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2 **New York State Workers' Compensation Bd. v Marsh U.S.A., Inc.**

3 **2013 NY Slip Op 51703(U)**

4 **Decided on October 16, 2013**

5 **Supreme Court, Albany County**

6 **Platkin, J.**

7 **Published by [New York State Law Reporting Bureau](#) pursuant to Judiciary Law § 431.**

8 **This opinion is uncorrected and will not be published in the printed Official Reports.**

9 Decided on October 16, 2013
10 Supreme Court, Albany County

The Insider: These line numbers are added to facilitate reading this week's summary of this decision

13 **New York State Workers' Compensation Board, in its**
14 **capacity as the governmental agency charged with**
15 **administration of the Workers' Compensation Law and**
16 **attendant regulations, and in its capacity as the**
17 **successor in interest to THE BUILDERS'**
18 **SELF-INSURANCE TRUST, Plaintiff,**

19
20 **against**

21
22 **Marsh U.S.A., Inc., JOSEPH McIVOR, RICHARD**
23 **BERGMAN, HOWARD ZUBIN, JOSEPH GUIDA,**
24 **BARRETT GREENE and PHILIP LaROCQUE,**
25 **Defendants.**

26 6503-12

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28
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Richard M. Platkin, J.

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46 This commercial action is brought by the State of New York Workers' Compensation Board
47 ("WCB") as successor in interest to The Builders' Self-Insurance Trust ("Trust"). Five separate
48 motions to dismiss the complaint have been filed.

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BACKGROUND

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52 According to the WCB's complaint ("Complaint"), the Trust is a group self-insured trust
53 ("GSIT") formed pursuant to Workers' Compensation Law § 50-a. Members of the Trust were
54 employers within the construction industry in New York State that were required to provide
55 workers' compensation insurance to employees. Due to a substantial accumulated deficit and the
56 inability of the Trust to properly manage its deficit, the WCB assumed administration of the
57 Trust on May 1, 2009. As such, the WCB sues as the successor in interest to the Trust. After
58 assuming administration of the Trust, the WCB commissioned a forensic accounting that detailed
59 administration of the Trust from inception to termination and provided a systematic review and
60 evaluation of the circumstances leading to the substantial accumulated deficit, estimated at
61 approximately \$20 million as of the November 30, 2012 commencement of this action.

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At the time the Trust was established, the Founding Trustees allegedly were associated with the
Niagara Frontier Builders Association ("NFBA"). According to the Complaint, NFBA's building
was pledged as security for a \$750,000 letter of credit that the Trust secured in order to comply
with the Workers' Compensation Law and attendant regulations.

86 The Trust Agreement was amended several times between 2000 and 2002 to, among other things:
87 change the name of the Trust; modify membership criteria; and alter the composition and
88 makeup of the board of trustees.

89

90 According to the Complaint, Marsh became group administrator to the Trust effective on January
91 1, 2001 pursuant to a Risk Management Services Agreement ("Service Agreement") executed by
92 Marsh and Trustee McIvor on December 19, 2003. By its terms, the Service Agreement was
93 effective for the five year period from January 1, 2001 until December 31, 2005. Under the
94 Service Agreement, Marsh agreed to provide certain services to the Trust, including
95 administrative, risk management, consulting and marketing services. The Service Agreement
96 further provided that "if Marsh has taken over any existing program or policies implemented by
97 another broker [w]ithin 12 months, Marsh will have completed a review of those programs and
98 policies and will make recommendations it believes are necessary."
99

100 On September 28, 2006, Marsh and Trustee McIvor executed BUILDERS' Trust Administration
101 Agreement ("First Administration Agreement"), effective for a nine-month term commencing
102 January 1, 2006 until September 30, 2006. Pursuant to the First Administration Agreement,
103 Marsh agreed to provide, *inter alia*, administrative and insurance brokerage services. The First
104 Administration Agreement further provided that "[w]ithin a reasonable period of time, Marsh
105 will have completed a review of [earlier] programs and policies and will make recommendations
106 it believes are necessary."

107

108 On October 31, 2007, Marsh and Trustee McIvor executed a second Trust Administration
109 Agreement ("Second Administration Agreement"), effective for the one-year period from
110 October 1, 2007 until September 30, 2008. The Second Administration Agreement similarly
111 obliged Marsh to provide administrative and insurance brokerage services.

