United States Fire Ins. Co. v North Shore Risk Mgt.
2012 NY Slip Op 33239(U)
March 29, 2012
Sup Ct, NY County
Docket Number: 402592/2010
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 402592/2010
UNITED STATES FIRE INSURANCE
vs.
NORTH SHORE RISK MANAGEMENT
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE 001
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ No(s). ______
Answering Affidavits — Exhibits ______ No(s). ______
Replying Affidavits ______ No(s). ______

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that motion sequence number 001 and 002 are consolidated for joint disposition and decided herein; and it is further

ORDERED that the branch of Inter-Reco's motion (001) to dismiss North Shore's third-party complaint in its favor for failure to state a cause of action is unwarranted; and it is further

ORDERED that the branch of Inter-Reco's motion to dismiss the third-party complaint based on documentary evidence is denied; and it is further

ORDERED that the request to treat the motion as one for summary judgment, and for summary judgment, is denied, except as to North Shore's breach of contract claim against Inter-Reco, which is hereby severed and dismissed;; and it is further

ORDERED that Crump's cross-motion to dismiss North Shore's claims against it is granted solely as to the claims for breach of contract and indemnification, and such claims are hereby severed and dismissed; and it is further

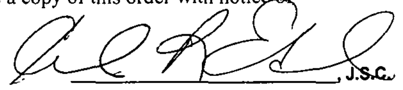
ORDERED that North Shore's request to file a separate motion for summary judgment to dismiss US Fire's "third-party action" based upon the applicable statutes of limitation is granted; and it is further

ORDERED that the branch of North Shore's motion (002) to dismiss US Fire's complaint for failure to state a cause of action and based on documentary evidence is denied; and it is further

ORDERED that third-party defendant Inter-Reco shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/30/2012



______, J.S.C.
HON. CAROL EDMEAD

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: .... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-- X

UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff,

-against-

NORTH SHORE RISK MANAGEMENT,

Defendant.

-- X

NORTH SHORE RISK MANAGEMENT,

Third Party Plaintiff,

-against-

CRUMP INSURANCE SERVICES, INC. and
INTER-RECO INC.,

Third Party Defendants.

-- X

Index No.: 402592/2010
Motion Seq. No. 001 & 002

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance defense and indemnification action, third-party defendant, Inter-Reco Inc. ("Inter-Reco") moves to dismiss the third-party complaint of North Shore Risk Management ("North Shore") pursuant to CPLR §3211(a)(1) based upon documentary evidence and pursuant to CPLR §3211(a)(7) for failure to state a cause of action, and for summary judgment pursuant to CPLR §3211(c), or in the alternative, for an order allowing Inter-Reco further time to Answer the third-party complaint (Motion #001). Crump Insurance Services, Inc. ("Crump") cross moves to dismiss the third-party complaint as barred by the statute of limitations and for failure to state a cause of action. By separate motion, North Shore moves for summary judgment, and to dismiss the complaint for failure to state a cause of action and based on documentary evidence (Motion

#002).[1]

Factual Background[2]

This action is related to an underlying declaratory judgment action, *Insurance Corporation of New York* ("Inscorp") *v United States Fire Insurance Company* ("US Fire") *and BFC Construction Corp.* ("BFC") (the "Inscorp DJ action"), which was commenced due to an insurance dispute arising from three personal injury actions filed by workers at three construction sites where BFC Construction Corp. ("BFC") performed construction work. Inscorp was the primary insurer on a commercial general liability insurance policy issued to BFC (the "Inscorp Policy" or "Policy") and US Fire was BFC's excess insurer.

By way of background, BFC's insurance broker North Shore, approached wholesale insurance broker, Crump, which in turn, approached Inter-Reco (Inscorp's agent/underwriting program administrator), and Inter-Reco issued the Inscorp Policy.

During the litigation of the three personal injury actions, Inscorp tendered the defense of the personal injury matters to US Fire, and US Fire disclaimed excess coverage on the ground that the Inscorp Policy was not exhausted.

Inscorp then commenced its DJ action against US Fire for reimbursements of settlement payments Inscorp made and defense costs in excess of its Policy limits. Inscorp argued that the Policy provided a *total* general aggregate limit of $2,000,000 for *all* insured locations combined. According to Inscorp, the "Designated Construction Project General Aggregate Limit Endorsement" (the "Endorsement"), which would otherwise have provided for separate

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[1] Motion sequence number 001 and 002 are consolidated for joint disposition and decided herein.

[2] The Factual Background is taken in large part from Inter-Reco's motion papers.

$2,000,000 aggregate limits for each individual BFC construction project, did not apply because the individual BFC construction projects were not individually listed in the box on the Endorsement or in the declarations to the Policy, and the six sites listed on the declarations page were not involved in the settled claims. In turn, US Fire cross-moved to dismiss the action, and submitted numerous documents to show that all parties intended that the Inscorp Policy applied a separate per project aggregate limit for each BFC construction project, and thus, said Policy had not yet been exhausted.

This Court determined that the parol evidence submitted as to the parties' course of conduct and intent of the Inscorp Policy could not be considered because the Policy was clear and unambiguous. Ruling against US Fire, this Court determined that the Inscorp Policy only provided a general aggregate limit totaling $2,000,000 because the Endorsement did not apply as it did not individually list the specific BFC projects in the designated box.[3]

US Fire then commenced this action against North Shore alleging damages as a result of North Shore's representations regarding the coverage afforded under the Inscorp Policy. US Fire alleges that under its agreement with North Shore, North Shore agreed to solicit, receive and send proposals for commercial contracts to US Fire, forward copies of all binders, certificates and endorsements to US Fire, and to defend/indemnify US Fire for claims arising out of North Shore's errors or omissions regarding business placed with US Fire. In turn, North Shore commenced a third-party action against Crump and Inter-Reco, seeking damages for common-law indemnification, contribution, breach of contract, and negligent misrepresentation.

[3] On appeal by US Fire, US Fire's cross-motion was granted and the complaint against it was dismissed. The Appellate Court's decision did not address, however, that part of US Fire's appeal regarding the Per Project Aggregate Limit Endorsement, but "dismissed the appeal in part."

