

RBG Mgt. Corp. v Compensation Risk Mgrs., LLC

2009 NY Slip Op 31923(U)

August 21, 2009

Supreme Court, New York County

Docket Number: 603058-2008

Judge: Carol R. Edmead

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

CAROL EDMEAD
J.S.C.

PRESENT: _____

PART 35

Index Number : 603058/2008

RBG MANAGEMENT CORP.

vs
COMPENSATION RISK MANAGERS, LLC

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 6/8/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion to dismiss the Complaint as asserted against the moving defendants is granted to the extent that the first cause of action for declaratory relief as asserted against CRM is dismissed, the second cause of action for breach of fiduciary duty is dismissed, with leave to replead this claim within 30 days of service of this order with notice of entry, and the third cause of action for a refund is dismissed; and it is further

ORDERED that the branch of the motion to consolidate is denied; and it is further

ORDERED that the parties appear for a preliminary conference on November 24, 2009, 2:15 p.m.; and it is further

ORDERED that the moving defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 8/21/09


CAROL EDMEAD
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

FILED
AUG 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
RBG MANAGEMENT CORP., RED & WHITE MARKETS,
INC., DORIA ENTERPRISES, INC. AND GRACE'S
MARKETPLACES, INC.,

Plaintiffs,

Index No. 603058-2008

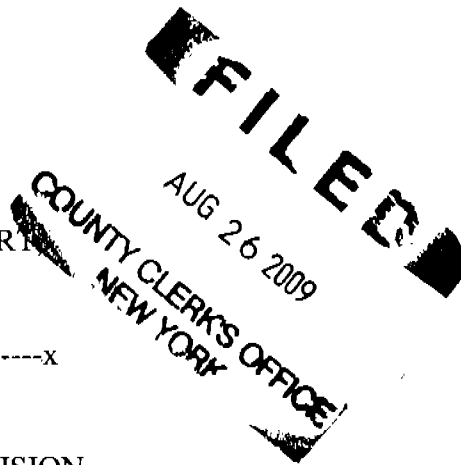
-against-

DECISION/ORDER

COMPENSATION RISK MANAGERS, LLC,
WHOLESALE AND RETAIL WORKERS'
COMPENSATION TRUST OF NEW YORK, DANIEL
G. HICKEY, JR., DANIEL G. HICKEY, SR., JAMES J.
SCARDINO, LOUIS J. VIGLOTTI, CHESTER I.
WALCZYK, RONALD PHILLIPS, JOSEPH BINDER,
KRISH MALIK, AVIV RAITSES, AND RON SCHUBERT

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.



MEMORANDUM DECISION

In this declaratory judgment action, defendants Compensation Risk Managers, LLC (“CRM”), Daniel G. Hickey, Jr., Daniel G. Hickey, Sr., James J. Scardino, Louis J. Viglotti, and Chester I. Walczyk (collectively, the “moving defendants”) move to dismiss the complaint, or in the alternative, to consolidate this action with an action pending in Dutchess County.

*Factual Background*¹

In order to provide workers’ compensation coverage to their employees, plaintiffs became members of the defendant Wholesale and Retail Workers’ Compensation Trust of New York (the “Trust”), a workers’ compensation group self-insured trust (“GSIT”). Compensation Risk Managers, LLC (“CRM”) served as the Trust administrator, under a Service Agreement and a

¹ The Factual Background is taken in large part from the complaint and the moving papers.

Trust Agreement and Declaration (the "Trust Agreement"). According to the complaint, plaintiffs RBG Management Corp. and Red & White Markets, Inc. were members of the Trust from March 2000, and plaintiffs Doria Enterprises, Inc. and Grace's Marketplaces, Inc. were members from April 2000, until they terminated their respective memberships in the Trust in April 2004 and on September 19, 2003, respectively. Plaintiffs claim that according to a certain Indemnification Agreement, they each agreed to be jointly and severally liable for expenses and obligations concerning workers' compensation liability while they remained a "Participating Employer" and prior to the date of their respective terminations, there were no deficits in the Trust accounts. However, beginning July 2007, CRM sent plaintiffs assessments for additional payments to the Trust, retroactive to the time that they were members of the Trust. According to plaintiffs, in late 2007 and early 2008, the Workers' Compensation Board (the "Board") began investigating the Trust as a result of its excessive underfunded liabilities. In June 2008, CRM entered into a settlement with the Board, whereby CRM surrendered its license and the Board transferred all of CRM's duties to S.A.F.E., LLC ("SAFE") another third-party administrator selected by the Board.