112

113 Finally, the Complaint goes on to detail the growing insolvency of the Trust from 2002 onward,
114 and the WCB's regulatory efforts to address the Trust's financial situation prior to its May 1, 2009
115 takeover.

116

117

LEGAL STANDARD

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119 Under CPLR 3211 (a) (1), dismissal is warranted if documentary evidence conclusively
120 establishes a defense as a matter of law ([Haire v Bonelli](#), 57 AD3d 1354 , 1356 [3d Dept 2008],
121 citing [Beal Sav. Bank v Sommer](#), 8 NY3d 318 , 324 [2007]; see *Goshen v Mutual Life Ins. Co. of*
122 *NY*, 98 NY2d 314, 326 [2002]; *Angelino v Michael Freedus, D.D.S., P.C.*, 69 AD3d 1203 [3d
123 Dept 2010]). On such a motion, "affidavits submitted by a defendant do not constitute
124 documentary evidence upon which a proponent of dismissal can rely" ([Crepin v Fogarty](#), 59
125 [AD3d 837](#) , 838 [3d Dept 2009]).

126

127 On a motion pursuant to CPLR 3211 (a) (7) to dismiss for failure to state a claim, "the Court
128 must afford the pleadings a liberal construction, take the allegations of the complaint as true and
129 provide plaintiff the benefit of every possible inference" ([EBC 1, Inc. v Goldman, Sachs & Co.](#), 5
130 [NY3d 11](#) , 19 [2005]). The Court's "sole criterion is whether the pleading states a cause of
131 action" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotations

132 omitted]). However, the Court need not "accept as true legal conclusions or factual allegations
133 that are either inherently incredible or flatly contradicted by documentary evidence" (1455
134 *Washington Ave. Assoc. v Rose & Kiernan*, 260 AD2d 770, 771 [3d Dept 1999] [internal
135 citations omitted]). As with a motion under CPLR 3211 (a) (1), the Court must "ignore the
136 affidavits submitted by defendants" (*Henbest & Morrissey Inc. v W. H. Ins. Agency*, 259 AD2d
137 829, 830 [3d Dept 1990]).

138
139 Dismissal is warranted under CPLR 3211 (a) (5) where the movant establishes that a cause of
140 action may not be maintained due to the expiration of the statute of limitations. The movant bears
141 the initial burden of supporting the motion with "an affidavit or other competent proof sufficient,
142 if uncontroverted, to establish the [statute of limitations] defense as a matter of law" (*State*
143 *Higher Educ. Services Corp. v Starr*, 158 AD2d 771, 771 [3d Dept 1990]; *accord Romanelli v*
144 *DiSilvio*, 76 AD3d 553, 554 [2d Dept 2010]). Upon such a showing, "the burden shifts to the
145 party opposing the motion to aver evidentiary facts" sufficient to defeat the statute of limitations
146 defense or at least raise factual questions concerning the defense (*Hoosac Val. Farmers Exch. v*
147 *AG Assets*, 168 AD2d 822, 823 [3d Dept 1990]; *see Doyon v Bascom*, 38 AD2d 645 [3d Dept
148 1971]).

149
150 Finally, under CPLR 3211 (a) (8), the burden of proving jurisdiction rests upon the party
151 asserting it. Thus, on a motion to dismiss, the plaintiff is obliged "to come forth with definite
152 evidentiary facts to support" the exercise of personal jurisdiction over the defendant (*Spectra*
153 *Prods. v Indian Riv. Citrus Specialties*, 144 AD2d 832, 833 [3d Dept 1988]).

154 155 **THE TRUSTEES**

156
157 The cause of action for breach of contract alleges that the Trustees failed to perform their
158 obligations under the Trust Agreement and Rules & Regulations, including but not limited to:
159 failing to provide for the proper capitalization of the Trust; setting improper contribution rates;
160 failing to comply with the Trust's membership requirements relative to the admission and
161 removal of members; failing to prevent conflicts of interest; and failing to assure the sound
162 administration of the Trust.

