SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

SIEGEL, FENCHEL & PEDDY P.C. PROFIT SHARING PLAN; SIEGEL, FENCHEL & PEDDY P.C. CASH BALANCE PENSION PLAN; SIEGEL, FENCHEL & PEDDY P.C.; WILLIAM D. SIEGEL; SAUL R. FENCHEL; and TRACIE P. PEDDY,

Plaintiffs,

INDEX NO.: 011239/2008
MOTION DATE: 10/03/2008
MOTION SEQUENCE: 001

-against-

CHERNOFF, DIAMOND & CO., LLC,

X X X

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Memorandum of Law in Support of Defendant's Motion to Dismiss	2
Memorandum of Law in Opposition to Defendant's Motion to Dismiss & Exhibit Annexed	3
Defendant's Reply Memorandum of Law in Further Support of its Motion to Dismiss	4

Motion by defendant pursuant to CPLR 3211(a)(7) for judgment dismissing the amended complaint for failure to state a cause of action is granted. Defendant's additional request pursuant to CPLR 3211(a)(1) for judgment dismissing the second cause of action, is denied as moot.

Defendant is the actuarial firm that drafted, implemented, and maintained a profit sharing plan and a cash balance pension plan (collectively "the pension plans") for plaintiff Siegel,

plans, and the individual partners of the law firm.

In the complaint plaintiffs allege claims for indemnification and contribution. These claims arose from the settlement of a federal lawsuit ("the Strom action") by a former partner of the law firm, who sought a declaration of her rights under the pension plans and an award of benefits after she left the firm. The settlement took place during the course of mediation. Defendant was not a participant in the Strom action, nor was it a participant in the mediation.

Plaintiffs' indemnification and contribution causes of action are based upon allegations of breach of contract, negligent misrepresentation, and negligence. Defendant seeks dismissal of both claims for failure to state a cause of action, and further seek dismissal of the contribution cause of action based upon the documentary evidence of the stipulation of settlement of the Strom action.

On a motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v. Martinez*, 84 N.Y.2d 83, 87-88(1994); *Goldin v Engineers Country Club,* 54 AD3d 658, 659 (2nd Dept. 2008); *Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408, 409(2nd Dept. 2005). However, bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704(2nd Dept. 2008); *Riback v Margulis*, 43 AD3d 1023(2nd Dept. 2007). Factual claims that are flatly contradicted by the evidence are also not presumed to be true on a motion to dismiss [*Smith v Meridian Technologies, Inc.*, 52 AD3d 685, 687(2nd Dept. 2008); *Parsippany Const. Co. Inc. v Clark Patterson Associates*, PC, 41 AD3d 805, 806(2nd Dept. 2007)].

In opposition to the defendant's moving papers, plaintiffs have submitted an amended complaint (annexed as Exhibit A to their Memorandum of Law in Opposition to Defendant's Motion to Dismiss).The amended complaint provides that the individual defendants are trustees of the pension plans. The substantive allegations of the amended complaint are the same as those in the original complaint, and in reply, defendant has elected to proceed with its motion to dismiss against this amended complaint. Thus, for the purposes of the instant motion, the amended complaint is the operative pleading.

In their opposition papers plaintiffs argue that federal common law, not state law, governs indemnity and contribution of ERISA liabilities, such as those presented in the amended complaint. In reply defendant argues that federal common law does not apply to it.

The Employment Retirement Income Security Act of 1974 ("ERISA") (29 USC 1001 et. seq.) is a federal statute that imposes disclosure and reporting requirements, and establishes standards of conduct for employee benefit plans and their fiduciaries [*Council of City of New York v Bloomberg*, 6 NY3d 380, 393 (2006)]. ERISA explicitly supercedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"[29 USC 1144[a]; *Silber v Silber*, 99 NY2d 395, 401, cert. den. 540 US 817(2003)]. Federal preemption does not require dismissal, as state courts exercise concurrent jurisdiction over ERISA claims [*Doe v HMO-CNY*, 14 AD3d 102, 107(4th Dept. 2004); *Piatko v Bethlehem Steel Corp.*, 134 AD2d 954 (4th Dept. 1987)]. The courts are to apply the " federal common law of rights and obligations under ERISA-regulated plans " [*Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), see *Montner v. Interfaith Medical Center*, 157 Misc.2d 583, 591 (NY Civ Ct, 1993)], and indemnity and contribution are causes of action available under ERISA [*Chemung Canal Trust Co. v Sovran Bank/Maryland*, 939 F2d 12, 18(2d Cir.), cert den. 505 US 1212(1991)].

