

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL COMMERCE DIVISION

SIMON WRECKING CO., ET AL :
 :
 : Plaintiffs :
 :
 VS. : DECEMBER TERM, 2006
 : NO. 0722
 : CONTROL NO. 100587
 :
 ACTION MANUFACTURING CO., INC :
 ET AL. :
 :
 : Defendants :

ORDER

AND NOW, this 6th day of January, 2009, upon consideration of the Preliminary Objections of Defendants Action Manufacturing Co., Inc., et al, and any response thereto, it is hereby **ORDERED AND DECREED** that the Preliminary Objections are **SUSTAINED** for the reasons stated in the accompanying opinion.

It is further **ORDERED AND DECREED** that the First Amended Complaint of Plaintiffs Simon Wrecking Co., et al, is hereby **DISMISSED**.

BY THE COURT:


ARNOLD L. NEW, J.

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PURSUANT TO Pa.R.C.P. 236(b)

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FIRST JUDICIAL DISTRICT OF PA
USER I.D.: _____

The Group subsequently entered into a Consent Decree with the EPA pursuant to which the Group would incur the full cost of remediation of the Site. Having settled with the EPA, the Group turned to its individual members, as well as Plaintiffs, for contribution. After a 13 day trial in January of 2006, Judge Brody of the United States District Court for the Eastern District of Pennsylvania found Plaintiffs liable for \$1.5 million.

Plaintiffs allege that the testimony elicited at the federal trial revealed that the Group's stated reason for expelling Plaintiffs from the Group, non-payment of the initial assessment, was mere pretext. Based on the testimony from the Federal Trial, Plaintiffs have initiated the instant case, bringing claims of 1) breach of contract, 2) breach of the duty of good faith and fair dealing, 3) breach of fiduciary duties, and 4) civil conspiracy. Defendants filed Preliminary Objections on the grounds that a) Plaintiff's were required by Federal Rule of Civil Procedure 13(a) to have brought the instant suit as a compulsory counterclaim, b) the instant action is barred by the statute of limitations, and c) that Plaintiffs have failed to plead a cause of action upon which relief could be granted as to Counts III and IV. This opinion focuses solely on the second preliminary objection, that the instant action is barred by the statute of limitations.

LEGAL ANALYSIS

The Court initially notes that the statute of limitations should be raised in New Matter, not on Preliminary Objections. Pa.R.C.P. 1030(a). When a defendant improperly raises the statute of limitations via Preliminary Objection, the proper method for challenging a defendant's preliminary objections is to file Preliminary Objections to defendant's Preliminary Objections. Farinacci v. Beaver County Industrial Dev.

Authority, 510 Pa. 589, 593 (1986). When, however, a plaintiff does not file Preliminary Objections to the defendant's Preliminary Objections, a court may overlook the procedural defect. Id. In the instant case, Plaintiff has not filed Preliminary Objections to Defendants' Preliminary Objections nor has Plaintiff objected in his brief to Defendants' procedurally improper Preliminary Objections; therefore, the Court will address the issue.

Plaintiff's First Amended Complaint raises four claims, 1) breach of contract, 2) breach of duty of good faith and fair dealing, 3) breach of fiduciary duty, and 4) civil conspiracy. The applicable statute of limitations period for each of these counts is as follows: 1) breach of contract is four years, 42 Pa.C.S.A. § 5525(a)(8) – 2) breach of duty of good faith and fair dealing is four years, 42 Pa.C.S.A. § 5525(a)(8); Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 722 (Pa. Super. 1996)(holding that a breach of the duty of good faith and fair dealing is a contract claim and therefore the statute of limitations for contracts applies) –3) breach of fiduciary duty is two years, 42 Pa.C.S.A. § 5525(7); Maillie v. Greater Del. Valley Health Care, 628 A.2d 528, 532 (Pa. Commw. 1993). For civil conspiracy, the statute of limitations period is the same as the statute of limitations period for the overt act allegedly committed in furtherance of the conspiracy. Evans v. Philadelphia Newspapers, Inc., 22 Phila. 25, 29 (1991)(Hill, J).

The statute of limitations period begins to run as soon as a right to institute and maintain suit arises. Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 84, 468 A.2d 468, 471 (1983). It is the duty of the person asserting the claim to use reasonable diligence to be informed of the facts and circumstances upon which a potential claim is based and initiate suit within the applicable time period prescribed by

the statute of limitations. Id.

A judicially created device, the discovery rule, tolls the application of the statute of limitations when the aggrieved party is unable to ascertain that he has been injured. Meehan v. Archdiocese of Philadelphia, 870 A.2d 912, 919 (Pa. Super. 2005) *allocatur denied* at 584 Pa. 717 (2005). “The party seeking to invoke the discovery rule ‘bears the burden of establishing the inability to know that he or she has been injured by the act of another despite the exercise of reasonable diligence.’” Id. (citing Cochran v. GAF Corp., 542 Pa. 210, (1995)).

In the case at bar, Defendants allege, and Plaintiff concedes, that Plaintiff was removed from the Chemclene Site Defense Group in 1998. (Preliminary Objections, ¶ 13; Answer to Preliminary Objections, ¶ 13). Therefore, the statute of limitations period began to run in 1998 and expired in 2000 for the breach of fiduciary duty claim and expired in 2002 for the remainder of the claims. The instant suit was not filed until December 2006, eight years after Plaintiff’s removal from the Chemclene Site Defense Group. Unless the statute of limitations was tolled by the discovery rule, Plaintiff’s claims are time-barred because they were filed after the expiration of the statute of limitations period.

Plaintiff has failed to allege why it was unable to know that it was injured despite the exercise of reasonable diligence.² Indeed, Plaintiff has not pled any exercise of reasonable diligence and admits in its pleadings that it took no actions to determine the basis for their expulsion in 1998. Plaintiff’s only argument is the reasons for the removal did not come forth until a federal trial in 2006. This is clearly insufficient for the statute

² While Plaintiff has not explicitly invoked the discovery rule, or cited to any cases applying the discovery rule, Plaintiff’s argument appears to imply that the statute of limitations should be tolled by the discovery rule. See Plaintiff’s Memorandum in Opposition to Defendants’ Preliminary Objections at pp. 5-6.

of limitations to be tolled by the discovery rule. See Meehan v. Archdiocese of Philadelphia, 870 A.2d 912, 919 (Pa. Super. 2005).

WHEREFORE, for all the reasons stated above, Defendants' Second Preliminary Objection are sustained and the First Amended Complaint of Plaintiffs Simon Wrecking Co., et al, is dismissed by an Order to which this Opinion is attached.



ARNOLD L. NEW, J.