NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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ROBERT L. PRITSKER,

Plaintiff,

Index No. 155269/2017
DECISION AND ORDER

- against-

OPPENHEIMER ACQUISITION CORP., TREMONT PARTNERS, INC., and TREMONT INTERNATIONAL INSURANCE FUND, L.P.,

Defendants.

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GERALD LEBOVITS, J.S.C.:

Plaintiff Robert L. Pritsker (Pritsker), a resident of Weston, Connecticut, brings this action to recover damages related to an investment (the Investment) of $586,000 in limited partnerships in which the general partner was defendant Tremont International Insurance Fund, L.P., a former Madoff feeder fund based in Rye, New York. The Investment comprised a portion of the excess cash value of Pritsker's variable life annuity (the Annuity), which was underwritten by nonparty American General Insurance Co. (American General). The limited partner was American General and not Pritsker, because the "investor control doctrine" required that the policyholder have no contact with the general partner, here Tremont International (complaint, ¶¶ 31-33). [1]

Pritsker alleges that by August 2012, the Annuity had received restitution, of all but $102,788 (the Remaining Balance), after Tremont International's settlement with the Madoff trustee (complaint ¶¶ 54-56).

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[1] Under the investor control doctrine, which is applicable to variable life policies such as the Annuity, is "a type of life insurance that, in essence, permits the policyholder to engage in some degree of investment activity while enjoying the tax advantages afforded a life insurance policy. On one hand, this policy allows the policyholder to direct, among the options provided by the Insurance carrier, how the funds paid into that account are to be invested. The proceeds from those investments are paid out through the policy's eventual death benefit and also, in the meantime, may be borrowed against and used to fund the policy premiums and other ongoing policy expenses. On the other hand, however, this arrangement is structured such that the assets held in the policy are considered to be those of the insurance carrier and not of the policyholder. This ensures that the transactions carried on within the [variable life insurance] benefit from the relatively generous tax advantages afforded life insurance benefits" (*In re Tremont Securities Law, State Law, & Ins. Litigation*, 2013 WL 2257053, at *1, 2013 US DIST LEXIS 23638 * 13 [SDNY, May 23, 2013, Nos. 08-CV - 1117, 11 CV 1687]).

Defendants Oppenheimer Acquisition Corp. (Oppenheimer Acquisition), Tremont Partners, Inc. (Tremont Partners), and Tremont International move to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (3), (5), and (7), on the grounds of documentary evidence, lack of standing, untimeliness, and failure to state a cause of action.

In determining a CPLR 3211 (a) motion for failure to state a cause of action, 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 within any cognizable legal theory"

(*Leon v Martinez*, 84 NY2d 83, 87–88 [1987]).

A CPLR 3211 (a) (1) motion to dismiss grounded upon documentary evidence will be granted only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" *(Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]).

The complaint alleges that Tremont International is a fund of funds offered under the umbrella of nonparty Tremont Group Holdings, Inc. (Tremont Group), a Delaware corporation that terminated its status as a corporation on January 5, 2017, and is listed as "inactive" in the database of the New York Attorney General, indicating that it no longer does business in New York (complaint ¶ 3 fn 1).

In an unrelated, similar action involving many of the same parties as defendants, Justice Kornreich stated that Oppenheimer Acquisition is owned by a subsidiary of Massachusetts Mutual Life Insurance Co., and that nonparty Tremont Group Holdings, Inc. (TGH) is a wholly-owned subsidiary of Oppenheimer Acquisition. Tremont Partners is a subsidiary of Tremont Group Holdings (*see SSR II, LLC v John Hancock Life Ins. Co. (U.S.A.),* 37 Misc 3d 1204 [A], *1, 2012 NY Slip Op 51880 [U], *1[Sup Ct, NY County 2012]).

