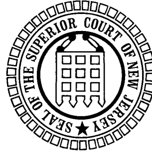
SUPERIOR COURT OF NEW JERSEY

CIVIL DIVISION
ESSEX VICINAGE

Chambers of
James S. Rothschild, Jr., J.S.C.



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Re: Bar-David v. Pension Strategies et al.
Docket No. ESX-L-6811-13

Dear Counsel:

Plaintiffs Dani Bar-David, Michal Bar-David and their company, Octal Corporation have brought the above action against various defendants, alleging numerous claims in connection with the creation of a 412(i)[1] Pension Plan (the "Plan"). The court has before it two motions to dismiss the complaint: one filed by defendant Amir Abramov ("Abramov") and one filed by defendant Pension Strategies, LLC ("Pension Strategies"). The relevant facts are as follows.

[1] "412(i)" refers to the IRS section that regulates the creation of such plans.

Abramov handled the majority of plaintiff Dani Bar-David's insurance needs along with some retirement and investment needs. Plaintiffs assert that Abramov suggested that the plaintiffs meet with Arthur D. Shankman, who allegedly held himself out as an expert in 412(i) defined pension plans.[2] According to the Complaint, in 2003, Abramov, along with Shankman, urged Dani Bar-David and Octal Corporation to participate in an insurance policy. The purpose of the insurance policy was to fund a 412(i) defined pension plan for plaintiff Octal Corporation. The Plan was implemented on November 17, 2003.[3] Plaintiffs invested $200,359 in 2003, and again in 2004, 2005, 2006, and 2007 for a total of $1,001,795.00 in investments. The plaintiffs assert that Shankman, Abramov, and David Burke, a current employee of Pension Strategies, made misrepresentations that induced the plaintiffs to purchase the policy and create the Plan.

Defendant Pension Strategies was formed in October of 2003, and was hired by the plaintiffs to be the third party administrator of the Plan.[4] The plaintiffs allege that Pension Strategies knew or should have known that the Plan was defective when it was adopted, and that the deductions that the plaintiffs claimed on the Octal Corporation tax return would be disallowed. Plaintiffs assert that Pension Strategies should have advised the plaintiffs that Octal Corporation was required to file certain forms with its corporate tax return and that the failure to

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[2] Subsequent to the filing of these motions, the Shankman defendants (including Arthur D. Shankman and Arthur D. Shankman & Co.) settled with the plaintiffs. Their pending motion to dismiss has therefore been denied as moot.

[3] While the court recognizes that the date of the Plan's implementation is disputed by some defendants - - Pension Strategies asserts that it was implemented earlier, in September 2003 - - the exact date is not relevant to the court's reasoning herein.

[4] In its brief, it asserts that:

> A third party administrator is the entity that annually reviews the plan funding formula and employee census information to ensure that the plan covers the correct employees as participants; determines the correctness of the contribution required by the funding formula of the plan; determines which participants are vested and the amount thereof; calculates the amount to which a participant is entitled upon termination or retirement; compiles information as to plan investments; and prepares, for the plan sponsor, the requisite forms that must be filed with the appropriate government agencies. Third party administrators do not file the income tax returns of the plan's corporate sponsor.

Br. in Supp. of Pension Strategies' Mot. to Dismiss, 2 n.4 (hereinafter "Pension Strategies Br.").

do so would result in penalties.

In 2004, one year after plaintiffs purchased the Plan, the IRS adopted regulations that increased government scrutiny on 412(i) plans and deemed the plans abusive tax shelters. Plaintiffs were audited by the IRS in 2007, and various damages ensued thereafter. More specifically, the Complaint alleges:

> The IRS made the following assessment against Plaintiffs: 1) back taxes against Dani and Michal Bar-David for 2006 and 2007 in the amount of $119,361.00; 2) accuracy-related penalties against Dani and Michal Bar-David for 2006 and 2007 in the amount of $21,786.00; 3) interest against Dani and Michal Bar-David for 2006 and 2007 in the amount of $22,254.00; 4) 6707A [penalties] against Octal Corporation for 2006 and 2007 in the amount of $20,000.00; and 6) excise taxes against Octal Corporation for 2006 and 2007 in the amount of $78,638.00.