163
164 The cause of action for fraud alleges that the Trust Agreement and other governing documents of
165 the Trust constitute written representations by the Trustees "that they would properly and
166 competently manage the Trust funds and oversee the administration of the Trust" [*4](Complaint
167 ¶ 172). The Complaint alleges that Trustees McIvor and Zubin acted in a disloyal manner in
168 order to further the interests of NFBA: "By having builders' associations, such as NFBA . . . ,
169 receive referral commissions from the [the Trust] for every association member who joined the
170 Trust while simultaneously representing that the Trustees were not receiving any compensation
171 from [the Trust] for their duties as Trustees", these Trustees are alleged to have made fraudulent
172 misrepresentations of fact (*id.* ¶ 178).^[FN1] The Complaint also alleges fraud in connection with
173 Trustee McIvor's actions in causing the NFBA building to be released as collateral shortly before
174 the WCB's takeover of the Trust. Finally, the Complaint alleges that the Trustees made false
175 representations concerning their qualifications, willingness and ability to properly manage the
176 Trust (*id.* ¶¶ 186-188).

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178

A. Personal Jurisdiction

179

180 Trustee LaRocque moves to dismiss the Complaint for lack of personal jurisdiction, arguing as
181 he improperly was served with process at his former residential address,. The WCB does not
182 oppose this branch of his motion. Accordingly, the Complaint is dismissed as against LaRocque
183 for lack of personal jurisdiction.^[FN2]

184

185

B. Statute of Limitations**1. Breach of Contract**

187

188 The statute of limitations for a breach of contract claim is six years (CPLR 213 [2]). Under New
189 York law, "a breach of contract cause of action accrues at the time of the breach"
190 (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *see* CPLR 203 [a]). The
191 date of the breach is controlling even where damages from the breach are not sustained until later
192 and even where the "injured party may be ignorant of the existence of the wrong or injury"
193 (*Ely-Cruikshank*, 81 NY2d at 403 [internal quotation marks omitted]).

194

195 Where, as here, "a contract provides for continuing performance over a period of time, each
196 breach may begin the running of the statute anew such that accrual occurs continuously and
197 plaintiffs may assert claims for damages occurring up to six years prior to filing of the suit"
198 (*Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80 [4th Dept 1980]). However,
199 "so much of the causes of action asserted by [plaintiff] as accrued more than six years prior to the
200 commencement of the instant action must be dismissed as time-barred" (*Westchester County*
201 *Correction Officers Benevolent Assn., Inc. v County of Westchester*, 65 AD3d 1226

202

203 Thus, the issue is whether any breaches of the Trust Agreement are alleged to have occurred on
204 or after November 30, 2006, six years prior to the commencement of this action (*see generally*
205 *State of NY Workers' Compensation Board v Madden*, 38 Misc 3d 1229 (A) [Sup Ct Albany
206 County] ["Madden"]).

207

208 At the outset, the WCB concedes that the documentary evidence submitted by Trustee Greene
209 conclusively establishes that his resignation as a Trustee occurred no later than October 4, 2006
210 and that the statute of limitations has run on both claims asserted against him. Accordingly, the
211 branch of Greene's motion seeking dismissal pursuant to CPLR 3211 (a) (5) is granted on
212 consent.^[FN3]

213

214 While Trustees McIvor and Zubin join in Greene's motion to dismiss on statute of limitations
215 grounds, their submissions do not include any documentary evidence establishing the dates upon
216 which their trusteeships terminated.^[FN4] In the absence of such proof, the Court must conclude
217 that their service as trustees continued until May 1, 2009, when the WCB assumed administration
218 of the Trust. As such, the WCB's claim for breach of contract is timely with respect to the period
219 from November 30, 2006 through May 1, 2009.

220

221 In this connection, the Court necessarily rejects the Trustees' argument that the cause of action
222 for breach of contract merely is a disguised claim for breach of fiduciary duty that is subject an
223 expired three-year statute-of-limitations. While courts must look to the reality and essence of the

224 causes of action alleged in the complaint (*Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264
225 [1937]), the WCB has pleaded the existence of an enforceable contract between the Trust and the
226 Trustees (the Trust Agreement), the Trustees' breaches of the Trust Agreement and the
227 incorporated Rules & Regulations, performance of the same by the Trust, and resulting damages.
228 No more is required (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]).
229 To be sure, the nature of the relationship between the Trustees and the Trust also may have given
230 rise to a claim for breach of fiduciary duty, but no such cause of action is asserted, and the
231 Trustees cite no authority that the potential availability of such a cause of action forecloses a
232 breach of contract claim under the circumstances presented herein. Of course, the contractual
233 duties owed by the Trustees to the Trust may be different and more limited in scope than their
234 duties as fiduciaries, but the issue at this juncture is merely whether the WCB has stated a cause
235 of action for breach of contract, not whether it can prove such a claim.
236