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Inter-Reco's Motion

In support of its motion to dismiss, Inter-Reco contends that according to its underwriter Patrick Conklin ("Conklin"), the Inscorp Policy was prepared to provide a $2,000,000 aggregate applicable to *each and every individual BFC Construction Project* ("Conklin Affidavit"). It was clear to all involved that the Inscorp Policy was to have an endorsement providing for a per-project aggregate limit. In conversations with Inscorp, Inscorp represented to Inter-Reco that whenever issuing any Inscorp policy intended to have a per-project limit, the box on the Endorsement used to achieve this end should be left blank to effectuate a per-project aggregate limit for all locations. The fact that the Endorsement was a part of the Policy in the first place provided for per-project coverage, and it would not have otherwise been included.

Inter-Reco contends that prior to the commencement of Inscorp's DJ action, by letter dated May 5, 2006 from North Shore Managing Director Steven Potolsky to Inscorp's claim representative Ward North America, L.P. ("Ward"), Potolsky indicated that the subject endorsement "was issued with no specific construction sites listed, the intent of which was to provide an unimpaired aggregate for each construction project they were working on." He offered to produce other similar policies that Inscorp issued that were handled in a similar manner.[4]

By email dated September 23, 2006, Inter-Reco's President Rick Krouner, confirmed to North Shore that when issuing policies with this endorsement on behalf of Inscorp, Inter-Reco purposely leaves the "Designated Construction Projects" box blank. It is the intent of the Inter-

[4] Potolsky followed up on June 27, 2006, reiterating North Shore's position to Ward that Inscorp never made North Shore list each construction site being worked on by North Shore's insured as a condition of coverage on any similar policy. Attached to that letter was a document explaining the purpose of the Endorsement.

Reco that simply attaching the Endorsement to the Policy "signifies that the aggregate applies to each and every project." This email was forwarded to Inscorp's claim representative, Ward, as well as to US Fire and BFC, by North Shore's letter dated October 3, 2006.

North Shore's Potolsky affidavit submitted in support of US Fire's motion in the Inscorp DJ action, again reiterated that although "the schedule contained in this endorsement is blank, the endorsement was specifically issued to provide an unimpaired per project aggregate limit for those construction projects where BFC performed work." Inscorp had issued other construction related policies to North Shore's clients which contained similar endorsements providing for unimpaired aggregates for each construction project worked on, and North Shore was not required to list each construction site at those times.

Inter-Reco also states that the documentation generated during the preparation of the Inscorp Policy in late 2000[5] demonstrates that the Policy was intended to cover BFC on a per-project aggregate basis and that all involved entities agreed and understood that the Inscorp Policy provided for such coverage.

Inter-Reco argues that such documentary evidence establishes that it was not negligent because it did everything that was required of it regarding the Inscorp Policy. It is not Inter-Reco's fault that the Court held that a total aggregate limit of $2,000,000 applied to the Inscorp Policy, and Inter-Reco cannot be held liable for that result. The Inscorp Policy was prepared according to what was quoted by Inter-Reco to Crump, and what was required by Inscorp itself. The documentary evidence shows that North Shore and all parties were in complete agreement

[5] October 31, 2000 "Large Contractor Application"; December 16, 2000 Inter-Reco "Quotation"; December 22, 2000 Insurance Accord; December 28, 2000 "Commercial Liability Confirmation of Insurance"; and January 1, 2001 Inter-Reco "Binder."

with the manner in which the Endorsement was being prepared by Inter-Reco pursuant to Inscorp's specific instructions. The parol evidence previously rejected by the Court can now be considered to determine the merit of North Shore's claims against Inter-Reco. The documents show that North Shore knew, understood and assented to the terms of the Inscorp Policy, and the manner in which it was created. Inter-Reco was never made aware that any additional or supplemental insurance was necessary, that any amendments were necessary, or that the Inscorp Policy was deficient in any manner.

North Shore, a well established retail insurance broker, even represented that the Policy was satisfactory by making reference to the prior Inscorp policies that had been produced for North Shore's clients in the same manner. Potolsky's affidavit confirms that prior policies issued by Inscorp to North Shore's clients contained similar endorsements and in each instance.

Inter-Reco also argues that North Shore's third-party complaint fails to state a cause of action because it fails to allege the existence of any contract between North Shore and Inter-Reco. Inter-Reco had no privity or contractual relationship with North Shore and owed it no duty with respect to the issuance of the Inscorp Policy. Inter-Reco only maintained contracts and privity with the insurer Inscorp, and the wholesale broker Crump. And, all involved were aware that Inter-Reco was acting as Inscorp's agent, and there can be no liability of an agent acting on behalf of a disclosed principal.

Furthermore, Inter-Reco argues that the instant motion should be considered as a motion for summary judgment pursuant to CPLR §3211(c), based upon the evidence presented. Such evidence shows that Inter-Reco is not liable to North Shore. North Shore agrees that the Policy as written provided for the per-project aggregate limit desired by BFC. And Inter-Reco could not

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have acted in contravention of Inscorp's wishes.

Alternatively, Inter-Reco reserves its right to move for summary judgment upon the completion of discovery.

North Shore opposes the motion, arguing that on all Inscorp policies underwritten by Inter-Reco, when no per project limit was to be provided, the endorsement was simply *not included* in the policy. Thus, the Endorsement provided for a $2,000,000 per project aggregate limit of liability. The "Designated Construction Projects:" box located to the top of the Endorsement page was intentionally left blank by Inter-Reco. As this method of memorializing the intention to provide for a per project aggregate limit of liability arose out of Inter-Reco's discussions with Inscorp, Inter-Reco was not simply an insurer's agent operating in a vacuum with no connection to North Shore. Instead, Inter-Reco is in effect the author of the Policy creating within the terms of the Policy the methodology by which the Policy communicated the fact that the aggregate coverage was a per construction site aggregate. Inter-Reco was fully aware of all the parties' intentions relative to the Policy, and aware that Crump would be dealing with a retail broker (such as North Shore) who would then be the agent for the insured, BFC.