On September 29, 2008, the Board wrote CRM's insurer, advising that it assumed legal responsibility of the Trust and six other GSITs for which CRM served as third-party administrator, and intended to sue CRM on their behalf, for *inter alia*, breach of fiduciary duty and breach of contract.

On October 3, 2008, CRM filed a declaratory judgment action in the Dutchess County Supreme Court against the Board and eight GSITs, including the Trust herein challenging the Board's claims and seeking a determination of CRM's nonliability to any of the GSITs (the

“Dutchess County Action”).

Thereafter, plaintiffs commenced this action, claiming that CRM and the remaining defendants (except SAFE), as executives and Board of Trustees, failed to follow proper accounting procedures, causing the Trust to suffer from large operating deficits and inadequate reserves.

Motion

The moving defendants argue that because plaintiffs withdrew from the Trust and thereby terminated CRM’s fiduciary relationship in 2003 and 2004, more than three years before this action was commenced, plaintiff’s second cause of action for breach of fiduciary duty claim is time-barred.

It is also argued that plaintiffs failed to state a breach of fiduciary duty claim against the individual moving defendants, and such claim against them should be dismissed. These defendants owed a duty only to CRM, and did not owe a separate duty to the plaintiffs as members of the Trust. Further, plaintiffs failed to allege any independent tortious conduct by the individual moving defendants, who were acting in the scope of their authority as officers of CRM.

The moving defendants also argue that CRM also owed no duty to the individual moving defendants. It is argued that the allegation that CRM agreed to perform administrative duties for the Trust is insufficient to sustain this claim against the individual moving defendants; plaintiffs have not alleged that CRM exerted superiority and influence over such defendants, or that CRM had *de facto* control and dominance over them. Failing to maintain adequate reserves is also insufficient.

Even if plaintiffs alleged sufficient facts for a fiduciary duty claim, plaintiffs lack standing to bring this action. Similar to shareholders of a corporation, beneficiaries of a trust do not have standing to sue in their individual capacity in relation to trust property, unless they first make a demand to redress a wrong to the trustee, and such demand is refused, or explain in detail why such demand was not made. Plaintiffs have not alleged any of these factors in their complaint.

Further, defendants argue that plaintiffs do not state a cause of action making CRM liable for the Trust deficits. As self-insured members of a GSIT, plaintiffs are the ones responsible for any Trust deficits. Further, if the plaintiffs were undercharged in earlier years, then a later assessment for the resulting unfunded deficit merely makes up the benefit plaintiffs enjoyed of having paid lower contributions earlier. The deficits are simply the result of changed loss experience or normal adjustments to the actuarial assumptions. Plaintiffs are jointly and severally liable while they belonged in it, and the Trust even permits the Trust to sue former members who refuse to pay the amounts they owe.

The moving defendants also argue that the declaratory judgment action against CRM must be dismissed, since the claim only concerns plaintiffs' relationship with the Trust as former members. CRM plays no role in that relationship.

And, the third cause of action for damages must be dismissed as it seeks damages without identifying a theory of liability.

Finally, this action should be consolidated with the Dutchess County action, which arises from the same core facts involving CRM's actions, the Board's determinations, and the effect of the Board's determinations on CRM and the Trust, as this action does. CRM's witnesses and

documents are located in Dutchess County.

Opposition

Plaintiffs argue that the breach of fiduciary duty claim is timely. Pursuant to caselaw, since CRM did not openly repudiate its position of trust until 2008, when it surrendered its license, the action is timely even though the wrongful conduct occurred more than three years prior to the commencement of the action. Further, the Board and CRM both assert that plaintiffs remain jointly liable for underfunded liabilities notwithstanding their withdrawal from the Trust; thus, if plaintiff are so liable, then by logic, their withdrawal from participation did not affect their continuing membership for purposes of joint liability. Since the breach of fiduciary duty claim becomes enforceable when damages are sustained, and damage was not sustained until 2007, the claim did not accrue until that date. Furthermore, the fraudulent activities and deceptive business practices of CRM, as alleged by the Board, extended the limitations period to six years.