Compl. ¶ 23. The Complaint also asserts that "Plaintiffs also suffered losses as a result of having to retain tax counsel and pay in excess of $57,500.00 in attorney and $8,974.00 in actuarial fees to terminate their 412(i) Plan." Compl. ¶ 54.

Plaintiffs have pled allegations of fraud, negligent misrepresentation, breach of fiduciary duty, negligence, unjust enrichment, money had and received, violation of the Consumer Fraud Act, violation of New Jersey Civil RICO, breach of contract, and breach of the duty of good faith and fair dealing against all of the defendants.

Plaintiffs filed the present action on August 29, 2013. Pension Strategies removed the action to federal court on October 3, 2013, asserting that the Employee Retirement Income Security Act of 1974 ("ERISA") preempts the plaintiffs' state law claims and that federal tax questions are raised by the complaint. The plaintiffs then made a motion to remand the proceedings to the state level. United States District Court Judge Kevin McNulty remanded the action back to the Superior Court in an order dated September 22, 2014.

Judge McNulty noted in his September 22 opinion that "The Third Circuit [has] analyzed

ERISA's objectives and explained that pre-plan fraudulent inducement claims are not the sorts of issues ERISA was meant to preempt." Bar-David v. Economic Concepts, Inc. et al., Civ. No. 2:13-5885 at 7 (D.N.J., Sept. 22, 2014). Judge McNulty went on to reason that:

> In this case, Bar-David's claims rest on misrepresentations and omissions made about the Plan before it existed. Although Bar-David also claims that misrepresentations continued after the Plan was in place, these allegations relate to the Plan's status under federal tax law, rather than the Plan's "actual administration." Bar-David is not suing as a beneficiary of an ERISA plan and does not seek to enforce any rights under any potential ERISA plan.
>
> Instead, Bar-David seeks to enforce duties that Defendants allegedly owe based on attorney-client and fiduciary relationships that existed outside of the Plan. For example, Bar-David claims that Defendants fraudulently misrepresented the tax advantages of the Plan; negligently made false representations in "selling an investment" to Bar-David; breached pre-Plan fiduciary duties by failing to disclose conflicts of interest before fiving financial advice; acted as negligent insurance and financial advisors in recommending the Plan; and violated the New Jersey Consumer Fraud and RICO Acts. All of these claims relate to pre-investment fraud of the type the Third Circuit explicitly stated did not concern ERISA.
>
> Because ERISA's objectives do not extend to the sort of pre-investment fraud Bar-David alleges in the Complaint, ERISA preemption is not appropriate in this case.

Id. at 8 (internal citations omitted).

A. Standard of Review

The standard of review for granting a Motion to Dismiss under Rule 4:6-2(e) requires the court to "examine[e] the legal sufficiency of the facts alleged on the face of the complaint" in a searching manner that is "generous and hospitable." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). When appropriate, the court "must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005), cert. den., 185 N.J. 297 (2005). The court's The test is "whether a cause of action is 'suggested' by the facts. 116 N.J. at 746. "The [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. . . .

For purposes of analysis plaintiffs are entitled to every reasonable inference of fact." Id. (internal citation omitted). When reviewing a motion to dismiss under Rule 4:6-2(e), the court will consider only "allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Printing, 116 N.J. at 746.

B. Abramov's Motion to Dismiss

Abramov raises three arguments as to why the plaintiffs' Complaint should be dismissed. First, Abramov asserts that the Complaint must be dismissed because "there are not alleged misrepresentations or omissions relating to any existing fact or law." Abramov's Br. in Supp. Mot to Dismiss, 5 (hereinafter "Abramov's Br."). Second, Abramov asserts that "Plaintiffs' claims are time-barred pursuant to the applicable statutes of limitations." Id. at 12. Finally, Abramov argues that plaintiffs' claims must also be dismissed as "plaintiffs fail to state a claim against Abramov." Id. at 14. The court will address each of these arguments in turn.