Pritsker's claim is that it was improper for Tremont International not to return the Remaining Balance because the Investment was made after December 31, 2007, the deadline for the clawback by the Madoff trustee; documentary evidence shows that at no time after the Investment did Tremont International have any investments in limited partnerships with Madoff exposure. The complaint alleges that Tremont International either improperly applied the remaining balance to the clawback or converted the funds. Pritsker states that he first learned that he did not have Madoff exposure when his claim was denied by the Madoff Victim Fund.[2]

[2] Pritsker states that the Madoff Victim Fund, which is part of the United States Department of Justice, informed him on December 13, 2016, that he was not entitled to restitution as an indirect investor in Maddoff investments, because any restitution had to come from funds assembled by trustee Picard as a result of setting aside fraudulent transfers, and that, because American General made the investment after December 31, 2007, the funds invested by American General on behalf of Pritsker could not be reached by trustee Picard as part of the clawback (Complaint, ¶¶ 5-8).

According to a March 31, 2009 account statement from Tremont International, that was forwarded to Pritsker by American General, Tremont International was setting aside a reserve of $11,740 from Pritsker's balance to begin preparation for the Madoff clawback (complaint, ¶ 35). On November 30, 2009, nonparty Tremont Group Holdings, in a letter forwarded to Pritzker by American General, stated that Trustee Picard

> "and his legal team had . . . asked that all Tremont funds of funds with Madoff exposure having assets that remain to be distributed not make any further distribution pending completion of their review and analysis"

(*id.*, ¶ 39).

Pritsker argues that the letters forwarded to him by American General led him to believe that he had Madoff exposure beyond the $11,740 initial reserve, which was false, and that Pritsker had no way of knowing that it was false (complaint, ¶ 45). Pritsker states that Tremont International stopped making distributions to him after June 30, 2009.

The complaint contains three causes of action: fraud, constructive fraud, and fraudulent conversion. The fraud cause of action alleges that defendants knew the date of Pritsker's investment, and knew that his funds were not subject to clawback. It alleges that defendants misled Pritsker into believing that he had Madoff exposure and that some of his balances would have to be diverted to the settlement.

The constructive fraud cause of action provides that, in the event that defendants deny actual knowledge that Pritsker's investment was not subject to clawback, they nevertheless owed a fiduciary duty to Pritsker as a third-party beneficiary of the fiduciary duty that Tremont International allegedly owed to its limited partner, American General. The constructive fraud cause of action asserts that defendants were required to disclose the truth to Pritsker and not allow him to be misled. The third cause of action alleges that Pritsker's funds were fraudulently converted by defendants.

A properly pleaded cause of action for fraud must allege each of the following elements with particularity, and with allegations of fact in support of each element: a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and resulting damages (*House of Spices (India), Inc. v SMJ Servs., Inc.*, 103 AD3d 848, 850–51 [2d Dept 2013] [citations omitted]).

To plead fraud sufficiently, each element of the fraud claim "must be supported by factual allegations containing the details constituting the wrong" (CPLR 3016 [b]; *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278 [2d Dept 2001]).

The fraud causes of action are insufficiently pleaded. The most obvious ground is lack of causation. Being misled could not have caused Pritsker's loss, which first occurred when Tremont International allegedly improperly took the $11,740 reserve as revealed in the July 2009 statement. The complaint does not adequately plead facts in support of a misrepresentation of fact knowingly made to Pritsker by any defendant, with knowledge of its falsity, and intent to deceive. American General is not a defendant. The complaint does not state that any factual statement in the letters or statements forwarded to him are false, only that Pritsker found them misleading because of the timing of the Investment. Therefore, the first cause of action is dismissed as against all defendants.

In the second cause of action, Pritsker alleges that he is a third-party beneficiary of the fiduciary duty owed by the Tremont International Fund, as general partner, to American General, as limited partner. Pritsker alleges that this alleged duty imposes upon Tremont International a duty to disclose to him that he did not have Madoff exposure. Courts have consistently held that there is no fiduciary duty owed by the fund to the carrier in this context. In *SSR II*, which also involved the investment of excess cash value of a variable life policy, the court held that the relationship of the policyholder to the Madoff feeder fund "is best characterized as a client of a client [citation omitted]," and that there was no fiduciary or otherwise elevated duty between the fund and the policyholder. (37 Misc 3d 1204 [A], *7, 2012 NY Slip Op 51880 [U], *7).