Plaintiffs further argue that the individual moving defendants engaged in independent tortious acts, and thus, do not receive the protection of the corporate robe. Plaintiffs point out that the moving defendants' own papers indicate that the Board has indicated that CRM engaged in self-dealing and fraudulent business practices. Therefore, plaintiffs argue, such conduct constitutes independent tortious acts on the part of the individual moving defendants.

Further, relying mostly on Second Department caselaw in the context of a condominium manager's duty to condominium owners, and a plan administrator's duty to administer the plan in good faith, plaintiffs argue that CRM's position as administrator of the Trust placed it in a fiduciary position to the plaintiffs as members of the Trust.

Plaintiffs maintain that they have standing to pursue this action by virtue of CRM's direct fiduciary duty to the plaintiffs, who suffered a distinct injury from that suffered by the current Trust members. Further, the Trust has been terminated and thus, any demand on the trustees would be a futile act. Also, even if CRM and the individual moving defendants did not owe a fiduciary duty directly to plaintiffs, the complaint sufficiently alleges a cognizable claim for aiding and abetting the Trustees in breach of their fiduciary duties. And, plaintiffs may maintain a derivative action against CRM and the individual defendants on behalf of the Trust; the Trust terminated in 2008, the Board assumed control of the Trust and appointed SAFE to administer the claims against the Trust, and any demand upon the Trustees would be futile as they lack the power to act. In the alternative, plaintiffs should be granted leave to replead to correct any defects in the pleading.

And, the moving defendants lack standing to assert any defenses relating to plaintiffs' liability of the Trust, or the interpretation of the Trust and plaintiffs' rights and liabilities thereunder. Plaintiffs are entitled to discovery to explore their breach of fiduciary duty and mismanagement claims.

As to the third cause action for damages, plaintiffs seek to replead to correct any deficiencies this Court finds therein.

Finally, this action should not be consolidated; plaintiffs are not parties to the Dutchess County action, and none of the decisions in the Dutchess County action would be binding upon plaintiffs herein. Further the discovery involving the eight trusts in the Dutchess County action, operating for six to nine years, will prejudice plaintiffs, in that the Dutchess County action will take a significantly large period of time. And, it is conceivable that CRM only mismanaged the

Trust herein and not the others. Defendants Ronald Phillips, Joseph Binder, Krish Malik, Aviv Raitses, and Ron Schubert (the "Individual Trustees") also oppose consolidation, adding that the plaintiffs herein are defendants in the Dutchess County action and that none of the Individual Trustees resides in or near Dutchess County.

Reply

The moving defendants argue that the statute of limitations caselaw cited by plaintiffs involved a claim for an accounting, and not for monetary damages as sought herein. The fact that CRM still served as Trust administrator until 2008 is irrelevant, because plaintiffs withdrew from the Trust years earlier. Further, the assessments made in 2007 do not revive plaintiffs' memberships in the Trust, because the assessments related to the deficit incurred during the time in which plaintiffs were members, and plaintiffs agreed to be liable to any underfunded liabilities incurred while they were members. And, any damages plaintiffs sustained were incurred while they were members, and not in 2007 when they were allegedly discovered. Furthermore, plaintiffs effort to re-characterize their claim as one for fraud to evade the three-year statute of limitations fails, since plaintiffs failed to plead any claim of intentional misrepresentation to plaintiffs.

The moving defendants argue that plaintiffs failed to allege with any specific independent tortious acts by any of them, but broadly alleges that they breach their fiduciary duty to plaintiffs by failing to determine and maintain adequate reserves. Further, it is unclear as to what plaintiffs are referring in regard to the Board's allegations of self-dealing and fraud.

It is also argued that the caselaw plaintiffs cite for the proposition that CRM owed them a fiduciary duty are inapplicable.

