

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL HUMPHREYS, ACTING
INSURANCE COMMISSIONER OF THE
COMMONWEALTH OF
PENNSYLVANIA IN HIS CAPACITY
AS THE STATUTORY
REHABILITATOR OF SENIOR
HEALTH INSURANCE COMPANY OF
PENNSYLVANIA,

Plaintiff,

v.

BRIAN WEGNER, PAUL LORENTZ,
BARRY STALDINE, AND PROTIVITI
INC.,

Defendants.

No. 1 SHP 2022

**DEFENDANT
PROTIVITI, INC.’S
APPLICATION FOR
LEAVE TO FILE A
REPLY TO
REHABILITATOR’S
BRIEF IN SUPPORT OF
HIS PRELIMINARY
OBJECTION TO
PROTIVITI’S
PRELIMINARY
OBJECTION 1**

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Defendant Protiviti, Inc.:

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THE STATUTORY REHABILITATOR :
OF SENIOR HEALTH INSURANCE :
COMPANY OF PENNSYLVANIA, :

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v. :

BRIAN WEGNER, PAUL LORENTZ, :
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INC., :

Defendants. :

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ORDER

AND NOW, this ___ day of _____, 2023, upon consideration of Protiviti Inc.’s Application for Leave to File a nine page Reply to Plaintiff’s Brief in Support of His Preliminary Objection to Protiviti’s Preliminary Objection 1, and all responses and briefing thereto, IT IS HEREBY ORDERED that the Application of Protiviti Inc. is GRANTED. The Prothonotary is directed to file the reply brief attached as Exhibit A to the Application.

, J.

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INC., :

Defendants. :

No. 1 SHP 2022

**PROTIVITI INC.’S APPLICATION FOR LEAVE TO FILE A REPLY TO
REHABILITATOR’S BRIEF IN SUPPORT OF HIS PRELIMINARY
OBJECTION TO PROTIVITI’S PRELIMINARY OBJECTION 1**

Pursuant to Commonwealth Court IOP Section 313, Defendant Protiviti Inc. (“Protiviti”) files this Application for Leave to File a nine-page Reply to Rehabilitator’s Brief in Support of His Preliminary Objection to Protiviti’s Preliminary Objection 1 regarding statute of limitations. In support thereof, Protiviti states as follows:

1. This is an original jurisdiction matter brought by the Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the “Rehabilitator”) in his

capacity as the statutory rehabilitator for Senior Health Insurance Company of Pennsylvania (“SHIP”).

2. On June 22, 2022, the Rehabilitator filed the instant Amended Complaint, bringing claims against Protiviti for breach of fiduciary duty, civil conspiracy, negligence, and breach of contract. *See* Am. Compl. ¶¶ 191-236.

3. On August 26, 2022, Protiviti filed its Preliminary Objections to the Amended Complaint. Protiviti raised, among other preliminary objections, a preliminary objection based on Pennsylvania’s statute of limitations. Protiviti’s Preliminary Objections ¶¶ 18-25.

4. On October 17, 2022, the Rehabilitator filed a Preliminary Objection to Protiviti’s Preliminary Objection based on statute of limitations. *See* Rehabilitator’s Preliminary Objection to Defendant Protiviti’s Preliminary Objection 1.

5. On the same day, the Rehabilitator filed a brief in opposition to Protiviti’s Preliminary Objections. *See* Plaintiff’s Brief in Opposition to Defendant Protiviti’s Preliminary Objections to the Amended Complaint.

6. On December 19, 2022, Protiviti filed its Brief of Defendant Protiviti in Support of Preliminary Objections to the Rehabilitator’s Amended Complaint and in Opposition to Rehabilitator’s Preliminary Objection.

7. On February 1, 2023, the Rehabilitator filed a brief in support of his Preliminary Objection. *See* Rehabilitator’s Brief in Support of His Preliminary Objection to Defendant Protiviti’s Preliminary Objection 1.

8. This Court’s Internal Operating Procedures state, in relevant part:

To govern the expeditious disposition of matters filed within the Court’s original jurisdiction, pretrial orders may regulate discovery, set a pretrial conference, require consideration of settlement, make provision for the identification of issues, establish a procedure for the acceptance of evidence through stipulations, provide for the advance exchange of exhibits and experts’ reports, and limit the number of witnesses, together with all other matters which the Judge shall deem proper.

Commonwealth Court IOP § 313.

9. In accordance with the broad authority vested in this Court under IOP 313, Protiviti seeks leave to file the nine-page reply brief attached to this Application as Exhibit A.

10. Protiviti’s reply brief will assist this Court in adjudicating the pending Preliminary Objections, especially since Protiviti’s reply brief is targeted towards addressing several misstatements of law and fact contained in the Rehabilitator’s second brief.