1. Judicial Estoppel

Abramov's argument that plaintiffs' Complaint contains no alleged misrepresentations or omissions relating to existing fact or law contains within it the argument that the plaintiffs are judicially estopped from bringing any claims regarding statements or omissions that occurred subsequent to the Plan's implementation. More specifically, Abramov argues that the plaintiffs represented to both the federal magistrate judge and the district judge in regard to their motion to remand that "the action relates solely to pre-investment misrepresentations and omissions by Defendants." Abramov's Br. at 5. Abramov therefore asserts that because plaintiffs have limited their claims to those misrepresentations occurring before November 17, 2003, and because the IRS did not issue regulations or procedures relating to 412(i) plans until February 13, 2004, the representations could not have been falsely made because "such predates the subject IRS rules

and were merely non-actionable opinion." Id.

Plaintiffs counter that, contrary to what the defendants allege, they "do not merely complain of the misrepresentations and omissions that caused Plaintiffs to contribute $200,359.00 in 2003. Plaintiffs also complain of the ongoing misrepresentations and omissions year after year that resulted in Plaintiffs contributing $200,359.00 each year for 2004, 2005, 2006, and 2007." Pls.' Opp. to Abramov's Mot. to Dismiss, 6 (hereinafter "Pls.' Opp to Abramov").

The court has reviewed the transcript of the motion to remand argument before the Honorable Madeline Cox Arleo, United States Magistrate Judge for the District of New Jersey, on February 19, 2014. At that hearing, the plaintiffs asserted, as they do before this court, that "there was continuing misrepresentation throughout the years." Hearing Tr. 27:19-20, Feb. 19, 2014. Judge Arleo asked plaintiffs to address this issue specifically. Id. She then created a Report and Recommendation recommending that the plaintiffs' motion to remand be granted, finding that ERISA preemption did not apply. Defendants Pension Strategies and Shankman objected, arguing that Judge Arleo's ERISA analysis was flawed. However, as quoted above, Judge McNulty both agreed with and upheld Judge Arleo's decision. Judge McNulty also specifically addressed the fact that not all of the misrepresentations occurred before the implementation of the Plan, noting that:

> In this case, Bar-David's claims rest on misrepresentations and omissions made about the Plan before it existed. **Although Bar-David also claims that misrepresentations continued after the Plan was in place, these allegations relate to the Plan's status under federal tax law, rather than the Plan's "actual administration."** Bar-David is not suing as a beneficiary of an ERISA plan and does not seek to enforce any rights under any potential ERISA plan.

Bar-David v. Economic Concepts, Inc. et al., Civ. No. 2:13-5885 at 7 (D.N.J., Sept. 22, 2014).

Thus, both Judge Arleo and Judge McNulty were aware that the plaintiffs were asserting the existence of misrepresentations and omissions **after** the Plans' implementation in 2003 and **after** the IRS issued new regulations regarding 412(i) plans in 2004. Nonetheless, both judges agreed that ERISA did not preempt these claims and that they would be best dealt with at the state level.

While the defendants urge the court to view Judge McNulty's opinion to narrowly rely on the plaintiffs' assertion that their claims are based solely on pre-investment misrepresentations, a more holistic reading of his analysis, when coupled with the dialogue that occurred at oral argument before Judge Arleo, leads to the conclusion that the plaintiffs are not judicially estopped from also complaining of the ongoing misrepresentations and omissions for years after the creation of the Plan. Plaintiffs, therefore, are **not** judicially estopped from bringing these claims, and the court will read and analyze the complaint accordingly.