Although the Trust no longer has an active Board of Trustees, the Workers' Compensation Board has assumed control of the Trust as the successor in interest to the Trust and thus, the Trust is still operating under the control of said Board. Even if making a demand were futile, plaintiffs failed to allege with particularity in their complaint why such a demand would be futile.

Consolidation is appropriate in this action because there is a common question of law and fact concerning CRM's administration of the Trust, CRM and the Trust are parties in the Dutchess County action, substantial rights of the parties will not be prejudiced, and consolidation will not cause jury confusion. Further, discovery has just commenced in the Dutchess County action.

Analysis

First Cause of Action for Declaratory Judgment

The first cause of action for declaratory relief as asserted against CRM is dismissed. The first cause of action seeks to establish the plaintiffs' rights and obligations under the Trust, to which CRM is not a party. Nor did plaintiffs set forth any arguments opposing this branch of the moving defendants' motion. Therefore, the first cause of action is dismissed solely as against CRM.

Statute of Limitations on Second Cause of Action for Breach of Fiduciary Duty

The applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought (*Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003], citing *Loengard v Santa Fe Indus.*, 70 NY2d 262, 267 [1987]). Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies (*Kaufman v Cohen*,

supra, citing *Loengard*, *supra*). “On the other hand, where suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging ‘injury to property,’ to which a three-year statute of limitations applies (*id.* citing CPLR 214 [4]). Here, it is uncontested that plaintiff’s second cause of action for breach of fiduciary duty seeks monetary damages. Thus, such claim is governed by the three-year statute of limitations (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009] [where plaintiff sought monetary damages and the equitable relief it seeks, including the disgorgement of profits, was incidental to that relief, “looking to the reality, rather than the form, of this action” plaintiff was held to have sought a monetary remedy]).

Although case law holds that a breach of fiduciary duty claim based on allegations of actual fraud is subject to a six-year limitations period (*see Goldberg v Schuman*, 289 AD2d 8 [2001] [plaintiff’s claims for fraud and breach of fiduciary duty governed by six-year limitations period in CPLR 213]; *Unibell Anesthesia v Guardian Life Ins. Co.*, 239 AD2d 248 [1997] [court correctly applied six-year limitations period, instead of three-year period, to breach of fiduciary duty claim where complaint also made out cause of action for fraud by insurer]), here, plaintiffs’ complaint does not allege fraud, the elements constituting a claim for fraud, or even any facts giving rise to support a claim for fraud (*Kaufman v Cohen*, *supra*, citing *Matter of Kasziner v Kasziner*, 286 AD2d 598, 598-599 [2001] [breach of fiduciary duty cause of action subject to three-year limitations period where complaint did not allege fraud or breach of trust agreement]; *Heffernan v Marine Midland Bank*, 283 AD2d 337, 338 [2001] [breach of fiduciary duty cause of action seeking damages from a defalcating fiduciary, if not involving allegations of actual fraud, is governed by three-year limitations period]). And, the Board’s allegations of fraud in its letter to

CRM, are incidental to the alleged breach of fiduciary duty herein, and accordingly may not be employed to lengthen the limitation period to six years (*see Buller v Giorno*, 28 AD3d 258, 813 NYS2d 394 [1st Dept 2006]; *see also, Waggoner v Caruso*, 20 Misc 3d 1146, 873 NYS2d 238 [Sup Ct New York County 2008] [stating that “the fraud claim must be more than only incidental to the breach of fiduciary duty claim”; the fraud claim must be essential to the breach of fiduciary duty claim, and that the application of the six-year statutory period will therefore turn on the viability of the fraud claim]). Therefore, the breach of fiduciary duty claim is governed by the three-year statute of limitations (*see Waggoner v Caruso, supra*).

The timeliness of this action now turns on the date on which the alleged breach of fiduciary duty accrued. In this regard, *IDT* is instructive.

In determining the accrual date of a breach of fiduciary duty claim after holding that the three-year statute of limitations applied, the Court of Appeals in *IDT* stated as follows:

A tort claim accrues as soon as “the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint.” . . . As with other torts in which damage is an essential element, the claim “is not enforceable until damages are sustained.” . . . To determine timeliness, we consider whether plaintiff’s complaint must, as a matter of law, be read to allege damages suffered so early as to render the claim time-barred . . . Here, the only reasonable inference to be drawn from [plaintiff’s] allegations is that it first suffered loss, as a result of [defendant’s] alleged breach of fiduciary duty, after Telefonica refused to comply with the MOU. *The exact date of the injury is not alleged but must have been before May 25, 2001, when IDT commenced the arbitration against Telefonica, alleging that it had sustained a loss of some \$3.15 billion as a result of Telefonica’s breach of their binding agreement.* (Emphasis added).