237 Further, contrary to the Trustees' contention, nothing in *Madden* forecloses such a contract claim.
238 Indeed, *Madden* specifically allowed the WCB to proceed on a contractual theory against former
239 GSIT trustees. Moreover, certain of the trustees in *Madden* argued that language in the relevant
240 trust agreement providing that the duties and obligations of the trustees shall be limited to those
241 imposed by the subject trust agreement negated the existence of any common-law fiduciary
242 duties and left the WCB with only a breach of contract claim. While the Court did not need to
243 reach this contention in *Madden*, it should be noted that similar language appears here in Section
244 6.1 of the Trust Agreement.
245

246 **2.Fraud**

247

248 A cause of action alleging fraud generally is subject to a six-year statute-of-limitations, but such
249 a claim may be brought within "two years from the time the [plaintiff] . . . discovered the fraud,
250 or could with reasonable diligence have discovered it" (CPLR 213 [8]). Here, the alleged fraud
251 relative to disloyalty continued throughout Trustees McIvor and Zubin's service, and the
252 allegations pertaining to the release of the NFBA building as collateral apparently are directed at
253 conduct in or around 2009. Accordingly, the remaining Trustees have not demonstrated their
254 entitlement to dismissal of the fraud claim as barred by the six-year limitations period of CPLR
255 213 (8), even without regard to application of the two-year discovery rule.
256

257 **C. Standing/Capacity**

258

259 The remaining Trustees allege that the WCB lacks standing to maintain claims on behalf of the
260 Trust. They argue that 12 NYCRR § 317.20, which authorizes the Chair of the WCB
261

262 to "assume administration and final distribution of [an insolvent GSIT's] assets", does not confer
263 legal successorship rights upon the WCB or permit the agency to pursue litigation on behalf of
264 the Trust. The Court disagrees.
265

266 The broad authority of the WCB to "assume administration" of the Trust plainly carries with it
267 the power to prosecute litigation as the successor-in-interest to the Trust. Moreover, any right of
268 action possessed by the Trust against the defendants is an asset (*see Canron Corp. v City of New*
269 *York*, 89 NY2d 147, 156 [1996]), which therefore is subject to the agency's administration and,

270 ultimately, final distribution. And the fact that a Trustee may enjoy a potential right of
271 indemnification under Section 5.12 of the Trust Agreement "if he . . . acted in good faith and in a
272 manner believed to be in or not opposed to the best interests of the [self insurance] Program and
273 the Members" cannot serve to defeat the WCB's standing to maintain this action in its capacity as
274 successor-in-interest to the Trust.

275

276 Accordingly, the Court is satisfied that the WCB may prosecute the claim for breach of contract
277 against the Trustees in its capacity as successor-in-interest to the Trust. For similar reasons, the
278 WCB may pursue a claim alleging that the Trust was defrauded by the Trustees. However, the
279 Court agrees with the Trustees that the WCB may not pursue a claim of fraud on behalf of Trust
280 members. A cause of action alleging that employer-members were fraudulently induced to join
281 the Trust belongs to the former members, not the Trust or its successor-in-interest. Accordingly,
282 so much of the fourth cause of action as is premised on the claim that employers were
283 fraudulently induced to become Trust members must be dismissed.

284

285 **D.Sufficiency of Fraud Claim**

286

287 A cause of action for fraud requires plaintiff to allege a misrepresentation or concealment of a
288 material fact, falsity, scienter, justifiable reliance on the deception, and resulting injury (*Lusins v*
289 *Cohen*, 49 AD3d 1015 , 1017 [3d Dept 2008]). The circumstances constituting the fraud must be
290 stated in detail (CPLR 3016 [b]).

