

Borgia v SCO Family of Servs.
2021 NY Slip Op 32335(U)
September 23, 2021
Supreme Court, Kings County
Docket Number: Index No. 523734/2019
Judge: Devin P. Cohen
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**Supreme Court of the State of New York
County of Kings**

Index Number 523734/2019
SEQ #001, 003 & 004

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

JOHN BORGIA, BRIAN COSGROVE,
REVEREND FRANK HUGHES, REVEREND
PATRICK KEATING, REVEREND THOMAS
LEACH AND MARTIN MCMANUS, IN THEIR
CAPACITY AS TRUSTEES OF THE ROMAN
CATHOLIC DIOCESE OF BROOKLYN
WORKERS' COMPENSATION TRUST,

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1-3</u>
Order to Show Cause and Affidavits Annexed...	<u> </u>
Answering Affidavits.....	<u>2, 4, 5</u>
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Other	<u> </u>

Petitioners,

For an Order Pursuant to Article 76 of the CPLR
to Determine a Controversy Pursuant to an
Agreement

against

SCO FAMILY OF SERVICES,

Respondent.

Upon the foregoing papers, the petition (Seq. 001) of petitioners John Borgia, Brian Cosgrove, Reverend Frank Hughes, Reverend Patrick Keating, Reverend Thomas Leach, and Martin McManus, in their Capacity as Trustees of the Roman Catholic Diocese of Brooklyn Workers' Compensation Trust (the "Trust"), respondent SCO Family of Services' ("SCO") motion to amend its answer (Seq. 003), and petitioners' motion to strike certain affirmative defenses (Seq. 004), are decided as follows:

Introduction and Procedural History

As set forth in the petition, the Trust provided workers' compensation coverage to its members from July 2006 through August 2008. The petitioner further states as follows: The Trust is managed by the Roman Catholic Diocese of Brooklyn (petition at ¶ 1). Pursuant to a

Participation Agreement, between the Trust and SCO, SCO was a member of the Trust from June 2006 through December 2007 pursuant to a written agreement called a Participation Agreement (*id.* at ¶ 2). The Trust ceased providing workers' compensation insurance after December 31, 2008 (*id.* at ¶ 6).

Pursuant to the Participation Agreement and the Trust's By-Laws, a member of the Trust is jointly and severally liable for all workers' compensation obligations of all Trust members during the period that member participated in the Trust (*id.* at ¶ 4). The By-Laws further state that members may be charged assessments to meet the Trust's liabilities (*id.* at ¶ 5).

In 2010, the Trust determined that its estimated liabilities were greater than its assets in the amount of \$14.8 million (*id.* at ¶ 6). The Trust assessed its members, including SCO, for their share of this \$14.8 million deficit in order to maintain its reserves (*id.* at ¶¶ 5, 6). SCO paid a portion of this assessment (*id.* at ¶ 7). When a dispute arose about any further payment, the Trust demanded that SCO participate in the dispute resolution procedure set forth in the Trust's by-laws, but SCO refused (*id.* at ¶¶ 8–14). The Trust commenced this special proceeding for an order declaring that SCO must participate in the said dispute resolution procedure (*id.* at ¶ 15).

SCO moved to dismiss the action as improperly brought under Article 76 of the CPLR, and pursuant to CPLR 3211. By order, dated October 2, 2020, this court denied the motion and directed SCO to answer the petition. SCO filed its answer and counterclaim on December 4, 2020. Petitioners filed their answer to SCO's counterclaim on December 23, 2020. The court heard argument on the petition, SCO's counterclaim and petitioners' answer to the counterclaim on January 6, 2021. Subsequently, on January 12, 2021, petitioners filed an amended answer to SCO's counterclaim. SCO now seeks to amend its answer to respond to the new information in

petitioners' amended counterclaim. Petitioners move to strike certain affirmative defenses in SCO's answer and amended answer.

Analysis

"In a special proceeding, ... '[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' " (*Matter of FR Holdings, FLP v Homapour*, 154 AD3d 936, 938 [2d Dept 2017], quoting CPLR 409 [b]). Following argument on the pleadings, petitioner amended its answer to SCO's counterclaim. In response, SCO moved to amend its answer, and petitioners moved to strike certain affirmative defenses.