Here, the Complaint alleges that plaintiffs at the time they withdrew their membership from the Trust in 2003 and 2004, the Trust was represented to be fully solvent (¶¶ 5, 31, 34).

However, beginning in 2007, plaintiffs were “assessed for the payment of additional

contributions” for more than \$167,000 as to plaintiffs RBG Management Corp. and Red & White Markets, Inc., and more than \$51,000.00 as to plaintiffs Doria Enterprises, Inc. and Grace’s Marketplaces, Inc. Plaintiffs, therefore, did not suffer any injuries from CRM’s alleged breach of fiduciary duty until 2007, and “[d]amages are an essential element of a cause of action for breach of fiduciary duty” (*Donovan v Ficus Investments, Inc.*, 20 Misc 3d 1139, 872 NYS2d 690 [Sup Ct New York County 2008]). Therefore, this action, commenced on October 23, 2008, is timely. To hold otherwise would require plaintiffs to have filed this action within three years from the date they withdrew their membership (in 2003 and 2004), which would have been premature and unfounded, since there was no loss suffered by plaintiffs at such times.

CRM’s reliance on *Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1st Dept 1999]) for the proposition that the limitations period for the breach of fiduciary duty claim “accrues” when the “fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated” lacks merit. In fact, the Court in *Westchester* stated that the applicable statutory period in an action for an accounting was based on a breach of fiduciary duty which “does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated.” However, such open repudiation or termination of relationship rule is a tolling rule based on the rationale that the beneficiary should be entitled to rely upon a fiduciary’s skill without the necessity of interrupting a continuous relationship of trust and confidence by instituting suit (*People ex rel. Spitzer ex rel. Ultimate Charitable*, 55 AD3d 1306, 866 NYS2d 464 [4th Dept 2008] [“The reason for such a *tolling* rule is that the beneficiary should be entitled to rely upon a fiduciary’s skill without the necessity of interrupting a continuous relationship of trust and confidence by instituting suit”]). This tolling rule has no

application to the issue herein, where the accrual date of plaintiffs' claim is measured from the date of actual damages suffered, and is held to be timely.

Therefore, dismissal of plaintiffs' breach of fiduciary duty claim on the ground of statute of limitations is denied.

Failure to State a Claim for Breach of Fiduciary Duty

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action or whether a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *see also Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d

802, 653 NYS2d 279 [1996]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims” (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]).

“To state a claim for breach of fiduciary duty, plaintiff must plead: (1) the existence of a fiduciary duty between the parties; (2) breach of that duty; and (3) damages suffered as a result of the breach” (*Donovan v Ficus Investments, Inc.*, *supra*, citing *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007] [“. . . a plaintiff must prove the existence of a fiduciary relationship, *misconduct by the defendant*, and damages that were directly caused by the defendant's misconduct”] [emphasis added]). “Plaintiff must go beyond merely alleging that these essential elements are present if its claim is to survive a motion to dismiss pursuant to CPLR § 3211(a)(7)” (*Donovan*, citing *Gall v Summit, Rovins and Feldesman*, 222 AD2d 225, 226 [1st Dep't 1995] [dismissing a claim for breach of fiduciary duty where the “verified complaint is devoid of factual allegations which sufficiently demonstrate a causal relationship between purported conduct on the part of defendants and damages suffered by plaintiff”]).

As to the individual moving defendants, there are no factual allegations or the mention of any acts undertaken by such defendants to support a claim for breach of fiduciary duty or self-dealing. Even considering the letter from the Board, such letter merely states that “CRM’s failure to disclose self dealing” No mention is made in the letter as to any factual details of self-dealing by CRM or by the individual moving defendants. While the Court is required to assume as true the allegations in the Complaint, there are no allegations of conduct allegedly performed by the individual moving defendants for the Court to assume. Therefore, the branch

of the motion to dismiss the second cause of action as asserted against the individual moving defendants is granted.