291

292 Insofar as the claim of fraud is grounded upon alleged misrepresentations in the Trust's governing
293 documents that the Trustees would properly and competently manage all Trust funds and oversee
294 the administration of the Trust, the Complaint fails to allege a viable claim of fraud. To establish
295 a fraud claim arising in connection with a contractual relationship, "the plaintiff must allege a
296 breach of duty which is collateral or extraneous to the contract between the parties" [*7](*Krantz v*
297 *Chateau Stores of Canada*, 256 AD2d 186, 187 [1st Dept 1998]; see *Cole, Schotz, Meisel,*
298 *Forman & Leonard, P.A. v Brown*, 2013 NY Slip Op 06088 [1st Dept] ["Rather, the promise
299 concerns the corporate defendant's performance of the promise itself"]). In other words, the
300 alleged fraud must be "sufficiently discrete from that underlying the breach of contract claim [in
301 order to] state a separate cause of action" (*Kosowsky v Willard Mtn., Inc.*, 90 AD3d 1127 , 1129
302 [3d Dept 2011] As the fraud alleged in the Complaint pertains directly "to the manner in which
303 defendant agreed to perform under the [contracts]" and concerns "promises to perform in the
304 future pursuant to a contract", this aspect of the fraud claim "merely duplicates claims for breach
305 of contract" (*Reiser Inc. v Roberts Real Estate*, 292 AD2d 726, 727-728 [3d Dept 2002]). As
306 such, it must be dismissed.

307

308 For similar reasons, so much of the fraud claim as is premised upon allegations that the Trustees
309 were not receiving any compensation from the Trust must be dismissed. The issue of trustee
310 compensation is addressed directly in the relevant contract (Trust Agreement, § 5.12), and the
311 Complaint identifies no misrepresentations of fact or insincere promises of future performance
312 made by defendants collateral to the Trust Agreement (*HSH Nordbank AG v UBS AG*, 95 AD3d
313 185 , 206 [1st Dept 2012]).

314

315 Finally, the Complaint fails to allege any actionable misrepresentation or concealment on the part

316 of Trustee McIvor in allegedly causing the NFBA building to be released as collateral shortly
317 before the WCB's takeover of the Trust. In the absence of an articulated misrepresentation or
318 concealment of a material fact in connection with the release, the allegations fail to plead a cause
319 of action for common-law fraud.

320

321 Based on the foregoing, the claim of fraud must be dismissed as against the Trustees.

322

323 **E.Lack of Damages**

324

325 Finally, the remaining Trustees contend that the Complaint must be dismissed because the WCB
326 is unable to establish damages as a matter of law. As stated above, the WCB seeks to recover the
327 outstanding insolvency of the Trust from the former trustees.

328

329 In arguing that the WCB cannot prove cognizable damages, the Trustees assert that "the WCB
330 wants to burden private entities and individuals with its Legislatively-imposed duties as payor of
331 last resort when a group self-insurance becomes insolvent." In making this argument, the
332 Trustees rely upon the following language in *Madden*, which articulated why the WCB cannot
333 maintain a claim for implied indemnification to recover the outstanding deficit of a GSIT in its
334 capacity as the State agency charged with administration of the Workers' Compensation Law:

335

336 . . . [The] alleged "loss" purely is the product of a legislative determination of New York
337 State regarding the continuation of benefits to injured workers. And the same statutory
338 scheme by which the State Legislature has made the WCB the payor of last resort
339 establishes a process for infusing the necessary funds into the agency's administrative fund
340 through assessments on the self-insurance industry (*see id.*). In light of the nature and
341 source of the WCB's obligation and the presence of a comprehensive statutory [*8]scheme
342 that does not include a right of indemnification, the Court sees no basis in law or appellate
343 precedent for implying separate duties running from the former trustees or professional
344 advisors of GSITs to the WCB

345 But the Trustees' argument fundamentally misconstrues the above-quoted language and
346 disregards the critical language that precedes it, which explained why the WCB does not possess
347 a claim for implied indemnity in its capacity as successor-in-interest to an insolvent GSIT:

348 The key element of a cause of action for common-law indemnification is an implied duty
349 running from the indemnitor to the indemnitee, separate from any direct duty owed by the
350 indemnitor to the injured party (*Raquet*, 90 NY2d at 183). But where the injured party and
351 the indemnitee are one and the same, there is no need to imply a separate restitutionary
352 duty, as the injured party can pursue direct claims (*see Peoples' Democratic Republic of*
353 *Yemen v Goodpasture, Inc.*, 782 F2d 346, 350 [2d Cir 1986]). For this reason, a party
354 cannot obtain the advantage of the generous statute of limitations applicable to indemnity
355 claims by styling its direct claims as ones for indemnity (*see Bunker*, 80 AD2d at 818).
356 And since the Trust cannot pursue indemnification from defendants, neither can the WCB
357 in its capacity as successor in interest