A defendant may be liable in tort when it has breached the duty of reasonable care distinct from its contractual obligations or when it has engaged in tortuous conduct separate and apart from its failure to fulfill its contractual obligations. Furthermore, a legal duty independent of contractual obligations may be imposed as an incident to the parties' relationship. In producing the Inscorp Policy, Inter-Reco was aware that the Policy could and would be used for the purposes of securing excess insurance coverage for the multiple construction sites that it intended to cover. It cannot be established at this early juncture whether Inter-Reco was aware or

understood that this Policy and the representations that were made about it would ultimately be relied upon by North Shore. Inter-Reco does not affirmatively deny knowledge of the existence and reliance of North Shore and even if it did, this litigation it is not at the point that would allow North Shore to join issue with its allegations. At best, Inter-Reco should have and more than likely did, understand that the insurance professionals up and down the line would rely upon its creation of the Policy based upon its acknowledged intention and would justifiably do so. Such reliance would be based upon Inter-Reco's understanding of the demands of its insurer, in this case Inscorp and/or its own chosen method of memorializing its intent.

Inter-Reco's arguments relative to privity or even that of being an agent for disclosed principal are insufficient as the issue of this litigation is purely one of process, procedure and authorship relative to the creation of an insurance product by an entity that could bind the insurer. An entity that creates a product acknowledging what it intended to do cannot escape liability for that product by simply declaring itself a member of a particular industry.

North Shore further argues that the issue of whether Inter-Reco did something wrong exists between Inter-Reco and its principal/insurer, Inscorp, and not between Inter-Reco and North Shore. North Shore can justifiably rely on Inter-Reco's creation as by agreement of all parties to this lawsuit, it was the intended result. Thus, it is premature to conclude whether or not Inter-Reco did something wrong.

US Fire also opposes Inter-Recos' motion, arguing that Inter-Reco failed to establish that privity was required and did not exist between North Shore and Inter-Reco. Inter-Reco was contacted through North Shore and Crump to procure the policy for BFC. Thus, there are numerous agency relationships and conversations in which coverage was discussed. Even

assuming there was no direct contract between North Shore and Inter-Reco, privity and liability will be found where the parties have a close relationship. Additionally, the parties are entitled to discovery as to whether there was a contract between the parties, the role Inter-Reco played in issuing the Policy, the representations made to the parties regarding the per project aggregate limit, and as to evidence supporting other forms of contract formation, such as by performance.

Additionally, courts have held that the existence of apparent authority depends on a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct of the principal—not the agent. Inter-Reco has an entirely different story than Inscorp, the principal, which at the very least, presents a question of fact.

And, Inter-Reco provides no legal support for why this Court should now consider the evidence it previously rejected. The issue of the separate per project aggregate limit was extensively briefed by the parties. Inter-Reco's argument as to why it was not negligent is entirely irrelevant to a determination as to the admissibility of documentary evidence.

When the per project aggregate limit was being contested by Inscorp, Inter-Reco refused to provide US Fire with an affidavit regarding the limit contained in the Inscorp Policy. It is not until now, after the Court found that the Inscorp Policy does not contain such a limit and US Fire is liable for amounts expended to defend and to indemnify BFC, that Inter-Reco provided an affidavit, and US Fire is entitled to depose Inter-Reco based on the affidavit. And, in any event, US Fire, as the party without fault, should be entitled to discovery with respect to Inter-Reco's role in the issuance of the Inscorp Policy and representations regarding the coverage provided by the Inscorp Policy. Inter-Reco's own interpretation of the facts differ from this Court's previous findings and statements of the other parties. Discovery is needed to determine the extent to

which representations were made by and to North Shore regarding the aggregate limit and as to the contracts between North Shore, Crump and Inter-Reco.

In reply, Inter-Reco argues that North Shore does not contest the accuracy of its submissions, or submit an affidavit of its own. Inter-Reco played no role in North Shore's procurement of US Fire's excess policy. The cases cited by North Shore do not apply in this insurance context. Further, North Shore did not rely on Inter-Reco, but was aware of Inscorp's methods and procedure by virtue of numerous prior Inscorp policies that were issued to North Shore's clients. North Shore's real dispute is with Inscorp, not Inter-Reco.

In further reply, Inter-Reco argues that all pertinent discovery has been provided *via* the motions, any discovery needed from Inter-Reco can be obtained later from Inter-Reco as a non-party. US Fire has never sued Inter-Reco or had any relationship with Inter-Reco. Inscorp never sued Inter-Reco, US Fire never impleaded Inter-Reco, and US Fire never amended its complaint to assert claims against Inter-Reco after North Shore commenced its third-party action. Also, US Fire is not a party to the third-party action, which has no affect on US Fire's ability to maintain its primary action against North Shore. Further, the Court's refusal to consider parol evidence in the context of contract interpretation is irrelevant in that the Court may consider documentary evidence to determine whether negligence occurred on Inter-Reco's part. Any liability for the fact that the Inscorp Policy did not provide for the desired coverage rests only with Inscorp. All defendants agree that representations, if any, were that the Policy had multiple limits because "that is what everyone, including Inscorp, intended." Thus, there is no need for discovery. Inter-Reco, with actual authority to act on behalf of Inscorp as the disclosed principal, only did exactly what Inscorp told it to do.

Crump's Cross-Motion to Dismiss

Crump cross moves to dismiss North Shore's third-party complaint as barred by the statute of limitations and for failure to state a cause of action.

Crump contends that the breach of contract claim was untimely commenced after the expiration of the six-year limitations period because the Policy was issued no later than January 1, 2001 and North Shore commenced this action on June 15, 2011. Further, North Shore failed to state a breach of contract claim because North Shore fails to plead the provisions of any contract between it and Crump that Crump allegedly breached. Also, the negligent misrepresentation claim brought after the three-year statute of limitations period expired is also time-barred because the latest date on which such claim accrued was upon the Court's determination on February 8, 2011. Further, North Shore was not Crump's agent or customer, and there is no privity or special relationship between North Shore and Crump to give rise to negligent misrepresentation claim. And, since North Shore had a copy of the clear and unambiguous Policy, North Shore is presumed to have known and understood the Policy, and North Shore's reliance on anything otherwise would have been unreasonable. Further, because a "retail insurance broker (North Shore) who breached its own duty of care is barred from looking to the wholesale insurance broker (Crump)" for indemnification or contribution, North Shore does not have a right to assert such claims against Crump. North Shore's indemnification claim is also precluded by its own negligence and there can be no contribution claim for economic loss resulting from North Shore's own breach in failing to read the unambiguous Policy. And, North Shore did not delegate its decision making responsibility to Crump.