These subsequent pleadings and motions arguably are outside the bounds of the papers contemplated by CPLR 409. That said, the issues raised in this proceeding are complex. These issues include: whether the Trust is a GSIT in run-off or terminated altogether; whether the Trust properly incurred this deficit as a result of a loss portfolio transfer; and the amount SCO potentially owes to the trust. With each subsequent filing, the parties developed and responded to arguments each posed by the other. The court finds that, although these submissions are arguably impermissible, they were helpful to the parties and the court to address the full scope of the dispute. In consideration of the liberal standard for permitting amendment to a pleading, and in further consideration of the complexity of this case, the court will accept petitioners' amended answer filed after argument, SCO's motion to amend, and petitioner's cross-motion to strike (*U.S. Bank Tr., N.A. v Carter*, 164 AD3d 539, 541 [2d Dept 2018] [Amendment of an answer to include a defense should be liberally granted absent prejudice or surprise and unless the proposed amendment is without merit]). Likewise, because SCO amended its answer to counterclaims

after oral argument on the pleadings, SCO's motion to amend its own answer is granted.

In addition to the substantive issues set forth above, SCO argues that petitioners' claim is barred by the statute of limitations. Petitioners do not respond to this argument in any of their papers. Pursuant to CPLR 7503(b), a party may move to avert arbitration if the "claim sought to be arbitrated is barred by the statute of limitations" (*Jewish Ctr. of Forest Hills W., Inc. v Goldberg*, 160 AD3d 644, 645-46 [2d Dept 2018]). Although this proceeding is brought pursuant to Article 76 of the CPLR, and not Article 75, both Articles address alternative dispute resolution. It is the policy of the State of New York that, even when parties agree to alternative dispute resolution, "threshold Statute of Limitations questions are for the courts" (*Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 253 [2005], citing *Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 202 [1995]).

Petitioners' claim for unpaid assessment is a breach of contract action. According to petitioners, SCO agreed to pay the assessments pursuant to the Participation Agreement and Trust By-Laws, which are incorporated into the Participation Agreement (petition at ¶¶ 4-5). The state of limitations for a breach of contract action is six years from the date the claim accrued (*Azulay v Malul*, 194 AD3d 680 [2d Dept 2021]). The claim accrues when the breach occurs (*id.*).

In this case, petitioners assessed SCO the amount of \$3,452,803.00 by invoice dated April 21, 2010 (SCO's amended answer at ¶ 7 and Exhibit D annexed thereto). Thereafter, by letter, dated August 19, 2010, petitioners advised SCO that SCO would have five years to pay the full amount, with the first installment of 20% (\$690,561.00) due on July 1, 2010, and each yearly installment due on July 1st of the following year (SCO's amended answer at ¶ 7 and Exhibit F

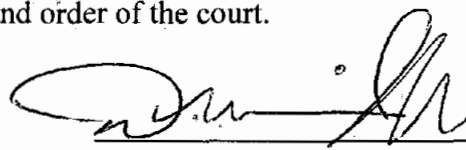
annexed thereto) SCO made the following payments: \$276,206 on or about June 13, 2011; \$414,355 on or about June 30, 2011; and \$300,000 at some point in 2014 (SCO's amended answer at ¶ 7). Thus, SCO paid the first installment but not the second, and was in breach as of July 1, 2012.¹ Six years from July 1, 2012 is July 1, 2018. Petitioners commenced this action on October 30, 2019. Accordingly, SCO has shown that petitioners' claim is time-barred.

Petitioners submit no counter-argument to SCO's statute of limitations defense. The court notes that a statute may be tolled by partial payment, but only if the debtor acknowledges the debt (*Cognetta v Valencia Developers, Inc.*, 8 AD3d 318, 320 [2d Dept 2004]; *Erdheim v Gelfman*, 303 AD2d 714, 714-15 [2d Dept 2003]). SCO contends that, while it paid \$300,000 in 2014, it also objected to the assessment (SCO's amended answer at ¶ 7). Accordingly, there is no evidence that the partial payment tolled the statutory period.

In the absence of any counter-argument from petitioners, the court finds that petitioners' claim for failure to pay the assessment is barred by the statute of limitations. Although this court grants petitioners' motion to amend (Seq. 003), the petition itself is denied (Seq. 001) and this action is dismissed. Petitioners' motion to strike (Seq. 004) is denied as moot.

This constitutes the decision and order of the court.

September 23, 2021
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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KINGS COUNTY CLERK
FILED

¹ SCO notes that, pursuant to 12 NYCRR 317.8(a), petitioners could have extended payment of the assessment for one year only. No matter whether the full amount was due in 2012, or pursuant to the five-year plan proposed by petitioners, the breach occurred at essentially the same time.