358 Thus, *Madden* held that because the WCB possesses direct claims for damages against former
359 GSIT trustees as successor-in-interest to a GSIT, there is no basis for implying a separate
360 restitutionary duty to the Trust (or its successor in interest). As such, the language relied upon by

361 the Trustees actually supports the WCB's position that it may sue the Trustees for contract
362 damages as successor in interest to the Trust. Moreover, the WCB need not establish that the
363 entire accumulated deficit is the product of the Trustees' misconduct; its claim for damages is
364 viable so long as the alleged breaches of contract contributed in some part to the deficit.^[FN5]

365

366 **MARSH**

367

368 **A.Breach of Contract**

369 The contract claim, brought by the WCB as successor-in-interest to the Trust, alleges that Marsh
370 breached the Service Agreement and the First and Second Administration Agreements
371 (collectively "Administration Agreements") by: (a) failing to properly calculate and adjust the
372 experience modification rates ("EMRs") for each Trust member each year; (b) providing Trust
373 members with large premium discounts that were inconsistent with the member's "loss runs"
374 and/or its EMR; (c) failing to calculate contribution rates in accordance with the particular needs
375 of the Trust and its membership claims profile; and (d) failing to originate, follow and/or
376 consistently apply underwriting guideline in recommending the acceptance or rejection of a
377 participating employer's application for participation. Additionally, the Complaint alleges that
378 [*9]Marsh breached the First Administration Agreement by failing to review the programs and
379 policies of FCS and provide recommendations to the Trustees based on its review.

380 Marsh contends that the breach of contract claim is barred by the applicable six-year statute of
381 limitations. As this action was commenced on November 30, 2012, the issue distills to whether
382 the Complaint alleges any breaches of contract on or after November 30, 2006. Additionally,
383 Marsh argues that any claim for breach of contract after November 30, 2006 is conclusively
384 defeated by documentary evidence.

385 As an initial matter, the Service Agreement expired on December 31, 2005 and the First
386 Administration Agreement expired on September 30, 2006. As these contracts expired more than
387 six years prior to the commencement of this action and the WCB has not identified any
388 post-termination obligations of Marsh that allegedly were breached, the Court concludes that any
389 claimed breaches of the Service Agreement and First Administration Agreement — including the
390 claim that Marsh breached the First Administration Agreement by failing to review the programs
391 and policies of FCS and make recommendations to the Trustees based on its review — must be
392 dismissed as time barred.

393 With regard to Marsh's alleged breaches relative to review of new membership applications, the
394 WCB submits an affidavit and documentary proof demonstrating that at least five members were
395 admitted to the Trust from October 1, 2006 through October 1, 2007,^[FN6] and the WCB argues
396 that Marsh was obliged to review these applicants pursuant to the provisions of the First
397 Administration Agreement. However, even assuming that these were, in fact, "new"
398 applications,^[FN7] the Complaint fails to allege the existence of an enforceable agreement
399 imposing review obligations upon Marsh at relevant times. While the WCB conjectures that "[i]t
400 is possible that the Trustees and Marsh have a backdated contract for the period" between the
401 effectiveness of the First and Second Administration Agreements, mere speculation that a
402 contract might exist is insufficient to survive a motion to dismiss, particularly where the plaintiff

403 has been in control of the Trust for more than four years and has had the benefit of a full forensic
404 review of the Trust (*see* CPLR 3211 [d]). And even if one of the Administration Agreements (or
405 a similar agreement) had been in effect during the period from October 1, 2006 through October
406 1, 2007, Marsh's obligation under the Administration Agreements with respect to a new member
407 was limited to the preparation of documents required for the admittance of the member, based
408 upon information provided by the applicant. Accordingly, the allegations of breach regarding
409 Marsh's review of new member applications must be rejected.

410 With regard to the alleged failure of Marsh to set proper premiums and discounts and to properly
411 adjust and calculate EMRs, Marsh argues principally that by October 16, 2006, the Trust and the
412 WCB had entered into a Consent Agreement whereby the Trust's contribution rates were
413 automatically set "at the 2005 NYCIRB manual rate as provided by By The Numbers Acturial
414 Consulting, Inc." Pursuant to the Consent Agreement, "[t]his rate assumes an experience
415 modification factor of .969, the full NYS Assessment surcharge of 18.6%, and also assumes no
416 discount." It is Marsh's contention that the Consent Agreement divested it of any obligation to set
417 premiums and discounts or to adjust and calculate EMRs.

