference by the Court. Without Luessenhop, the plaintiffs would never have known, or seemingly bothered to inquire, into the reason for their substantial losses at Lloyd's. Further, Luessenhop did not merely share information she had with plaintiffs but actively organized the Names in order to prosecute these claims, keeping an entitlement to a 5% commission despite the fact that she was no longer a Name herself. This relationship between plaintiffs and Luessenhop blurs the line between merely informing plaintiffs that they might have a right of action, and actively inserting herself into the litigation. Both plaintiffs and Luessenhop stand to benefit if this litigation succeeds. Plaintiffs cannot attach themselves to Luessenhop in order to claim their winnings under this litigation, while at the same time distancing themselves from her previous knowledge of the foundation for the claims asserted in this litigation. Luessenhop's knowledge will be imputed to plaintiffs for purposes of determining when the discovery period under CPLR 213 (8) began to run.

The referee concluded that plaintiffs could reasonably have known of the fraud before the two-year discovery period contained in the statute. Luessenhop had sufficient facts available to her, which she learned while doing research on her book, from 1993 to

1995, as well as in 1996, when a box of controversial documents was given to Luessenhop by Walter Curtner (Curtner), a former employee at Manville. The box contained conflicting projections, drawn by Curtner and another former Manville employee, of the rate at which claims against Manville might increase over time. Because Luessenhop was found by the referee to have had access to this and other relevant information before the fall of 1997, Luessenhop's efforts at raising money to finance litigation against Manville, her decision not to see a lawyer and not to inquire further until 1997 was found by the referee to be more a matter of economics, as opposed to insufficient facts to articulate a fraud claim. Report, at 28. In March 1998, Luessenhop's solicitation letter to Names stated that she and other Names had been "working hard for several years gathering evidence to support" a legal action against those who she felt were responsible for failing to disclose material facts known to them at the time the risks were placed at Lloyd's of London. Plaintiffs were found to have had an ample opportunity to discover the alleged fraud, vis-a-vis Luessenhop, in 1996.

Although not determinative of the issue of inquiry notice, the referee noted that there was public information available prior to November 1997 that would have placed a person of ordinary intelligence on inquiry notice of the claims asserted herein no later than the end of 1996. In addition, the fact that agents at Lloyd's gave minimal response to individual inquiries from Names was reported to be an indicia that further inquiry by them would have been reasonably expected. Luessenhop was on notice as early as March

1996, when she first received the box of documents from Curtner; and plaintiffs, who never saw the documents but rely on them to support their fraud claim, were deemed by the referee to have constructive notice as of March 1996. Plaintiff Outhwaite admitted receiving documents from Luessenhop, which she had obtained from the Curtner box, in 1996. Outhwaite was found to be incredible as a witness, and his testimony was found to be designed to circumvent the fraud statute and his statutory obligation of inquiring about the fraud at the time that he first received the Curtner documents. Report, at 31.

Thus, the referee concluded that the evidence supports the finding that, with reasonable diligence, the allege fraud could have been discovered much earlier. Report, at 32.

Accordingly, it is

ORDERED that the motion to confirm the report of the Special Referee is granted; and it is further

ORDERED that the branch of the defendants' underlying motion to dismiss the amended complaint is granted to the extent that the first cause of action is dismissed.

Dated: June 4, 2007

ENTER:

J.S.C.