Pritsker previously brought a similar action in Connecticut state court, that was removed to federal court, involving another investment of a portion of the excess cash value of his American General variable life insurance policy in a Madoff-related hedge fund (*see Pritsker v American General Life Ins. Co.*, 2016 WL 3747507, 2016 US DIST LEXIS 89104 (D Conn, July 11, 2016), *affd* No. 3:15-CV-846 [SPV] 690 F Appx 770 [2d Cir 2017]. That case involved alleged breaches of duty related to similar investments of excess cash value in limited partnerships in Madoff feeder funds offered by entities other than Tremont. The court held that American General did not owe any fiduciary or heightened duty to Pritsker. There, as here, the only privity of contract that existed was between Pritsker and American General. This court holds that none of the defendants owes Pritsker a fiduciary duty. There is no privity of contract between Pritsker and any defendant.

The court adopts the finding of the district court in the case cited above that American General, in substantially identical circumstances, the sponsored fund did not owe Pritsker any duty to act, much less a fiduciary duty:

> "Pritsker has not shown [that American General] had any duty to act, nor that those alleged failures within the limitations periods contributed to his harm. And for reasons that I explained on the record when I granted the motion to dismiss, Pritsker's argument that [American General] owed him a fiduciary duty would impose such duties in all manner of commercial transactions where there are none . . ."

(*id.*, 2016 WL 3747527, at * 2, 2016 US DIST Lexis 89104, at * 5).

Therefore, the second cause of action is dismissed for failure to state a cause of action against all defendants.

This action differs from most Madoff related cases in that it does not involve either the decision to invest in Madoff limited partnerships, or losses sustained as a result of Madoff exposure. This is a simple conversion case against Tremont International.

With respect to the third cause of action, no allegations are made in the complaint of any actions taken by either Oppenheimer Acquisition or Tremont Partners. Mere ownership is an insufficient predicate for imposing liability. "[A] corporation may not be held liable for the actions of another company merely because it has an ownership interest in it" (SSR II, 37 Misc 3d 1204 [A], *13, 2012 NY Slip Op 51880 [U] at *13), citing *Maung Ng We v Merrill Lynch & Co.*, 2000 WL 1159835, at *3 [SD NY 2000]).

As to the remaining defendant, Tremont International, to the extent it remains a viable entity or has any assets, both of which are doubtful, the complaint is dismissed as untimely.

Pritsker commenced this action by filing on June 8, 2017, alleging that he learned on December 31, 2016, that defendants had deceived him for eight years about the status of his Investment.

As a nonresident suing on a cause of action accruing in Connecticut, Pritsker must satisfy the limitation periods of both New York and Connecticut (*see Antone v General Motors Corp.*, 64 NY2d 20, 27-28 [1984]). Because the third cause of action is untimely under New York law, it is unnecessary to consider its timeliness under Connecticut law.

New York applies a three-year statute of limitations to actions sounding in conversion, measured from the date when the plaintiff could first bring an action (CPLR 214 [3]).

To state a cause of action for conversion, a pleading must allege that the defendant

> "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's right. Money, if specifically identifiable, may be the subject of a conversion action" [internal quotation marks and citations omitted]"

(*Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017]).

Conversion is a tort against property. A cause of action for conversion accrues for timeliness purposes at the time and place where the plaintiff first had the right to bring the cause of action. Generally, it does not accrue upon discovery (*see State of New York v Seventh Regiment Fund*, 98 NY2d 249, 261 [2002]; 1 Weinstein–Korn–Miller, NY Civ Prac ¶ 202.04, at 2-61).

The conversion cause of action accrued on March 31, 2009, when the reserve of $11,740 was taken to prepare for the Madoff clawback. Pritsker has not pleaded any facts that would raise an issue of whether the statute of limitations is tolled.

Accordingly, it is

ORDERED that the motion of defendants to dismiss this action is granted; and it is further

ORDERED that defendants must serve a copy of this decision and order on all parties and on the County Clerk's Office, which is directed to enter judgment of dismissal, with costs and disbursements, upon presentment of an appropriate bill of costs.

Dated: April 20, 2018

J. S. C.
HON. GERALD LEBOVITS
J.S.C.