418 In opposition, the WCB takes the position that the Consent Agreement did not supersede Marsh's
419 relevant contractual obligations. Further, with regard to EMRs, the WCB submits an affidavit
420 from Mary Beth Woods, who negotiated the Consent Agreement on the agency's behalf, and a
421 confirming email from Robert Bossert, her counterpart at Marsh, supporting the WCB's position
422 that the manual premium was intended to be adjusted by the employer's individual EMR.
423 Relatedly, the WCB argues that Marsh was obliged to calculate premiums in such a way to
424 ensure that admittance of the new member would not cause the Trust to deviate from break-even
425 status.

426 The Court concludes that the terms of the Consent Agreement conclusively defeat most, but not
427 all, of these alleged breaches of contract. The Consent Agreement plainly contemplated the use
428 of manual premiums with no discounting, and there is no basis in the Administration Agreements
429 or the Consent Agreement for finding an obligation on the part of Marsh to maintain the Trust in
430 "break-even" status. However, the WCB's submissions in opposition to the motion, including
431 Marsh's own emails, raise questions as to whether the parties intended the manual premiums to
432 be adjusted by individual EMRs. As the obligation to compute individual EMRs for members
433 continued under the Second Administration Agreement, which was in effect during the relevant
434 statutory period, and Marsh has failed to conclusively establish that the Consent Decree served to
435 extinguish, limit or eliminate the possibility of breach of this obligation, the portion of the claim
436 alleging that Marsh failed to calculate and adjust EMRs and to set premiums accordingly cannot
437 be dismissed.

438 Accordingly, the cause of action for breach of contract must be dismissed, except to the limited
439 extent stated immediately above.^[FN8]

440

441 **B. Unjust Enrichment**

442 The second cause of action against Marsh, claiming unjust enrichment, alleges that Marsh was
443 compensated for services it did not perform and/or inadequately performed under the Service

444 Agreement and Administration Agreements. Further, it is alleged that Marsh was compensated
445 for services it did not perform and/or inadequately performed after the Second Administration
446 Agreement expired on September 30, 2008. According to the WCB, Marsh therefore received a
447 financial benefit to the detriment of the Trust and has failed to make adequate restitution to the
448 Trust for such unjust compensation. On the basis of the foregoing allegations, the WCB seeks
449 recovery of \$2,171,624 in fees paid to Marsh.

450 As an initial matter, as there is no dispute that the Service Agreement and Administration
451 [*11]Agreements represent binding and enforceable contracts between the Trust and Marsh, the
452 cause of action seeking recovery in quasi-contract for the periods in which those contracts were
453 in effect must be dismissed (*Kosowsky v Willard Mtn., Inc.*, 90 AD3d 1127 , 1131 [3d Dept 2011]).
454

455 Further, the parties agree that the claim for unjust enrichment is governed by a six-year
456 statute-of-limitations, so allegations of unjust enrichment prior to November 30, 2006 must be
457 dismissed as time barred.

458 However, claims that Marsh was unjustly enriched by receipt of compensation following the
459 termination of the Second Administration Agreement is not barred by the statute of limitations.
460 Further, as amplified by the WCB's submissions in opposition to Marsh's motion, the Complaint
461 also can be understood as alleging unjust enrichment from November 30, 2006 until the Second
462 Administration Agreement entered into force and effect. Accordingly, Marsh has failed to
463 demonstrate its entitlement to dismissal of the claim, as limited herein.

464

CONCLUSION

465 Accordingly,^[FN9] it is

466 **ORDERED** that defendants' motions to dismiss plaintiff's complaint are granted in part and
467 denied in part in accordance with the foregoing; and it is further

468 **ORDERED** that within thirty days from service of this Decision & Order upon defendants with
469 notice of entry, the remaining parties shall confer and plaintiff shall contact Chambers with
470 several proposed dates and times for the holding of a preliminary conference; and finally it is

471 **ORDERED** that prior to said preliminary conference, counsel shall consult and confer in
472 accordance with Rule 8 of the Commercial Division.