Abramov relies on three cases to argue that the plaintiffs' claims fail as they do not relate to any existing law or fact: Patel v. Pacific Life Ins. Co., No. 3:08-CV-0249-B, 2009 U.S. Dist. LEXIS 44105 (N.D. Tex., May 22, 2009), Brakke v. Economic Concepts, Inc., 213 Cal. App. 4th 761 (Cal. Ct. App. 2013), and Berry v. Indianapolis Life Ins. Co., 638 F. Supp. 2d 732 (N.D. Tex. 2009).

In Patel, the plaintiff complained of alleged negligent misrepresentations regarding the implementation of a 412(i) pension plan funded by life insurance policies. The plan was implemented in 2003. The court dismissed the plaintiffs' negligent misrepresentation claims, finding that:

> Those opinions as to future events [are] non-actionable as the basis for a fraud claim under these circumstances. Each statement allegedly made by Cushner is a statement regarding federal income tax law or policy, including the policies of a third party government agency—the IRS. As a matter of law, any representation or prediction by any alleged Pacific Life agent as to how the IRS would treat the

> 412(i) plans, and the funding thereof, in the future is either an non-actionable opinion or was unjustifiably relied upon.

2009 U.S. Dist. LEXIS 44105 at *42. The defendants rely on Patel to argue that the plaintiffs should be precluded from asserting any claims based on alleged misrepresentations occurring before the IRS regulations were promulgated in 2004. The plaintiffs, however, assert that they have "sufficiently demonstrated why their 412(i) Plan, from its very inception, was NOT a valid and compliant 412(i) plan and why any representation to the contrary was false at the time it was made." Pls.' Opp. to Abramov, 8 (emphasis in original). These allegations include:

> a. Failure to include individuals who are employees or members of a controlled group of corporations—and therefore failure to adhere to minimum participation requirements and rules prohibiting discrimination in favor of highly compensated employees [Code §§ 401(a)(3), 401(a)(4), 414];
>
> b. Discrimination in benefits, rights and features in violation of Code section 401(a)(40 because non-highly compensated employees do not have life insurance they only have annuities funding benefits;
>
> c. Failure to fund the Plan within maximum funding and contribution limitations set by Code sections 404, 412, and 415 because the accelerated cost structions of the life insurance policies results in the making and deduction of excess contributions;
>
> d. Failure to follow the Code provisions applicable to Code section 412(i) (now Code section 412(e)(3)) which requires level contributions and that proceeds from annuities and insurance match the benfit value at normal retirement age; and
>
> e. Failure to follow the incidental death benefit limitations as stated in relevant Revenue Rulings.

Id. at 8-9. Because the plaintiffs here are relying on more than just the 2004 IRS publications, this case is distinguishable from that of Patel, and the plaintiffs' pre-investment claims will survive the liberal pleadings standard applied on a motion to dismiss.

Plaintiffs' Complaint is also distinguishable from that in Brakke v. Economic Concepts, Inc. In Brakke, a situation very similar to that which occurred in both this case and Patel

occurred. The plaintiffs invested in a 412(i) plan prior to the IRS' 2004 publications, and brought suit against various entities for allegedly making misrepresentations regarding their investments. The Appellate Division of California concluded that the plaintiffs failed to adequately plead their case:

> All of the causes of action are based on Defendant's alleged misrepresentations made in 2002 and 2003 concerning the tax consequences of the . . . [P]lan, and it was not until 2004 that the IRS issued revenue rulings and proposed regulations under which plan was declared unlawful. . . . Plaintiffs have not shown how they can amend to sho that the representations made by the Defendants were misrepresentations, or how, even if the representations could be considered representations of fact and not mere future predictions, Plaintiffs could have reasonably relied on them.

213 Cal. App. 4th at 766. Once more, for the reasons stated above, the plaintiffs' cause of action here is distinguishable from that in Brakke. Firstly, the plaintiffs complain of misrepresentations and omissions that occurred after the 2004 IRS rulings. Moreover, the plaintiffs have adequately pled that their pre-investment causes of action rest upon materials **other than** these 2004 IRS documents.