North Shore opposes Crump's motion, arguing that the breach of contract action is

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timely. The manner chosen by Inscorp or its agent to communicate the type of coverage could only be tested when Inscorp chose not to stand behind the intent of its own Policy. Thus, the appropriate point from which to begin the running of the statute of limitations is when this action was commenced by US Fire on March 27, 2009. This was the first notice to North Shore that Inscorp had contested the coverage of its own Policy and thereby created questions relative to the representations that had been made by Crump's predecessor, Tri-City. Nor can Crump rely on this Court's February 5, 2008 decision interpreting the Policy because North Shore was neither named as a party in that litigation at that point, nor did it otherwise have an opportunity to contest the interpretation of the Policy. Should this Court accept that the statute of limitations relative to the contract cause of action began to run with the issuance of the Policy, North Shore requests this Court recognize that US Fire's third-party action, including the breach of fiduciary duty and quantum meruit/unjust enrichment claims, filed on March 27, 2009 was also filed well over three years beyond the running of the statute of limitations. And, if the Court declines to do so, North Shore requests to file a separate motion for summary judgment to dismiss those claims based upon the applicable statutes of limitation.

US Fire also opposes Crump's cross-motion, arguing that North Shore's breach of contract claim against Crump begins to accrue at the time of the breach. Up until this Court's decision, as confirmed by the Appellate Court, all of the parties maintained, and still maintain, that the Inscorp Policy had a separate per project limit, and all the parties deny any wrongdoing. Thus, there is an issue of fact as to when the breach occurred.

In any event, equitable estoppel bars the statute of limitations defense as the defendants' "affirmative wrongdoing" contributed to the delay between accrual of the cause of action and

commencement of the legal proceeding. Prior to this Court's ruling dated February 5, 2008, US Fire understood that the Inscorp Policy contained a separate per project aggregate limit. US Fire timely commenced an action against North Shore based on, among other things, breach of contract. North Shore's third-party complaint stems from US Fire's complaint and therefore is timely. The statute of limitations should be tolled as issues of the parties' misrepresentations regarding the Inscorp Policy are at issue. Notably, Crump does not deny that it was involved in the issuance of the Inscorp Policy.

US Fire argues that North Shore's negligent misrepresentation claim is also timely. This is not a simple negligence claim. Courts apply a six-year statute of limitations period to negligent misrepresentation claims that are related to fraud claims. As admitted by Crump, this Court confirmed that the Inscorp Policy did not contain a per project aggregate limit despite the parties' representations that it did. Moreover, North Shore's reliance on CPLR §214(4) is also misplaced as this statute applies to "action[s] to recover damages for an injury to property." As the relief sought is equitable in nature, the six-year limitations period of CPLR § 213(1) applies. Furthermore, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR § 213(8).

US Fire also argues that North Shore presented documents showing that the Policy contained a separate aggregate limit for each construction site, and US Fire issued its policy based on North Shore's representations. As a result of this Court's ruling, US Fire was required to defend and to settle various personal injury actions. The parties failed to procure the proper coverage as required, and in the absence of discovery, each party's motion should be denied.

Also, North Shore sufficiently alleges, and Crump does not deny, that Crump agreed to

originate and issue an insurance policy that would provide for BFC the aggregate amount of coverage available under the policy for each and every construction project, that the agreement was breached, and damages were sustained. Thus, as pleadings are liberally construed, North Shore states a cause of action for breach of contract.

US Fire maintains that North Shore also states a claim for negligent misrepresentation. Without discovery, US Fire cannot opine regarding the relationship between Crump and North Shore. At the very least, allegations of an agreement between North Shore and Crump suggests there is privity. Nevertheless, New York courts have permitted a party like North Shore to assert claims against Crump, a wholesale broker, despite the absence of alleged privity between the parties. In order to sustain a finding of privity between the parties, discovery is needed to determine what representations were made regarding the coverage afforded under the Inscorp Policy, who made such representations, and when they were made.

US Fire points out that North Shore alleges that Crump "did represent to the third-party plaintiff that the policy of insurance was underwritten by the insurance corporation of New York in favor of BFC Construction Corp. bearing . . . the unimpaired aggregate insurance coverage provided by the policy for each and every construction site that BFC Construction Corp. was or would work on during the policy period." The parties were in contact, and not only did North Shore appear to rely on Crump's statements in instructing US Fire, but there was sufficient privity. Additionally, further information is needed to address Crump's additional argument that North Shore did not share a special relationship with Crump. North Shore asserts that Crump had contacts and a sufficient relationship with Crump so North Shore rightfully relied upon the representations made by Crump and was damaged as a result.

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Finally, US Fire points out that it has a claim for indemnification against Crump as it concedes that it also was involved with the procurement of the Inscorp Policy. The statute of limitations on these causes of action begins to run when the party seeking indemnification or contribution has made payment to the injured party. Therefore, such claims are not time-barred.

In reply to North Shore, Crump argues that breach of contract claims accrue with the alleged breach to procure the requisite insurance coverage, even if the damage occurs later. And, any representation of the general aggregate limit, if any, had to have occurred before January 1, 2001, when the Inscorp Policy was issued. The latest North Shore can claim injury is February 5, 2008, since North Shore would not have suffered any damages had the Court ruled differently. Thus, the negligent misrepresentation claim is untimely. Further, US Fire presented the same arguments and documentary evidence of which North Shore now claims it was deprived. Further, North Shore cannot introduce parol evidence barred by the Court. The paragraphs North Shore relies upon in its complaint do not refer to any contract between it and Crump. Further, if US Fire recovers from North Shore, it will be due to North Shore's breach of its contract and agent duty to US Fire, which in turn, precludes North Shore from looking to the wholesaler, Crump, for damages.