11. Given that Rehabilitator has already filed two sets of briefs regarding Protiviti’s Preliminary Objections, fairness counsels that Protiviti be permitted to file a reply brief.

12. Protiviti's request for leave is timely, especially since no oral argument has been scheduled yet on the pending Preliminary Objections.

13. Pursuant to Pennsylvania Rule of Appellate Procedure 3707, counsel for Defendants informed the Rehabilitator's counsel of their intention to file Applications for Leave to file reply briefs. The Rehabilitator's counsel informed counsel for Defendants that the Rehabilitator takes no position on the Applications.

WHEREFORE, Protiviti Inc. respectfully requests that the Court grant its Application and deem the Reply Brief attached as Exhibit A to this Application filed for the purposes of resolving the parties' Preliminary Objections.

Dated: February 24, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Perry A. Napolitano
Perry A. Napolitano

PROOF OF SERVICE

I hereby certify that on this 24th day of February, 2023, I am serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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cc: All Counsel of Record

EXHIBIT 10

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**DEFENDANT PROTIVITI, INC.’S REPLY TO PLAINTIFF’S BRIEF IN
SUPPORT OF HIS PRELIMINARY OBJECTION TO PROTIVITI’S
PRELIMINARY OBJECTION 1**

Defendant Protiviti, Inc.’s (“Protiviti”) Preliminary Objections established that Plaintiff’s claims are barred by the applicable statutes of limitations. Plaintiff, however, asks this Court to forestall resolution for no sound reason. Plaintiff offers ineffectual procedural obstacles and unsupported arguments, only confirming that dismissal is appropriate. Accordingly, “no purpose would be served by a delay in ruling” on Protiviti’s preliminary objections. *See Feldman v. Hoffman*, 107 A.3d 821, 832 (Pa. Commw. Ct. 2014).

I. Plaintiff Effectively Concedes that His Claims are Time-Barred

Plaintiff does not contest that Pennsylvania's two-year statute of limitations applicable to his breach of fiduciary duty, negligence, and conspiracy claims and four-year statute applicable to its breach of contract claim would bar his claims against Protiviti if the statutes began to run *seven years* ago when Protiviti delivered the at-issue February 2015 report ("Report"). See Protiviti Opening Br. at 7.

Nor does Plaintiff have any answer for the fact that the Amended Complaint unequivocally asserts that the Report reached the "appropriate" SHIP personnel by November 2016, resolving any doubt as to the latest date on which the statute of limitations could have run. Am. Compl. ¶ 60. The pleading could not be clearer. By November 2016, SHIP was keenly aware of the problems with the Beechwood Re transaction, as to which Plaintiff now seeks to hold Protiviti responsible. Protiviti Opening Br. at 14-17; Am. Compl. ¶¶ 60, 63, 65-70, 72, 127, 131, 133. This admitted and repeated awareness triggered SHIP's duty to investigate potential legal claims stemming from the Beechwood transaction. Protiviti Opening Br. at 16-17 & n.10. Therefore, the clock was running by no later than November 2016.

To avoid dismissal, Plaintiff now attempts to rewrite his pleading through briefing. Plaintiff now falsely asserts that, "SHIP did not allege that the report in question was circulated to the Board in 2016 or that the report was delivered to the right people in 2016; instead, SHIP alleges that the report was not provided to anyone

other than [SHIP’s]¹ co-conspiring management until November 2016 at the earliest, and that, more importantly, the report did not circulate amongst the Board members until April 2018.” Pl. Br. at 25. Review of the Plaintiff’s allegations in the complaint, including that the “Protiviti report was . . . delivered to *appropriate committees or individuals at SHIP* [at] a SHOT executive session *in November 2016*,” precludes Plaintiff’s attempted recasting. Am. Compl. ¶ 60 (emphasis added). So too is it belied by SHIP’s own assertion in another litigation that “[t]he truth was . . . revealed . . . in the summer and fall of 2016” regarding “the nature and extent of Beechwood’s involvement with and control by Platinum.” *In Re Platinum-Beechwood Litigation*, No. 1:18-cv-6658-JSR (S.D.N.Y.), SHIP’s Compl. ECF No. 1, ¶ 197. Plaintiff is estopped from arguing otherwise—an argument that he fails to contest and, thus, concedes. *See* Protiviti Opening Br. at 15-16; *Barton v. Lowe’s Home Ctrs., Inc.*, 124 A.3d 349, 356 n.4 (Pa. Super. Ct. 2015); *Ulmer v. L.F. Driscoll Co.*, No. 2841 EDA 2013, 2015 Pa. Super. Unpub. LEXIS 2968, *10 (Pa. Super. 2015).²

¹ Plaintiff mistakenly said “Protiviti’s” in its brief; however, the cited allegation clearly relates to SHIP’s management, not Protiviti’s. Am. Compl. ¶ 183.