The defendants also rely on Berry to argue that the plaintiffs' pre-implementation claims cannot stand as they rely solely on opinion. Once more, in Berry, the plaintiffs' claims were based on misrepresentations and omissions that occurred prior to the IRS' 2004 rulings, and were dismissed for failing to provide an explanation of exactly what information the defendants allegedly knew and failed to disclose prior to the purchase. 638 F. Supp. 2d at 737. However, for the same reasons noted above, the plaintiffs in this case are claiming misrepresentations that are unrelated to the 2004 IRS rulings.

Moreover, in Tolentino v. Hartford Life and Annuity Ins. Co., No. 2:09-CV-1327 at *1 (D. Nev., March 25, 2010), the United States District Court for the District of Nevada allowed a

similarly pled case to survive a motion to dismiss for failure to state a claim. The court in Tolentino noted that "After the IRS issued a statement in 2005 clarifying the tax liabilities related to such plans, **defendants allegedly continued to misrepresent the consequences of plaintiffs' participation in the plan.** When plaintiffs prepared to buy out the plan in 2008, they were advised for the first time that the IRS had changed their policy on these plans and the buyout was at least $750,000." Id. at *2 (emphasis added). The court permitted the plaintiffs' fraud-related claims to stand, noting that, "[defendants'] alleged misrepresentation continued throughout the five year funding term. Therefore, the pleadings contain the required specificity with respect to fraud claims against [defendants]." Id. at *4. Similarly, here, plaintiffs' have adequately pled that the defendants continued to assert the alleged misrepresentations and omissions throughout the years from 2004 to 2007.

The court therefore finds that 1) the plaintiffs are not estopped from bringing forth their claims based on misrepresentations and omissions occurring after the Plan's implementation and 2) the plaintiffs' claims based on pre-investment misrepresentations have been pled with enough particularity and specificity to survive their generalized comparisons to Patel, Berry, and Brakke by the defendants.

2. Failure to State a Claim Upon Which Relief Can be Granted

When determining whether to dismiss a complaint for failure to state a claim, the courts traditionally utilize a generous standard. Green v. Morgan Properties, 215 N.J. 431 (2013). The "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). The test is "whether a cause of action is 'suggested' by the facts." Id. "A reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action

may be gleaned even from an obscure statement of claim . . .'" Id. (internal quotation omitted).

Abramov's argument that the plaintiffs fail to state a claim against him for fraud and negligent misrepresentation rely on his assertion that the plaintiffs can only allege pre-plan misrepresentations against him. However, because the court has determined that the plaintiffs are not judicially estopped from asserting post-implementation claims against the defendants, these arguments do not stand, and the plaintiffs claims for such are not dismissed.

Abramov further asserts that:

> Plaintiffs' claims for negligence, breach of fiduciary duty, breach of contract, breach of the implied duties of good faith and fair dealing, unjust enrichment, monies had and received, the alleged violation of NJCFA and/or NJ RICO Act fail for the same reasons. None of Plaintiffs' claimed misrepresentations could have been known to be "false" by any of the defendants at the time the alleged misrepresentations were purportedly made since the IRS did not issue any of its rulings about 412(i) plans until 2004, after the subject plan was already put in effect.

Abramov's Br. at 16. Once again, because the plaintiffs' have sufficiently asserted misrepresentations and omissions that occurred after the IRS promulgated the 2004 rulings, the abovementioned causes of action are **not** dismissed for failure to state a claim upon which relief can be granted, with the exception of two, discussed below.

a. New Jersey Consumer Fraud Act ("NJCFA")