In reply to US Fire, Crump adds that equitable estoppel does not apply because no affirmative wrongdoing on the part of Crump contributed to the delay. Also, there is no allegation that North Shore reasonably relied on any misrepresentation by Crump that North Shore's due diligence would not have uncovered. Nor is there an allegation of fraud to permit a longer statute of limitations to apply to the misrepresentation claim against Crump.

North Shore's Motion to Dismiss

North Shore also moves to dismiss, arguing that each of US Fire's claims requires an act or action upon which US Fire can establish that a contract has been breached, from which indemnification can flow, a fiduciary duty has been breached, or that North Shore has been unjustly enriched. As no such act or action exists, none of the causes of action are viable. The method used within the Policy to memorialize or commit Inscorp to provide a separate $2 million general aggregate limit for each of the construction sites where BFC performed work originated with Inter-Reco. Through its insurance accord forms, commercial liability confirmations of insurance, binders, and insurance policies, Inter-Reco communicated to North Shore and its insureds that each policy provided such a limit. An insurance agent represents an insurer under an exclusive employment agreement by the insurance company. The acts of the agent are imputable to the insurer, and a principal is bound by the actions of its agent, acting within the bounds of its authority. The representation to US Fire that the Inscorp Policy provided such a limit was made on the quote of insurance from Inter-Reco, confirmation of insurance from Inter-Reco, and the policy of insurance as generated by Inter-Reco, all as agent for Inscorp. North Shore could rely upon the offers of coverage, confirmation of insurance and the content of the insurance policy including the method utilized by Inter-Reco, and the statement that the Policy provided that coverage is not a misstatement, but rather is a statement of fact. North Shore had a right to rely on and accept as fact the content of the Policy based upon the actions, representations, authority, and directions to Inter-Reco as agent for Inscorp. Therefore, no fact finder could conclude that North Shore misrepresented the coverage provided by the Policy.

US Fire opposes North Shore's motion, arguing that the documentary evidence, such as

Conklin's affidavit, is insufficient. US Fire points out that North Shore relies upon documents submitted by US Fire that were rejected by this Court and it is incredulous for North Shore to ask this Court to consider such evidence to escape liability. Despite North Shore's representations to US Fire that the Policy contained a separate per project limit, this Court confirmed that it did not.

Moreover, North Shore's reliance on Conklin's affidavit submitted on behalf of Inter-Reco is misplaced. Inter-Reco is the agent for Inscorp, and Inter-Reco was involved in the issuance and underwriting of the Inscorp Policy. Significantly, despite Inter-Reco's continued assertions that the Inscorp Policy was issued with the intent that it would contain a separate per project limit, Inscorp has always maintained that the Policy did not contain such a limit. An insurance agent or broker owes a duty to his or her principal to exercise good faith and reasonable diligence to procure a policy that provides the coverage desired, on the best terms that he or she can obtain, and any negligence or breach of duty on the agent's part that defeats the insurance that the agent procures will render him or her liable for the resulting loss. To the extent that the agent breaches any of its duties, the agent is liable to the insurance company in damages for the loss sustained if such breach resulted in injury to the insurance company. Pursuant to the Agency Agreement between US Fire and North Shore, North Shore agreed to send US Fire proposals for commercial lines insurance contracts and comply with all applicable laws and regulations including, but not limited to, the cancellation, nonrenewal or conditional renewal of policies, as well as all other law governing the conduct of the Agent. The Agency Agreement provides that North Shore is required to defend and indemnify US Fire as a result of its acts, errors, omissions or misrepresentations. Based on representations and documents presented by North Shore, the US Fire policy was issued with the express understanding that the

Inscorp Policy contained a separate per project aggregate limit. Yet, US Fire had to incur costs to defend and to indemnify BFC. Thus, North Shore is required to reimburse US Fire for the damages resulting from that breach.

And, at the very least, US Fire has sufficiently pled causes of action for breach of contract, unjust enrichment/*quantum meruit*, breach of fiduciary duty, and indemnification. US Fire accepted North Shore's services in that North Shore provided US Fire with binders, certificates, and endorsements, showing that the Inscorp Policy contained a separate limit. North Shore was compensated for its services and therefore, was enriched at US Fire's expense. And, North Shore breached its fiduciary duty of undivided loyalty, obedience and a duty of reasonable care to US Fire in that despite North Shore's assertions to US Fire, the Inscorp Policy did not contain a separate aggregate limit. North Shore also had a common law obligation to exercise reasonable skill and diligence in procuring and obtaining insurance coverage. Moreover, North Shore is required to defend, indemnify and hold harmless US Fire. As the Inscorp Policy did not contain a separate limit, the indemnification language contained in the Agency Agreement was triggered. Thus, at a minimum, US Fire has a cause of action for indemnification. Until a full picture can be developed as to the facts of this case, specifically, North Shore's role with respect to the Inscorp and US Fire Policy, North Shore's motion should be denied as premature.

In reply, North Shore argues that this Court's prior decisions regarding the meaning and effect of the Policy language as well as the admissibility of evidence outside the four walls of the Policy are irrelevant with respect to this motion. Collateral estoppel and *res judicata* do not apply, as North Shore, Crump and Inter-Reco were not parties to the original lawsuit and were therefore unable to place before this Court what is now apparently true about the circumstances

at the time of the creation of the Policy and at the time of Inscorp's successful attempt to avoid its obligations under the Policy. US Fire cannot establish that North Shore ever misrepresented the intended coverage of the Policy, and communicated the true intended coverage in reliance upon an agent for Inscorp who then made and now makes that same representation for Inscorp and therefore binding Inscorp.

Discussion

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). When considering such a motion, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

And, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been

stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*" (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant, "[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of this defense may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Philips South Beach, LLC v ZC Specialty Ins. Co.*,

55 AD3d 493, 867 NYS2d 386 [1st Dept 2008] (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based")).

Pursuant to CPLR 3211(c), upon "motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. . . . [T]he court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. . . ." In this connection, the proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York University Medical Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Inter-Reco's Motion to Dismiss

Inter-Reco's motion seeks dismissal of all of North Shore's four causes of action based on a lack of duty owed to North Shore due to the absence of privity and contractual relationship. Inter-Reco acknowledges that it had privity with wholesaler Crump, but denies privity with North Shore.