Defendant argues that federal common law will not salvage the amended complaint because it does not meet the federal criteria for ERISA-related liability. Defendant explains that it because it is merely a plan creator and administrator, it is not a fiduciary to the pension plans, nor is it a "party in interest" to a "prohibited transaction." Consequently, defendant insists that plaintiffs have failed to allege a cause of action under federal common law for contribution and indemnity, and what remains are garden-variety state law claims which are precluded by state law. First the Court turns to federal law to determine if there is a basis for ERISA-related liability. The first issue presented is whether defendant is a "fiduciary." ERISA defines "fiduciary" not in terms of formal trusteeship, but in functional terms of control and authority over the plan [29 USC 1002(21)(A)]. Consequently, under ERISA, the fiduciaries of a pension plan include not only the named fiduciaries, but also any person who exercises discretionary control or authority over the plan's management, administration, or assets [*Mertens v Hewitt Associates*, 508 US 248, 251 (1993)]. Actuaries, attorneys, and accountants are not ordinarily fiduciaries unless they render investment advice or are given special authority over plan

management [*Gerosa v Savasta & Co., Inc.,* 329 F3d 317at FN3(2nd Cir.), cert. den. 540 US 967, and cert. den. 54 US 1040 (2003); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259-60 (2d Cir.1987) (citing 29 C.F.R. § 2509.75-5 (1986)); see also *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 21 (2d Cir.1996) and 29 C.F.R. § 2509.75-5 (2002)]. Actuaries become liable under ERISA when they cross the line from providing advice to exercising discretionary control over the plan [*Mertens v Hewitt Associates*, 508 US at 262; cf. *Cole v North American Administrators, Inc.* 11 AD3d 974(4th Dept. 2004)].

Next the Court reviews the amended complaint as to the specific allegations against defendant. According to the amended complaint, defendant's conduct consisted of the following: creation, implementation, maintenance, and administration of the subject pension plans. Defendant performed all governmental filings and all notifications. Its job was to tailor the pension plans to the needs of the law firm, which included allocating an increased contribution to officers and shareholders, while maintaining the existing rate of benefit accrual for all others. Plaintiffs allege that defendant breached its contract, was negligent, and made negligent misrepresentations when it failed to create and maintain pension plans that would exclude Ms. Strom from the increased contribution that was supposed to be reserved only for the officers and shareholders as requested by the law firm.

None of these allegations demonstrate any discretionary authority or control whatsoever over the subject pension plans. In essence, plaintiffs' charge is that defendant failed to tailor the pension plans according to its directions. Consequently, on this record, plaintiffs have failed to state a cause of action against defendant in any kind of express or implied fiduciary capacity.

Liability under ERISA extends to non-fiduciaries under a two-part test: the non-fiduciary must be a "party in interest," and the "party in interest" must participate in a "prohibited transaction" [*see Harris Trust and Sav Bank v Salomon Smith Barney Inc.*, 530 US 238 (2000); *Mahoney v JJ Weiser & Co., Inc.*, 564 FSupp2d 248, 260(SDNY 2008)]. The term "party in interest" includes those entities that a fiduciary might be inclined to favor at the expense of beneficiaries [*Harris Trust and Sav Bank* at 242], is defined at 29 USC 1002(14), and covers "a person providing services" to an employee benefit plan. Defendant does appear to fall within this definition.

"Prohibited transactions" between a pension plan and a "party in interest" are defined in

greater than it otherwise would be, because the deal is struck with plan insiders, presumably not at arms' length [see generally *Lockhead Corp. v Spink*, 517 US 882, 893(1996)]. No "prohibited transaction" is alleged in the amended complaint; indeed, no violation of ERISA is alleged by plaintiffs. In the absence of any "prohibited transaction," plaintiffs fail to state an ERISA-related cause of action under federal common law for contribution and indemnity.

As plaintiffs have failed to address the deficiencies alleged by defendant in their claims under state law, the Court presumes they have conceded these deficiencies. In any event, the expiration of the three-year and six-year limitations periods, respectively, precludes any claim for negligence, actuarial malpractice, negligent misrepresentation, or breach of contract [CPLR 214(6) and 213(2)].

The voluntary settlement of the Strom action, together with plaintiffs' failure to allege a basis for their legal liability to Strom, precludes a claim for indemnification [*HSBC Bank USA v Bond,Schoeneck & King, PLLC*, __AD3d__, __NYS2d__, 2008 WL 4531639 (4th Dept. 2008); *Midura v 740 Corp, LLC*, 31 AD3d 401 (2nd Dept. 2006)]. New York General Obligations Law 15-108(c) precludes a claim for contribution by a settling tortfeasor [*HSBC Bank USA v Bond, Schoeneck & King, PLLC*]. Under these circumstances plaintiffs have no state law claims against defendant.

Based on the foregoing defendant is entitled to judgment dismissing the amended complaint for failure to state a cause of action pursuant to CPLR 3211 (a)(7). There is no need for the Court to consider defendant's alternative request to dismiss the second cause of action pursuant to CPLR 3211(a)(1), which is denied as moot.

Dated: November 12, 2008