However, Abramov also asserts that plaintiffs' claim for violation of the NJCFA fails "because insurance brokers are not subject to claims under the NJCFA as a matter of law." Abramov's Br. at 17. As Abramov notes in his brief, "Members of 'learned professions,' including those who occupy a 'semi-professional status,' engage in 'an activity beyond the pale of the [CFA]." Plemmons v. Blue Chip Ins. Services, Inc., 387 N.J. Super. 551, 565 (App. Div. 2006). Moreover, "insurance brokers are 'semi-professional[s]' who are excluded from liability

under the CFA." Id. In addition, the CFA applies to "goods or services generally sold to the public at large," Prof. Cleaning & Innovative Bldg. Servs. v. Kennedy Funding, Inc., 408 Fed. Appx. 566, 570 (3rd Cir. 2010), and not those "complex arrangements" involved in multifaceted plans that are marketed to a small class of investors, see Cetel v. Kirwan Fin. Grp. Inc., 460 F.3d 494 (3rd Cir. 2006). The court thus agrees with Abramov that 412(i) plans are not the type of transaction covered by the NJCFA.

For these reasons, the NJCFA claims against Abramov are hereby dismissed.

b. New Jersey Civil RICO

As set out below, the New Jersey RICO cause of action is barred by the statute of limitations. Because the parties have brief the issue, however, the court will address the merits as well. For a plaintiff to "establish an entitlement to relief for a violation of N.J. RICO, [it] must prove: 1) the existence of an enterprise; 2) engaged in or conducting activities affecting commerce; 3) in which the defendant was associated; 4) and engaged in the conduct of the enterprise was done through a pattern of racketeering activity." Demodulation, Inc. v. Applied DNA Scis., Inc., 2012 U.S. Dist. LEXIS 175917, at *13 (D.N.J. 2012). Abramov asserts that the plaintiffs have failed to allege the existence of an enterprise and a pattern of racketeering activity with the particularity required when asserting a RICO claim premised on fraud. Abramov's Br. at 19. Plaintiffs' complaint asserts, in relevant part, that:

> 92. The conduct of Defendants, as alleged above, is in violation of N.J.S.A. 2C:41-1, et. seq. ("RICO") in that (a) there was unquestionably an enterprise, (2) that the enterprise engaged in or its acitivies affected trade or commerce, (3) that Defendants were employed by, or were associated with the enterprise, (4) that Defendants participated in the conduct of the affairs of the enterprise, and (5) that Defendants participated through a patters of racketeering activity. The predicate acts of Defendants' enterprise include acts in violation of 18 USCS § 1341 (pertaining to mail fraud).

> 93. Defendants devised this insurance scam to defraud and deprive Plaintiffs of their hard earned money and to unjustly enrich Defendants. Defendants executed the scheme by untilizing the United States Post Office to send Plaintiffs executed plan documents, the insurance policy used to fund the 412(i) Plan, bills and statements for contribution amounts or administrative fees owed as a result of participation in the 412(i) Plan.
>
> 94. Such violations resulted in damages to Plaintiffs. Plaintiffs are therefore entitled to recover their damages, treble damages, costs of suit, and reasonable attorneys' fees.

Compl. ¶ 92-94. The court concurs with Abramov that the have failed to allege a pattern of racketeering activity with the necessary particularity. The Complaint includes misrepresentations made by the defendants in regards to the Octal Corporation 412(i) plan alone. The Complaint does not allege any similar misconduct on the part of the defendants in regard to any other similarly situated individuals or companies.

Accordingly, plaintiffs have failed to state a cognizable claim under NJ RICO, and this claim is therefore dismissed.

3. Statute of Limitations

Abramov next asserts that the plaintiffs' claims are time-barred pursuant to the six-year statute of limitations for the common law fraud claims under N.J.S.A. § 2A:14-1 and the four-year statute of limitations for the NJ RICO claims.

Plaintiffs counter that their claims are preserved by New Jersey's discovery rule. The discovery rule provides that "in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 271 (1973). The limitations period begins to run when a plaintiff knows or should know the facts underlying those elements, not necessarily when a plaintiff learns the legal effect

of those facts." Grunwald v. Bronkesh, 131 N.J. 483, 493 (1993)(internal citation omitted).