² It is well-settled that a plaintiff “may not amend his complaint through arguments in a brief in opposition[.]” *See, e.g., Hayden v. Westfield Ins. Co.*, Case No. GD-13-014064, 2014 Pa. Dist. & Cnty. Dec. LEXIS 14928, at *110-11 (C.P. Allegheny Cty. Oct. 31, 2014) (citing *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) and *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109 n.9 (3d Cir. 2002)).

Nevertheless, even if Plaintiff were correct in suggesting a delay of the statute of limitations until April 2018, the claims are *still* time-barred. The two-year tort limitations period would have expired long before Plaintiff filed suit on January 28, 2022. As for the breach of contract claim, that too cannot be saved. As previously explained, controlling law holds that the clock runs “upon the occurrence of the [contractual] breach” so the discovery rule cannot push back the February 2015 date of the alleged breach. *See* Protiviti Opening Br. at 11-12.

II. Plaintiff’s New Legal Theories and Misrepresentations Fail to Save the Amended Complaint from its Untimeliness

a. Settled Law Permits Adjudication of Protiviti’s Statute of Limitations Defense at the Preliminary Objection Stage

As Plaintiff concedes, this Court’s most recent pronouncement “permitted [a decision on a statute of limitation defense] on preliminary objections over the objection of the plaintiff.” Pl. Br. at 19 ([citing *Baney v. Fisher, Pa. Commw. Unpub. LEXIS 433 at *10 n.16 \(Pa. Commw. Ct. 2020\) \(per curiam\)*](#)). *Baney*’s well-reasoned analysis controls and should be followed—“the complaint and the attachments thereto expressly acknowledge[] facts disproving the plaintiff’s two tolling theories, fraudulent concealment and the discovery rule.” Pl. Br. at 20; *see* Protiviti Opening Br. at 11-17.

Moreover, the rule permitting adjudication at the preliminary objection stage is not cast aside simply because a plaintiff objects. *See* Pl. Br. at 4-6. Indeed, this

Court already considered that very argument a decade ago and did “not agree” with the “rigid rule” that Plaintiff advances. *Feldman*, 107 A.3d at 830, 832. Rather, controlling law permits adjudication where a defense is apparent on the face of the complaint, regardless of objection. *See id.* at 835 (holding that “it would serve no purpose to summarily reverse the trial court’s order which sustained [defendant’s] preliminary objections on the sole, procedural ground that [plaintiff] filed preliminary objections to [defendant’s] preliminary objections”).³

Plaintiff’s attempt to distinguish others in this line of cases simply because they decided different substantive defenses than Protiviti’s—immunity, litigation privilege, and defamation defenses—is likewise unavailing. Rule 1030(a) does not differentiate between defenses. *See* Pa. R.C.P. 1030(a). Indeed, because the rule upon which Protiviti relies has been readily applied in a variety of contexts, Plaintiff’s contention that it is limited to sovereign immunity is hollow.

b. Protiviti’s Statute of Limitations Defenses are Clear and Apparent as a Matter of Law

³ Contrary to Plaintiff’s selective quoting of *Feldman*, this Court did not adopt “three different rules depending on the defense asserted” and whether plaintiff objected. Pl. Br. at 9-10. Rather, after reviewing the “conflicting lines of cases [that] evolved,” *Feldman* decisively adopted “as the more sound approach” the rule permitting adjudication of defenses which are apparent on the face of the complaint regardless of objection or type of defense. *Id.* at 830, 835. To deviate from *Feldman* would, “in effect be overruling other panels of this Court.” *Id.* at 835 n.14.

Plaintiff's argument that SHIP was unable to "bring suit until after the rehabilitation order" – by resort to the discovery rule and fraudulent concealment doctrine – fails as a matter of law. Pl. Br. at 11.

The discovery rule does not save Plaintiff's untimely claims. Recognizing that the rule does not apply to a breach of contract claim, Plaintiff raises a new legal theory based on the "continuing contract doctrine." *Id.* at 15. Plaintiff posits that if a contract does not fix a certain time for payment or termination of services, the contract is treated as continuous, and the statute of limitations does not begin to run until termination of the parties' contractual relationship. *Id.* at 15.