As to CRM's claim that it owed no duty to the individual moving defendants, it has been held that a "fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*HF Mgmt. Servs. LLC v Pistone*, 34 AD3d 82, 818 NYS2d 40 [1st Dept 2006] *citing EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts § 874, Comment a). The "essential elements of a fiduciary relation are . . . 'reliance, . . . de facto control and dominance'" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 11 NY3d 146 [2008] *citing Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 173 [1993]). "Stated differently, '[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other'" (*id.*).

It is uncontested that CRM performed third-party administrator functions for the Trust pursuant the Service Agreement, and there is no indication in the pleadings or record that CRM exerted superiority and influence over the individual plaintiffs/members of the Trust, or that CRM had *de facto* control over the plaintiffs or the Trust. The allegation that CRM failed to maintain adequate reserves is plainly insufficient to establish a fiduciary duty between CRM and the plaintiffs. While fiduciary liability is based on the relationship, a fiduciary relationship may not be inferred from bare conclusions or factual assertions flatly contradicted (*see EBC I*, 5 NY3d at 20; *Frank v Sobel*, 2007 NY Slip Op 1798, *1 [1st Dept 2007] [breach of fiduciary duty claim dismissed because no evidence was presented to establish the existence of any fiduciary relationship between the parties]). "If the parties . . . do not create their own relationship of higher

trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (*Id.*) Plaintiff has alleged nothing to suggest that a relationship of higher trust, separate and apart from the relationship created by the Service Agreement, existed between CRM and the plaintiffs.

The caselaw cited by plaintiffs to establish a fiduciary relationship between them and CRM are either factually distinguishable or do not support plaintiffs' contention (*see e.g., Lipton v Unumprovident Corp.*, 10 AD3d 703 [2d Dept 2004] [employer, which procured for the benefit of both its employees and brokers a disability insurance plan, held to have a fiduciary duty to plaintiff/broker to inform him of changes in policy coverage]; *Caprer v Nussbaum*, 26 AD3d 176 [2d Dept 2006] [concluding "that the managing agent is a fiduciary as to the condominium, *but not as to the individual unit owners*" and declining to "recognize a fiduciary relationship between the [condominium's] accountants and the individual unit owners"]; *Liss v Smith*, 991 F Supp 278 [SDNY 1998] [determining fiduciary liability of trustee, and attorney pursuant to express definitions of fiduciary duty under ERISA where record indicated that he exerted such influence over the trustees' decision making that he exercised effective control over the subject funds]). There is no direct relationship between CRM and the plaintiffs; the relationship giving rise to CRM's obligations stem from the Service Agreement between the Trust and CRM; CRM is not the Trustee of the Trust, and there is no claim that CRM exerted such influence over the Trustee's decision making. Therefore, plaintiffs fail to adequately state that CRM owed them a fiduciary duty so as to support their second of action.

As to the standing issue, "[w]here a claim exists in favor of the trust (properly speaking, of the trustees in their trust capacity) against third persons and the trustees are under a duty to

enforce that claim and have improperly and unjustifiably failed to do so, the beneficiaries may bring a suit on behalf of the trust” (*Velez v Feinstein*, 87 AD2d 309, 451 NYS2d 110 [1st Dept 1982]). In order for plaintiffs to seek redress for wrongs committed against the Trust, plaintiffs must set forth “with particularity” in the Complaint “the efforts of the plaintiffs to secure the initiation of the action by the trustees, or the reasons for not making such effort” (*Id.*).

It is uncontested that the Complaint does not allege any facts concerning any demands of the Trustee to seek redress against the moving defendants, or explain why such demand would be futile, plaintiffs have standing to seek redress on behalf of the Trust, and in this regard, plaintiffs’ action would be derivative in nature. Therefore, plaintiffs failed to allege sufficient facts to establish standing to maintain a breach of fiduciary claim against the moving defendants.