It is well settled that "common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries" (*Structure Tone, Inc. v Universal Services Group, Ltd.*, 87 AD3d 909, 929 NYS2d 242 [1st Dept 2011]

[* 23]

citing Hawthorne v South Bronx Community Corp., 78 NY2d 433, 576 NYS2d 203, 582 NE2d 586 [1991]).

To state a cause of action for contribution, third-party plaintiff North Shore must allege that the third-party defendant Inter-Reco owed it or plaintiff US Fire a duty (*Facundo, S.A. v Pressman*, 233 AD2d 117, 649 NYS2d 133 [1st Dept 1996]).[6]

To state a cause of action for breach of contract, North Shore must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071(A), 816 NYS2d 702 [Supreme Court, New York County 2006] *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; and *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

And, in order for a plaintiff to allege a negligent misrepresentation claim, plaintiff must allege a "special relationship," *i.e.*, either privity of contract between the plaintiff and the defendant or a relationship "so close as to approach that of privity" (*Sykes v RFD Third Ave. 1 Assocs., LLC,* 67 AD3d 162, 884 NYS2d 745 [1st Dept 2009]). To assert "a relationship sufficiently approaching privity" (*id.*), the plaintiff must allege: (1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the

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[6] As to North Shore's claim for common law indemnification and contribution, Inter-Reco asserts no separate argument for dismissal of these claims, except for the claim that it owes North Shore no duty.

statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance (*Levi v Utica First Ins. Co.*, 2003 WL 25700239 (Trial Order) [Supreme Court, New York County [2003] *citing Point O'Woods Assn. v Those Underwriters at Lloyd's, London*, 288 AD2d 78, 81 [1st Dept 2001] [internal citations and quotation marks omitted], *lv denied* 98 NY2d 611 [2002]).

First, with a liberal reading the third-party complaint, and accepting North Shore's allegations as true, as this Court must, North Shore states a claim for breach of contract, and negligent misrepresentation. The third-party complaint alleges that "third-party defendants" Inter-Reco (and Crump) "agreed" to secure, generate and issue an insurance policy to BFC for "each and every construction project"on which BFC would be working, and that it failed to fulfill this obligation, causing North Shore to incur expenses. North Shore alleges that third-party defendants intentionally did not list the location of all covered construction projects of BFC, but rather left the Endorsement box blank to signify an aggregate per project coverage. In light of these allegations, that there is no specific allegation of a contract between Inter-Reco and Crump, is of no moment to this branch of the analysis.

As to the negligent misrepresentation claim, North Shore's complaint sufficiently alleges that Inter-Reco (and Crump) represented to North Shore that the Inscorp Policy provided an unimpaired aggregate insurance covered each and every construction site on which BFC was working. And, it alleges that Inter-Reco was aware that the Inscorp Policy would be used for the purposes of securing BFC's assets and to allow North Shore to obtain further excess coverage for BFC. At this stage of the litigation, and in the absence of full discovery, dismissal of the negligent misrepresentation claim is unwarranted.

Thus, dismissal of North Shore's entire third-party complaint in favor of Inter-Reco for failure to state a cause of action is unwarranted.

As to dismissal based on documentary evidence, the Court notes that such evidence is not precluded from consideration based on this Court's prior order, which, unlike the matter herein, involved an interpretation of an unambiguous Policy issued by Inscorp to determine Inscorp's liability thereunder.

However, the Court notes that except for the pleadings and the Court's prior order, the documents submitted by Inter-Reco, including, but not limited to the May 5, 2006 and June 27, 2006 correspondence to Inscorp's claim representative Ward, and affidavit by Inter-Reco's President, do not qualify as "documentary evidence" as that term is understood under CPLR 3211(a)(1). The term "documentary evidence" as referred to in CPLR 3211(a)(1) typically means judicial records such as judgments and orders" (*Webster Estate of Webster v State of New York*, 2003 WL 728780 [N.Y.Ct.Cl. 2003]; *Fontanetta v Doe*, 898 NYS2d 569 [2d Dept 2010] (Judicial records would qualify as "documentary evidence" in the proper case) citing 2 N.Y. Prac., Com. Litig. in New York State Courts § 7:60, 2d. ed.)). "Obviously, a defendant may not prevail on a motion to dismiss on documentary evidence where the relied upon document is ambiguous" (NYPRAC-COMM § 7:60 Motion to dismiss on documentary evidence). "Typically, the term means judicial records such as judgments and orders, or out-of-court documents such as contracts, deeds, wills and/or mortgages. It also includes a paper, the contents of which are essentially undeniable and which, assuming the verity of those contents and the validity of its execution, will itself support the ground on which the motion is based. Affidavits and deposition transcripts do not qualify as "documentary evidence" for purposes of this rule (see

Williamson, Picket, Gross v Hirschfeld, 92 AD2d 289, 290 [1st Dept 1983]; *Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court Bronx County 2004]).

Such correspondence submitted by Inter-Reco tends to show that contrary to Inter-Reco's contention, Inscorp never intended for the blank box to provide an aggregate for each construction site. Notably, Inter-Reco submits no documentation from Inscorp indicating that Inscorp told it to leave the box blank when attempting to effectuate coverage on a per-project aggregate basis.[7]

Further, contrary to Inter-Reco's contention that it was only Inscorp "who caused the endorsement on their policy to be structured in the way that it was . . ." (Reply to US Fire, ¶14), the record indicates that Inscorp had a different interpretation of the blank box on the Endorsement. The Court notes that in addition to the position taken by Inscorp as alluded to in the May 5, 2006 and June 27, 2006 correspondence, in defense of the $2 million total aggregate argument on appeal, Inscorp asserted that "No projects are listed in the box on the Endorsement (117). Therefore, to determine the applicability of the Endorsement, it is necessary to refer to the Declarations pages of the Policy" (2009 WL 7310024, *14) The Designated Construction Projects Aggregate Limit Endorsement expressly states that it only applies to Scheduled projects listed on the Endorsement or, where no projects are listed on the Endorsement, then to projects referenced in the Declarations (*id.* 16-17). However, Inscorp's "agent," Inter-Reco, contends that

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[7] The Court observes that it appears from footnote 2 of Inscorp's appellate brief that Inscorp did not submit any documentation to support its intentions concerning the blank box ("In addition to being irrelevant, the extrinsic evidence submitted by U.S. Fire only tells part of the story. If U.S. Fire's extrinsic evidence were considered, Inscorp would be entitled to provide its own contrary extrinsic evidence regarding the parties' intent (*Id.* 17)).