This argument fails. Plaintiff's claim that neither the Agreement nor Amended Complaint include a fixed time for the termination of Protiviti's services is incorrect. The at-issue Statement of Work specifically provides an "Estimated End Date" of "April 30, 2015 unless otherwise modified or terminated in accordance with the terms of the Agreement." Am. Compl. Ex. B § 6. The Amended Complaint contains no allegation that this date was "modified," and Protiviti delivered its report in February 2015, as the pleading concedes. Am. Compl. ¶ 60.⁴

⁴ Faced with these facts, Plaintiff resorts to summarily arguing that "[b]ased on the continuing nature of the SOW and MSA, the four-year statute of limitations for breach of contract actions could not have run at the time SHIP was placed in rehabilitation." Pl. Br. at 16. That *ipse dixit* finds no basis in any case Plaintiff cited, nor in any allegations in the Amended Complaint.

As for the tort claims, Plaintiff's contention that the discovery rule delayed the running of the statute of limitations "[u]ntil the Rehabilitator took control of the company," Pl. Br. at 14, is yet another attempt to rewrite Pennsylvania law. *See* Protiviti Opening Br. at 17-20. And as previously explained, Plaintiff's misplaced reliance on the discovery rule fails as a matter of law.⁵ *Id.* at 11-17.

The fraudulent concealment doctrine cannot save Plaintiff's claims. Plaintiff vaguely argues that he "has alleged facts showing that Protiviti engaged in fraud and concealed the truth from SHIP and the Rehabilitator, tolling any applicable statute of limitations." Pl. Br. at 17. But he fails to identify a single factual allegation in the Amended Complaint that supports application of the fraudulent concealment doctrine as to Protiviti. *See id.* at 17-18. As discussed in Protiviti's opening brief, nowhere does Plaintiff allege "specifics as to exactly what act of concealment the

⁵ Plaintiff's handling of *Rice* and *Nicolaou* also fails. Pl. Br. at 12-14. Here, like in *Rice v. Diocese of Altoona-Johnstown*, 255 A.3d 237, 255 (Pa. 2021), the Amended Complaint clearly shows that SHIP had "actual or constructive knowledge of at least some form of significant harm" by no later than November 2016, *id.*, when the Report reached appropriate SHIP personnel and when the Beechwood transaction's "glaring problems" were admittedly known. *See supra* Section I. As for *Nicolaou*, the unique circumstances of that medical malpractice case necessitated a fact-intensive inquiry into the "untrained layperson" plaintiff's condition and involved a "lengthy history of attempted contradictory diagnosis and treatment." *Rice*, 255 A.3d at 251; *Nicolaou v. Martin*, 195 A.3d 880, 895-96 (Pa. 2018)). SHIP, on the other hand, was armed with a sophisticated board that was required to exercise due diligence in investigating potential claims. And that included in November 2016, when the Board had the Report in hand and when the Board was already investigating the SHIP managers who commissioned and previously received the Report, as Plaintiff concedes. *See* Am. Compl. ¶¶ 131, 133.

defendant performed.” *Gorski v. Colton*, No. 10-6656, 2005 Pa. Dist. & Cnty. Dec. LEXIS 809, at *23 (C.P. Delaware Cty. Nov. 4, 2005); *see* Protiviti Opening Br. at 13-15.

III. Plaintiff’s Theory that “Public Policy” Justifies a Reset of the Statutes of Limitations is Foreclosed by Controlling Law

As a matter of law, statutes of limitations apply to claims brought by an insurance rehabilitator just as they do to any other plaintiff. *See* Protiviti Opening Br. at 17-20. This Plaintiff is no exception. In response, Plaintiff attempts to manufacture a factual issue by pointing to the public policies underlying insurance rehabilitation. Pl. Br. at 25-26. But the question of whether public policy can delay the running of the statute of limitations is purely a legal question that the Pennsylvania legislature and courts already have decided against Plaintiff’s position. Protiviti Opening Br. at 17-18.

Finally, as a last-ditch effort, Plaintiff passes off the holding and analysis of *Foster v. Alexander & Alexander Servs.*, No. 91-1179, 1995 U.S. Dist. LEXIS 711 (E.D. Pa. Jan. 20, 1995), as if it were the Pennsylvania Supreme Court’s decision in *Foster v. Mutual Fire Insurance Co.*, 614 A.2d 1086 (Pa. 1992). *See* Pl. Br. at 26-27. But as previously explained, *see* Protiviti Opening Br. at 19 n.11, the Pennsylvania Supreme Court’s decision in *Foster* never addressed the issue at hand and Plaintiff’s reliance on a non-precedential district court decision that happens to

bear the same *Foster* name cannot overcome controlling precedent. *See id.* at 19-20.

IV. Conclusion

Defendant Protiviti respectfully requests that this Court enter an order sustaining Protiviti's Preliminary Objections and dismissing claims against Protiviti in Plaintiff's Amended Complaint with prejudice.

Dated: February 24, 2023

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/s/ Perry A. Napolitano

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Submitted by: Perry A. Napolitano

Signature: /s/ Perry A. Napolitano

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