Defendants argument that they cannot be held liable for the Trust deficits is warranted, however, only to the extent that plaintiffs have failed to sufficiently state a claim for breach of fiduciary duty against them as noted above. To the extent plaintiffs argue that their damages for the assessments made against them are distinct from the damages to the Trust, such a claim sounds in common law contribution or indemnification, or is derivative in nature since they are beneficiaries of the Trust, although none of these theories are alleged in the Complaint. Therefore, plaintiffs failed to state a cause of action rendering CRM liable for the Trust deficits at this juncture.

Yet, the absence of a direct fiduciary relationship, however, does not immunize the moving defendants from the plaintiffs’ claims herein. Plaintiffs shall be given leave to replead facts to support a claim to recover any damages it suffers as a result of the assessments imposed

against plaintiffs. Plaintiffs shall replead their Complaint within 30 days of service of this order with notice of entry.

Third Cause of Action for Damages

Plaintiffs' third cause of action for a refund of all payments made to the Trust due to the wrongful assessment to plaintiffs is plainly insufficient. Although the third cause of action incorporates all of allegations of the Complaint, it fails to identify the party liable for the alleged refund, or any theory of liability (*see e.g., Sosa v Joyce Beverages, Inc.*, 138 AD2d 256, 525 NYS2d 607 [1st Dept 1988] [cause of action asserting that each third-party defendant acted in a tortious manner in adhering to a dangerous industry wide safety standard is both legally insufficient as worded to set forth a recognized basis for liability]). It would also appear that a complete refund of all payments to the Trust under which plaintiffs did derive a benefit, in the absence of any legal authority to support such relief, would be unwarranted. Therefore, leave to replead this cause of action is denied.

Consolidation

CPLR 602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact (*Progressive Ins. Co. v Vasquez*, 10 AD3d 518, 782 NYS2d 21 [1st Dept 2004]). There is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right (*Progressive Ins. Co. v Vasquez*, 10 AD3d 518 *citing Raboy v McCrory Corp.*, 210 AD2d 145, 147, 621 NYS2d 14).

Consolidation of this action with the Dutchess County action is unwarranted. The two actions do not present sufficiently similar common questions of law and fact, consolidation would be prejudicial to the Individual Trustees herein, and the identities of the parties are significantly different from one another.

Although both actions result from CRM's alleged mismanagement of its duties, this action contains causes of action different from those asserted in the Dutchess County action. Plaintiffs herein seek a declaratory judgment that they are duly terminated members of the Trust herein, and have no further liability thereunder. Even though the Trust itself is one of the many defendants in the Dutchess County action, the plaintiffs herein are *not* parties to the Dutchess County Action. Further, plaintiffs herein potentially seek claims against the individual officers of CRM, who are not parties in the Dutchess County action. CRM, one of the defendants herein, is the *plaintiff* in the Dutchess County action, which seeks a finding of nonliability under to the Trust under breach of contract and deceptive business practices allegations by the Board, which are not alleged in this action. Further, the discovery anticipated in the Dutchess County action among the eight defendants in the Dutchess County action will unduly delay the prosecution of this action.

Therefore, the branch of the motion seeking consolidation is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion to dismiss the Complaint as asserted against the moving defendants is granted to the extent that the first cause of action for declaratory relief as

asserted against CRM is dismissed, the second cause of action for breach of fiduciary duty is dismissed, with leave to replead this claim within 30 days of service of this order with notice of entry, and the third cause of action for a refund is dismissed; and it is further

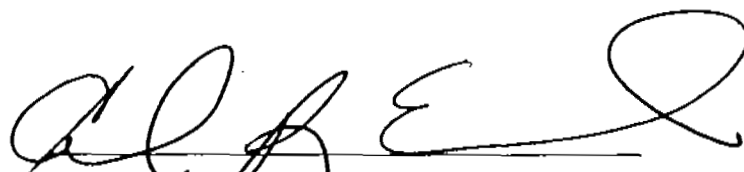
ORDERED that the branch of the motion to consolidate is denied; and it is further

ORDERED that the parties appear for a preliminary conference on November 24, 2009, 2:15 p.m.; and it is further

ORDERED that the moving defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 21, 2009



Hon. Carol Robinson Edmead, J.S.C.

FILED
AUG 26 2009
COUNTY CLERK'S OFFICE
NEW YORK