Inscorp instructed it not to list projects in the box on the Endorsement as a means of insuring each project. Further, that Inter-Reco, as an underwriter program administrator, worked as agents for insurers to underwrite policies in accordance with the insurer's instruction, does not establish that Inter-Reco was not aware that the Policy was going to by relied upon by North Shore or did not expressly state to North Shore that the Policy would provide an aggregate per project; indeed, the email from Inter-Reco's President Krouner to North Shore indicated that such was the case.

And, the cases cited by Inter-Reco are factually dissimilar *(see e.g., Point O'Woods Assn. v Those Underwriters at Lloyd's, London Subscribing to Certificate No. 6771*, 288 AD2d 78, 733 NYS2d 146 [1st Dept 2001] (finding that the carrier could not rely "on a phrase contained in a promotional flyer that the broker received from an entity described by the carrier as a 'wholesale broker,' and which identifies the carrier as the underwriter of the insurance being promoted" to establish privity)).

In light of the above, the documentary evidence submitted fails to establish, as a matter of law, that Inter-Reco was not negligent and made no negligent misrepresentations regarding the Inscorp Policy.

As to Inter-Reco's claim that it is not liable as an agent of a disclosed principle, the rule is firmly established that "an agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal'" (*News America Marketing, Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 791 NYS2d 80 [1st Dept 2005] *citing Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4, 254 NYS2d 521, 203 NE2d 206 [1964]). As the movant, Inter-Reco failed to

establish, with documentary evidence, that it did not intend, or cannot be deemed to have intended, to substitute its personal liability for, or to, that of its principal, Inscorp. Discovery is necessary in order for the parties to uncover any evidence in this regard.

However, as to North Shore's breach of contract claim, it is uncontested, and the record indicates, that no agreement existed between North Shore and Inter-Reco. In light of the submissions, the request to treat the motion as one for summary judgment, and for summary judgment, is unwarranted, except as to North Shore's breach of contract claim against Inter-Reco, which is hereby severed and dismissed.

Therefore, Inter-Reco's motion to dismiss is denied at this juncture, without prejudice, except that the motion is granted as to North Shore's breach of contract claim against Inter-Reco.

<u>Crump's Cross-Motion</u>

In an action against an insurance broker for failure of obtain the requested coverage, a "cause of action for breach of contract accrues and the Statute of Limitations commences to run when the contract is breached" (*Lamendola v Mossa*, 190 Misc 2d 147, 736 NYS2d 836 [App. Term, 2d Dept 2001] *citing Ely–Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 599 NYS2d 501, 615 NE2d 985), which begins to run from the date plaintiff requested defendant to obtain the insurance and defendants' alleged failure to take steps to procure said insurance (*Lamendola v Mossa, supra citing Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 595 NYS2d 931, 612 NE2d 289)). "Knowledge of the occurrence of the wrong on the part of plaintiff is not necessary to start the Statute of Limitations running in a breach of contract action" (*Lamendola v Mossa, supra, citing Varga v Credit–Suisse*, 5 AD2d 289, 292, 171 NYS2d 674, *affd.* 5 NY2d 865, 182 NYS2d 17,

155 NE2d 865). "[T]he Statute runs from the time of the breach though no damage occurs until later" (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 599 NYS2d 501 [1993] *citing* 6 Williston, Contracts § 2004, at 5641 [rev ed 1938]; *T & N PLC v Fred S. James & Co. of New York, Inc.*, 29 F 3d 57 [1994] (rejecting the claim that the six-year statute of limitations for breach of contract claims commenced to run when insured was first injured by insurer's disclaimer of liability)).

Although North Shore states a claim against Crump for breach of contract (see discussion *supra*, p. 23), it is uncontested that both Inscorp and US Fire issued policies to BFC before January 1, 2001. Thus, the claims against Crump accrued no later than January 1, 2001. Therefore, North Shore's action against Crump, brought 10 years later in 2011, is untimely.[8]

And, the doctrine of equitable estoppel is inapplicable to toll the statute of limitations on the breach of contract claim, as there is no allegation of any affirmative conduct undertaken by Crump that contributed to the delay between accrual of the cause of action and commencement of the legal proceeding (*Walker v New York City Health and Hospitals Corp.*, 36 AD3d 509, 828 NYS2d 365 [1st Dept 2007]).

The allegation of negligence against such defendant in the performance of its contractual obligations is also governed by the six year statute of limitations (*Lamendola v Mossa, supra citing* CPLR 213[2] *and National Life Ins. Co. v Hall & Co.*, 67 NY2d 1021, 503 NYS2d 318, 494 NE2d 449); *Federal Ins. Co. v. Spectrum Ins. Brokerage Services, Inc.*, 304 AD2d 316, 758 NYS2d 21 [1st Dept 2003] (finding that "negligence causes were not time-barred under the

[8] North Shore's request to file a separate motion for summary judgment to dismiss US Fire's "third-party action" based upon the applicable statutes of limitation is granted.

three-year statutory period prescribed in CPLR 214(6) since that statutory period only applies to allegations of 'malpractice,' which is inapplicable to agents and insurance brokers)). Crump cites no authority for the Court to apply a three-year statute of limitations.

The record indicates that the latest North Shore can claim injury resulting from the alleged misrepresentation as to the aggregate coverage limits afforded under the Inscorp Policy was when this Court determined, on February 8, 2011, that the Inscorp Policy did not provide, as represented to North Shore, a per construction site aggregate limit. Therefore, the negligence claim, having been commenced on June 15, 2011, such claim is timely.