The plaintiffs assert that, "The false, misleading or deceptive acts and/or practices related to a variety of complex legal and/or tax issues, which were well beyond the knowledge and understanding of Plaintiffs. Plaintiffs justifiably relied on the advice and expertise of Abramov." Pls.' Opp to Abramov, at 20. Moreover, the plaintiffs assert that their cause of action did not accrue until the plaintiffs suffered damages attributable to the defendants' alleged actions.

The court agrees with plaintiffs that determining the applicability of the discovery rule requires the resolution of many factual assertions, which are often not ripe for determination during the analysis of a motion to dismiss. See Leone v. Aetna Cas. & Sur. Co., 599 F.2d 566, 569 (3d Cir. 1979) ("We stress again that we deal here only with a pleading. We do not imply that a question of fact exists on the question whether conduct of [defendant] has tolled the suit limitation clause. We only hold that the plaintiff must be given an opportunity to attempt to establish a fact question on this issue").

Here, the plaintiffs allege that they did not suffer damages until after the 2006 and 2007 tax years (the 2007 tax year required filing in 2008). Taking the Complaint's allegations as true, as the court must, the plaintiffs have alleged facts sufficient to implicate the discovery rule and the tolling of the statute of limitations. For these reasons (together with the reasons set out on pages 12-13 above), Abramov's motion to dismiss is not granted on statute of limitations grounds, except for the plaintiffs' RICO claim. Even considering the application of the discovery rule, the plaintiffs have failed to bring their RICO claim within the four-year statute of limitations period. For these reasons, the plaintiffs' RICO claim is dismissed.

C. Pension Strategies' Motion to Dismiss

As noted above, Pension Strategies was the third party administrator ("TPA") of the

pension plan that the plaintiffs purchased in 2003. Pension Strategies makes three arguments as to why the plaintiffs' Complaint should be dismissed as to it. First, Pension Strategies argues that there is a lack of personal jurisdiction over it in the state of New Jersey. Second, Pension Strategies also asserts that the plaintiffs are judicially estopped from asserting any claims relating to misrepresentations or omissions made after the Plans' adoption. Third, it asserts that the plaintiffs' claims are time-barred by the relevant statutes of limitations, and fourth, that the claims against Pension Strategies are otherwise unsustainable as a matter of law.

For the same reasons stated above, the court finds that the plaintiffs are **not** judicially estopped from relying on or asserting claims against Pension Strategies that relate to occurrences after the Plan's adoption. The motion to dismiss is therefore denied on these grounds. In addition, for the same reasons stated above, the court finds that the plaintiffs have sufficiently pled the discovery rule to survive motion to dismiss pleadings standard. Pension Strategies' motion to dismiss is denied on statutes of limitations grounds as well. (Of course, the NJ RICO claims are time-barred). The court will address both the personal jurisdiction and the failure to state a claim issues below.

1. Personal Jurisdiction

Under New Jersey's "long-arm" rule, a New Jersey court may exercise jurisdiction over a non-resident defendant subject to the limitations imposed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Avdel v. Mecure, 58 N.J. 264, 268 (1971). A defendant is only required to defend itself in a forum in which it has had a sufficient amount of minimum contacts in that "maintenance of the suit would not offend traditional notions of fair play and substantial justice." Charles Gendler & Co. v. Telecom Equip. Corp., 102 N.J. 460, 469 (1986) (internal quotation omitted). The court must determine that "there be

some act by which the defendant purposefully avails itself of the privilege of conducting business within the forum state, thus invoking the benefits and protections of its laws." Mellon Bank (East) PSFS Nat'l Assoc. v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992).

Courts must engage in a two-part analysis to determine whether personal jurisdiction exists. First, the plaintiff must establish that minimum contacts within the forum state are sufficient. Once established, the burden shifts to the defendant to show that the exercise of such jurisdiction would offend "traditional notions of fair play and substantial justice." Lebel v. Everglades Marina, Inc., 115 N.J. 317, 327-29 (1989).

It is well-established law in New Jersey that, "where a defendant knowingly sends into a state a false statement, intending that it should then be relied upon to the injury of the resident of that state, he has, for jurisdictional purposes, acted within that state." Id. at 326. In the case at hand, plaintiffs assert in their Complaint that Pension Strategies completed Form 5330s to submit to the IRS, which contained "the large deductible amount of the contribution to the Plan." Pls.' Opp. to Pension Strategies, at 13. As Pension Strategies itself noted, "What the IRS did not like – and in 2004 took steps to publically address – is the front-end loading of very large deductible contributions being claimed by plan sponsor. The amount of the deduction claimed is what made Section 412(i) plans suspect in the eyes of the IRS." Pension Strategies' Br. at 20. Plaintiffs allege that Pension Strategies was aware of this and other realities as to their Plan, but that Pension Strategies failed to make such disclosures.

Given that, on the face of the Complaint, the Plaintiffs are alleging that Pension Strategies engaged in misrepresentations and omissions that were directed to the state of New Jersey, the court finds that the Plaintiffs have established a sufficient amount of minimum contacts to satisfy New Jersey's liberal standard. Moreover, the court finds that Pension

Strategies have failed to demonstrate that New Jersey's exercise in such jurisdiction would offend traditional notions of fair play and substantial justice.

2. Failure to State a Claim Upon Which Relief Can be Granted

In much the same way that defendant Abramov does, Pension Strategies asserts that the plaintiffs have failed to plead its claims with the requisite particularity. Pension Strategies also bases its arguments on the assertion that the plaintiffs are judicially estopped from basing their claims on the existence of post-implementation misrepresentations and omissions. It first asserts that "there are only conclusory allegations regarding any acts or omissions on the part of Pension Strategies and its employee, David Burke.[5] Pension Strategies' Br., 3. Pension Strategies then argues that it was not involved in the design or marketing of any plan to plaintiff Octal Corporation. Moreover, it points out that it was not formed until October 2003, *after* the plaintiffs purchased the Plan.

Based on the court's ruling on the judicial estoppel issue, however, plaintiffs are permitted to also complain of the alleged misrepresentations and omissions that resulted in plaintiffs investing again in 2004, 2005, 2006 and 2007. Thus, for the same reasons articulated above, the court permits plaintiffs' claims for fraud, negligent misrepresentation, breach of fiduciary duty, negligence, unjust enrichment, money had and received, breach of contract, and breach of good faith and fair dealing to go forward against defendant Pension Strategies.[6] However, for the same reasons stated above, the Complaint has failed to state a cognizable claim

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[5] Pension Strategies writes in its brief that "Mr. Burke was not then an employee of Pension Strategies; in fact, at the time the Plan was adopted, Mr. Burke was in college and did not join Pension Strategies until 2005. . . . Moreover, Pension Strategies has never shared in insurance commissions relating to policies used to fund a retirement plan. Because the allegations are so preposterous as to Pension Strategies and Mr. Burke, counsel wrote to the Plaintiffs' counsel advising of the many fallacious allegations and giving Plaintiffs the opportunity to correct the Complaint consistent with the practice under Rule 11, Fed. R. Civ. P." Pension Strategies' Br. at 5-6.

[6] The court has not addressed the Consumer Fraud Act claim against Pension Strategies, as it has indicated in its brief that the plaintiffs have dismissed that claim. See Pension Strategies Br. at 3 n.7.

under NJ RICO, and this count is therefore dismissed against defendant Pension Strategies as well.

Conclusion

For the foregoing reasons, defendant Abramov's motion to dismiss is hereby granted in part, dismissing solely the NJCFA and NJ RICO claims, and defendant Pension Strategies motion to dismiss is granted in part as well, dismissing solely the NJ RICO claim against it (as the NJCFA claims was already dismissed). The appropriate orders are enclosed.

Very truly yours,

JSR:kfb

JAMES S. ROTHSCHILD, JR., JSC