473 This constitutes the Decision & Order of the Court. This Decision & Order is being transmitted
474 to plaintiff's counsel for filing and service. The signing of this Decision & Order shall not
475 constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable
476 provisions of that Rule respecting filing, entry and Notice of Entry.
477

478 Dated: Albany, New York, October 16, 2013
479 RICHARD M. PLATKIN, A.J.S.C.

480

481 Papers Considered:

482

483 Notice of Motion of Defendant Greene, dated May 20, 2013;

484 Defendant Greene's Memorandum of Law, dated May 20, 2013;

485 Affirmation of Jason E. Markel, Esq., dated May 17, 2013, with attached exhibits 1-3;

486 Affidavit of Michael Papa, Esq., sworn to July 15, 2013, with attached exhibits A-D;[*12]

487 Affidavit of Mary Beth Woods, sworn to July 15, 2013, with attached exhibits A-K;

488 Plaintiff's Memorandum of Law, dated July 15, 2013;

489 Reply Affirmation of Jason E. Markel, Esq., dated August 27, 2013, with attached exhibit A;

490 Defendant Greene's Reply Memorandum of Law, dated August 27, 2013;

491 Notice of Motion of Defendant Zubin, dated May 31, 2013;

492 Affirmation of Brian C. Mahoney, Esq., dated May 31, 2013, with attached exhibit A;

493 Defendant Zubin's Reply Memorandum of Law, dated August 29, 2013;

494 Notice of Motion of Defendant McIvor, dated June 6, 2013;

495 Affirmation of Jeffery D. Palumbo, Esq., dated June 6, 2013, with attached exhibit A;

496 Reply Affidavit of Michael L. Amodeo, Esq., dated August 29, 2013;

497 Defendant McIvor's Reply Memorandum of Law, dated August 29, 2013;

498 Notice of Motion of Defendant LaRocque, dated June 10, 2013;

499 Affirmation of Michael C. Conway, Esq., dated June 10, 2013, with attached exhibits A-B;

500 Notice of Motion of Defendant Marsh U.S.A., Inc., dated June 27, 2013;

501 Affirmation of Sandra D. Hauser, Esq., dated June 27, 2013, with attached exhibit 1;

502 Affidavit of Robert C. Bossert, sworn to August 28, 2013, with attached exhibits 1-4;

503 Reply Memorandum of Law of Defendant Marsh U.S.A., Inc., dated August 29, 2013.

504

505

Footnotes

506 **Footnote 1:** As the Complaint must be dismissed against LaRocque on jurisdictional grounds,
507 the Court will not review the allegations of fraud specifically and solely directed against him (see
508 Complaint ¶¶ 175-177).

509

510 **Footnote 2:** Given the conceded absence of personal jurisdiction, the Court declines to consider
511 the alternative grounds for dismissal tendered by defendant in support of his motion.

512

513 **Footnote 3:** In view of the fact that Trustee Greene has demonstrated his entitlement to dismissal
514 of the Complaint under CPLR 3211 (a) (5), the Court has no occasion to consider the other
515 arguments for dismissal tendered by him.

516

517 **Footnote 4:** Certain of the Trustees attempted to remedy this defect in their reply papers, but the
518 function of reply papers is to address arguments made in opposition to the position taken by the
519 movant, not to permit the movant to introduce new evidence to meet its *prima facie* burden
520 (*Litvinov v Hodson*, 34 AD3d 1332 , 1332 [4th Dept 2006]; *Watts v Champion Home Bldrs Co.*,
521 15 AD3d 850 , 851 [4th Dept 2005]).

522

523 **Footnote 5:** In any event, "nominal damages are always available in breach of contract actions"
524 (*Ely-Cruikshank*, 81 NY2d at 402).

525

526 **Footnote 6:** The WCB explains that the Consent Agreement (*see infra*) opened the Trust to new
527 members. Further, even under the February 19, 2004 membership freeze, the WCB asserts that

528 Marsh was permitted to submit applications from: (1) applicants that previously had been offered
529 membership; (2) applicants that shared common ownership with, or were successors in interest
530 to, admitted members.

531

532 **Footnote 7:** It is Marsh's contention that all of these applications were from renamed, successor
533 or subsidiary companies that already were part of the Trust and, therefore, not new applications
534 subject to review.

535

536 **Footnote 8:** In this connection, the Court finds that the present record fails to conclusively
537 establish that at least some portion of the Trust's accumulated deficit was not attributable to
538 Marsh's alleged breaches of contract.

539

540 **Footnote 9:** The Court has considered the parties' remaining arguments and contentions but finds
541 them unavailing or unnecessary to the disposition ordered herein.

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