Further, as stated above, North Shore states a claim against Crump for negligent misrepresentation (*see supra*, p. 23). And, notwithstanding this Court's determination that the Inscorp Policy clearly and unambiguously did not provide for a per construction site aggregate limit, in light of Potolsky's affidavit, it cannot be said at this juncture that North Shore's reliance on the representations made concerning the Inscorp Policy were unreasonable. Thus, dismissal of this claim for failure to state a cause of action is unwarranted.

However, as to North Shore's claim for indemnification, such claim is dismissed. North Shore's common-law indemnification claim is unavailable to it since there is no claim that it will be held vicariously liable for Crump's alleged wrongdoing. And, any liability found against North Shore, for which North Shore seeks indemnification, would be based on North Shore's own negligence or breach of contract with US Fire, thereby precluding North Shore from seeking indemnification from Crump.

However, the same cannot be said against Crump as to North Shore's contribution claim,

since North Shore's potential liability to US Fire is not solely premised on Crump's breach of agreement with North Shore, but is also premised on negligence theories, such as breach of fiduciary duty (*Albino v New York City Housing Auth.*, 78 AD3d 485, 912 NYS2d 27 [1st Dept 2010] ("a third-party plaintiff almost always has the right to seek contribution from a possible joint tortfeasor")). While it is has been held that a retail insurance broker could not seek contribution from wholesale insurance broker for economic loss resulting exclusively from breach of contract," it cannot be said, at this juncture, that the loss allegedly sustained by North Shore solely results from its breach of a contract.

Therefore, dismissal of North Shore's claims against Crump is warranted solely as to the claims for breach of contract and indemnification.

North Shore's Motion to Dismiss

US Fire alleges claims against North Shore for breach of contract, unjust enrichment,[9] breach of fiduciary duty, and indemnification.

In order to state a claim of unjust enrichment, a plaintiff must allege that he or she "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fuji*, 253 AD2d 387, 390 [1st Dept 1998]).

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[9] In opposition to North Shore's motion, US Fire addresses both unjust enrichment and *quantum meruit* simultaneously (p. 10). However, to state a claim for *quantum meruit*, plaintiff must allege allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Georgia Malone & Co., Inc. v. Ralph Rieder*, 86 AD3d 406, 926 NYS2d 494 [1st Dept 2011]; *Soumayah v Minnelli*, 41 AD3d 390, 839 NYS2d 79 [1st Dept 207] *citing Tesser v Allboro Equipment Co.*, 302 AD2d 589, 590, 756 NYS2d 253 [2003]). Neither US Fire nor North Shore make any distinction between these two causes of action. Therefore, for purposes of this motion, the Court addresses the unjust enrichment claim as the distinct elements of *quantum meruit* are not raised or addressed by the parties.

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 924 NYS2d 77, [1st Dept 2011]).

US Fire alleges that North Shore entered into an agreement with US Fire to solicit and send US Fire all binders, certificates, and endorsements bound by North Shore, and that North Shore presented such documents showing that the Inscorp Policy contained a separate aggregate limit for each construction site at which BFC was performing work. North Shore also agreed to hold US Fire harmless against, *inter alia*, all claims and expenses, US Fire incurred as a result of North Shore's acts, errors, omissions, or misrepresentations. In reliance upon the documents provided related to the Inscorp Policy, US Fire issued an excess insurance policy to BFC. However, the Inscorp Policy did not provide for such coverage, causing US Fire to incur damages.

US Fire also alleges that North Shore had a common law duty to exercise reasonable skill and diligence in procuring and obtaining insurance policies.

Further, North Shore was compensated by US Fire to bind and execute insurance policies, including the US Fire policy at issue. It is alleged that North Shore was unjustly enriched in that it was compensated for procuring insurance when, notwithstanding the representations made in the Inscorp Policy to the contrary, the Inscorp Policy does not contain a separate $2 million aggregate limit for the subject construction sites.

The above allegations sufficiently allege the elements to state a cause of action for breach

of contract (*see discussion supra* at pp. 22), unjust enrichment, breach of fiduciary duty, and indemnification.

As to the documentary evidence, while North Shore submitted documentation (*i.e.*, Conklin's affidavit) indicating that Inter-Reco was the source of the misrepresentations concerning the coverage afforded under the Inscorp Policy, North Shore, as the movant, failed to establish that its reliance on the language in the Inscorp Policy was reasonable, especially in light of the clear terms of said Policy indicating that the Policy provided a total project aggregate limit. Notwithstanding the fact that North Shore was not a party to the DJ Action, North Shore provided documents to US Fire, including the Inscorp Policy containing the alleged misrepresentations, on which US Fire relied to issue the excess policy to BFC. The documents submitted either to do not qualify as "documentary evidence" as that term is understood under CPLR 3211(a)(1) (see *discussion supra* at pp. 24-25), or fail to establish North Shore's freedom from liability as a matter of law. And, the parties are entitled to engage in full discovery to explore these issues with further documents and depositions.

Whether US Fire had a right to sue each of the parties that is currently named as defendant and/or third-party defendant in this action and failed to do so is of no moment.

Therefore, dismissal of US Fire's complaint is denied, at this juncture, as premature.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of Inter-Reco's motion (001) to dismiss North Shore's third-party complaint in its favor for failure to state a cause of action is unwarranted; and it is further

ORDERED that the branch of Inter-Reco's motion to dismiss the third-party complaint based on documentary evidence is denied; and it is further

ORDERED that the request to treat the motion as one for summary judgment, and for summary judgment, is denied, except as to North Shore's breach of contract claim against Inter-Reco, which is hereby severed and dismissed;; and it is further

ORDERED that Crump's cross-motion to dismiss North Shore's claims against it is granted solely as to the claims for breach of contract and indemnification, and such claims are hereby severed and dismissed; and it is further

ORDERED that North Shore's request to file a separate motion for summary judgment to dismiss US Fire's "third-party action" based upon the applicable statutes of limitation is granted; and it is further

ORDERED that the branch of North Shore's motion (002) to dismiss US Fire's complaint for failure to state a cause of action and based on documentary evidence is denied; and it is further

ORDERED that third-party defendant Inter-Reco shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 29, 2012

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD