

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

FILED
Jul 11, 2014
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

In re:
BRANTLEY JUSTIN GARRETT and
ERIN EILEEN GARRETT,
Debtors.

Case No. 12-36599-B-7
Chapter 7.

JAMES DAILY and KATHARINE
DAILY,
Plaintiffs.

District Court No. 2:14-cv-1639 MCE

Adv. Pro. No. 12-02719-B

vs.

REPORT AND RECOMMENDATION

BRANTLEY JUSTIN GARRETT,
Defendant.

BRANTLEY JUSTIN GARRETT,
Cross-Complainant.

vs.

BEACH & O'NEILL INSURANCE
ASSOCIATES, INC.,
Cross-Defendant.

Before the court is a motion for summary judgment (Adv. Dkt. 111) (the "Motion") in a non-core proceeding. Specifically, it is a cross-defendant's motion for summary judgment on a cross-claim filed by a Chapter 7 debtor who is a defendant in an adversary proceeding alleging non-dischargeability of a debt

1 under 11 U.S.C. § 523(a)(2)(A). The cross-claim alleges only
2 state law claims against the cross-defendant, who is a non-debtor
3 party in these proceedings. The resolution of this matter will
4 have no effect on the Chapter 7 bankruptcy estate and is
5 therefore not related to a case under title 11 within the meaning
6 of 28 U.S.C. § 1334(b). A bankruptcy court has jurisdiction over
7 a related proceeding when "the outcome of that proceeding could
8 conceivably have any effect on the estate being administered in
9 bankruptcy." Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir.
10 1984); In re Feitz, 852 F.2d 455, 457 (9th Cir. 1988). As
11 evidenced by the report of no distribution filed by the Chapter 7
12 trustee on October 23, 2012, the parent bankruptcy case has been
13 fully administered. The Chapter 7 debtor received a discharge on
14 January 7, 2013. The bankruptcy case remains open solely because
15 of the pendency of this adversary proceeding. Accordingly, the
16 cross-claim is before the court based solely on supplemental
17 jurisdiction under 28 U.S.C. § 1367(a).

18 A hearing on the Motion was held on May 6, 2014, at 9:32
19 a.m. Appearances are noted on the record. The court took the
20 matter under submission based on the pleadings and supporting
21 papers. The following constitutes the court's proposed findings
22 of fact and conclusions of law, pursuant to 28 U.S.C. § 157(c)(1)
23 and Federal Rule of Bankruptcy Procedure 7052.

24 Cross-Defendant Beach & O'Neill Insurance Associates, Inc.
25 ("Beach") moves for summary judgment on Defendant/Cross-Claimant
26 Brantley Justin Garrett ("Garrett")'s first amended cross-claim
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1 filed May 7, 2013 (Adv. Dkt. 41) (the "First Amended Cross-
2 Claim").

3 For the reasons stated herein, Garrett's opposition should
4 be overruled. The motion should be granted, and judgment should
5 be entered on the First Amended Cross-Claim stating that Garrett
6 shall take nothing against Beach by reason of the First Amended
7 Cross-Claim.

8 **I. BACKGROUND**

9 A recitation of the procedural history and factual
10 background of this matter is appropriate.

11 **(a) Procedural History**

12 On September 13, 2012, Garrett and Erin Eileen Garrett
13 commenced the above-captioned bankruptcy case by jointly filing a
14 voluntary petition under chapter 7. On December 18, 2012,
15 plaintiffs James and Katharine Daily (the "Plaintiffs") timely
16 commenced this adversary proceeding by filing a complaint (Adv.
17 Dkt. 1) against Garrett seeking a determination that an amount of
18 no less than \$190,000.00 be deemed non-dischargeable in Garrett's
19 bankruptcy case pursuant to an unspecified section of the
20 Bankruptcy Code. The complaint also seeks recovery of attorney's
21 fees, costs of suit, and pre-judgment interest on the \$190,000.00
22 claim. Garrett filed an answer to the complaint on January 24,
23 2013 (Adv. Dkt. 9), and an amended answer on January 31, 2013
24 (Adv. Dkt. 13).

25 On August 14, 2013, the Plaintiffs filed a first amended
26 complaint (Adv. Dkt. 71) (the "First Amended Complaint") seeking
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1 a court determination that the aforementioned \$190,000.00 be
2 deemed non-dischargeable in Garrett's bankruptcy case pursuant to
3 11 U.S.C. § 523(a)(2)(A). Garrett filed an answer to the First
4 Amended Complaint on August 28, 2013 (Adv. Dkt. 72).

5 Garrett joined Beach in this proceeding by filing a cross-
6 claim on January 24, 2013 (Adv. Dkt. 10), alleging causes of
7 action for negligence, breach of fiduciary duty, and equitable
8 indemnity. The prayer for relief requests (1) general, special,
9 and consequential damages according to proof; (2) reasonable
10 attorney's fees, costs, and expenses of litigation according to
11 proof; (3) a judgment declaring Garrett's right to total or
12 partial indemnification from Beach, as well as an apportionment
13 of Garrett and Beach's comparative faults, if any, in the event
14 that Garrett is found liable for the damages alleged by the
15 Plaintiffs in the First Amended Complaint; (4) a declaration that
16 Beach is obligated to defend Garrett in this adversary
17 proceeding, to represent Garrett's interests, and to hold Garrett
18 harmless, either totally or in proportion to the relative faults
19 of Garrett and Beach, from any judgment or settlement that may
20 result from the damages alleged in the First Amended Complaint;
21 (5) costs; and (6) any further relief the court may deem just and
22 proper.

23 On March 7, 2013, Beach filed a motion to dismiss (Adv. Dkt.
24 22) all claims for relief set forth in the cross-claim (the
25 "First Beach Motion to Dismiss"). Beach alleged that the first
26 two claims, negligence and breach of fiduciary duty, were barred
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1 indemnity.

2 In response to the court's ruling on the First Beach Motion
3 to Dismiss, Garrett filed the First Amended Cross-Claim, alleging
4 claims for breach of fiduciary duty and equitable indemnity, and
5 praying for the same relief sought in the original cross-claim.
6 On May 24, 2013, Beach filed a motion to dismiss (Adv. Dkt. 42)
7 all claims alleged in the First Amended Cross-Claim (the "Second
8 Beach Motion to Dismiss").

9 In the Second Beach Motion to Dismiss, Beach argued that Mr.
10 Garrett's breach of fiduciary duty claim should be dismissed for
11 two independent yet related reasons. First, it argued that under
12 California law, Beach, as Garrett's insurance broker, was not a
13 fiduciary and that any fiduciary duties it purportedly owed
14 Garrett were no different than the duties owed under a general or
15 professional negligence standard. As the court had previously
16 dismissed Garrett's negligence claim without leave to amend,
17 Beach argued that Garrett should not be allowed to pursue a
18 negligence claim by simply "re-labeling" it as a claim for breach
19 of fiduciary duty. Second, relying substantially on the
20 California Second District Court of Appeal decision in Hydro-Mill
21 Co., Inc. v Hayward, Tilton & Rolapp Ins. Associates, Inc., 115
22 Cal.App.4th 1145, 10 Cal.Rptr.3d 582 (2004), Beach asserted that
23 Garrett's breach of fiduciary duty claim was barred by a two-year
24 statute of limitations because the gravamen of the claim was
25 really professional negligence and Garrett could not circumvent
26 the two-year statute of limitations by labeling it as a breach of

1 fiduciary duty claim. Beach sought dismissal of Garrett's claim
2 for equitable indemnity again on the grounds that Garrett had
3 failed to allege all of the elements of that claim, specifically
4 that Beach was a joint tortfeasor during the events that gave
5 rise to the original adversary complaint and the First Amended
6 Complaint. Finally, Beach argued that the First Amended Cross-
7 Claim should be dismissed because Garrett had failed to plead
8 facts sufficient to show that Beach's alleged actions were the
9 proximate cause of his damages.

10 The Second Beach Motion to Dismiss was heard on August 6,
11 2013, and taken under submission. By order entered August 12,
12 2013 (Adv. Dkt. 69), the court granted the Second Beach Motion to
13 Dismiss in part. Specifically, the court dismissed the second
14 claim for relief, equitable indemnity, without leave to amend,
15 finding once again that Garrett had failed to plead facts
16 sufficient to support a plausible claim. As the court had
17 already given Garrett an opportunity to amend this claim, it
18 found that additional amendment would be futile. The court
19 denied the Second Beach Motion to Dismiss as to the first claim
20 for relief, breach of fiduciary duty. The court acknowledged a
21 split of authority under California law as to whether there is a
22 fiduciary relationship between an insurance broker and an
23 insured. Given the lack of definite California authority on the
24 subject, the court turned to the general definition of a
25 fiduciary relationship under California law and found that
26 Garrett had pled facts sufficient to support a claim for breach
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1 of fiduciary duty, thereby rejecting Beach's argument that the
2 claim was barred by a two year statute of limitations.

3 Based on the foregoing rulings, the only remaining claim for
4 relief in the First Amended Cross-Claim, and the only claim that
5 is the subject of the Motion, is Beach's alleged breach of
6 fiduciary duty.

7 **(b) Factual Background**

8 Although the Motion is directed toward the First Amended
9 Cross-Claim, the entire matter arises from facts alleged in the
10 First Amended Complaint. Accordingly, the discussion must begin
11 with the following allegations set forth in the First Amended
12 Complaint.

13 In or about July 2008, Garrett, with knowledge that his
14 representations were false and with the intent to deceive the
15 Plaintiffs in order to induce them to enter into an agreement
16 with him, falsely and fraudulently represented to the Plaintiffs
17 that he possessed the experience, skill, available personnel,
18 liability insurance, and workers compensation insurance necessary
19 to construct for them a new single family home at their property
20 located at 10223 Sunrise Vista, Auburn, CA, and to do so in a
21 workmanlike manner, in a timely manner by March 27, 2009, and for
22 a total price of \$495,000.00. Garrett further represented to the
23 Plaintiffs that he would be able to complete the project in a
24 cost effective and timely manner because he had his own employees
25 and therefore had more control over the project and its progress.
26 Additionally, Garrett represented to the Plaintiffs that any
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1 subcontractors working on the project would be licensed
2 contractors. Not knowing that these representations were false,
3 and in reliance thereon, the Plaintiffs hired Garrett as their
4 general contractor for the project. On July 3, 2008, Garrett and
5 the Plaintiffs entered into a California Contractor Agreement
6 (Exhibit "A", Adv. Dkt. 71, p.9) (the "Contractor Agreement").
7 Under the terms of the Contractor Agreement, construction of the
8 home was to be commenced on or before August 18, 2008.

9 In July 2008, Garrett knew that the Plaintiffs would be
10 borrowing money from Wachovia Mortgage FSB ("Wachovia") for the
11 purpose of funding the project. On or about September 9, 2008,
12 prior to the commencement of the project, Garrett falsely and
13 fraudulently, with the intent to deceive the Plaintiffs and
14 induce them to continue utilizing him as their builder,
15 represented to both the Plaintiffs and Wachovia that any funds
16 received by him would be used only to pay for costs authorized
17 under the Contractor Agreement. Garrett knew that if the
18 Plaintiffs were aware of the fact that he did not possess general
19 liability insurance or workers compensation insurance applicable
20 to the construction of their home, or that he did not have his
21 own crew of employees, or that he would hire unlicensed
22 subcontractors, or that he would use construction loan proceeds
23 for purposes other than for the construction project, the
24 Plaintiffs would not have entered into the Contractor Agreement.
25 Furthermore, Garrett knew that if Wachovia had been aware of any
26 of the foregoing, it would not have loaned money to the
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1 Plaintiffs for the purpose of paying Garrett to complete the
2 project. On September 9, 2008, relying on Garrett's
3 representations, the parties entered into a Contractor
4 Acknowledgment and Agreement (Exhibit "B", Adv. Dkt. 71, p.20)
5 whereby Wachovia agreed to furnish the Plaintiffs with the funds
6 necessary for Garrett to complete the project.

7 Garrett commenced construction of the Plaintiffs' home in
8 September 2008. In May 2009, Garrett abandoned the project even
9 though he had been paid approximately \$418,000.00 for his work.
10 At the time he abandoned the job, construction of the home was
11 not close to being complete, and some of Garrett's work that was
12 purportedly complete was so substandard and defective that it had
13 to be either repaired or replaced. Additionally, after Garrett
14 abandoned the project, the Plaintiffs discovered that he did not
15 have liability insurance or workers compensation insurance, and
16 that he had stopped paying his workers during the course of the
17 project. He also hired subcontractors who were not licensed to
18 perform the work they performed on the home.

19 The Plaintiffs made demand on Garrett to compensate them for
20 the expenses they have incurred and will incur in the future to
21 finish the work Garrett refused to complete, as well as
22 compensate them for the cost to repair or replace defective and
23 substandard work Garrett did complete. However, Garrett has
24 failed and refused, and still fails and refuses, to pay any sums
25 to the Plaintiffs, and the whole sum remains due, owing, and
26 unpaid.

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1 With the foregoing in mind, the allegations which have been
2 set forth in the First Amended Cross-Claim or that are otherwise
3 undisputed between the parties include the following.

4 For years prior to 2008, Beach served as Garrett's insurance
5 broker, advising him regarding, and procuring for him, business
6 insurance to cover his construction activities. Beach and
7 Garrett had a written contract whereby Beach agreed to perform
8 insurance brokerage services for Garrett and under which Garrett
9 paid Beach a fee each year for procuring insurance (Exhibit "H",
10 "Broker Fee Agreement", Adv. Dkt. 140, p.3). Over the years,
11 Garrett told Beach through Beach's representative, Linda Curtis
12 ("Curtis"), that his business involved home remodels and
13 additions and some new construction of residential homes.

14 The parties do not dispute the following allegations
15 regarding their specific business relationship, though the court
16 acknowledges that Beach believes the facts to be immaterial for
17 purposes of the Motion. Beach was tasked with surveying the
18 insurance market, finding the best insurance products at the best
19 prices to fit Garrett's particular insurance needs based on his
20 construction activities, and actually obtaining this insurance
21 for Garrett. Beach's practice included preparing any and all
22 forms necessary for Garrett to apply for and purchase insurance.
23 To that end, Beach held itself out as "the experts" in the field
24 of insurance for contractors. The foregoing convinced Garrett to
25 place his trust and confidence in Beach for all of his business
26 insurance needs. Because this relationship was built on such
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1 trust and confidence, Beach did not spend time reviewing any
2 prospective insurance applications or policies with Garrett.
3 Instead, it took responsibility for reading all of the insurance
4 documents on behalf of Garrett, preparing any and all necessary
5 forms, and asking Garrett questions it believed were appropriate
6 to determine if anything about the nature of his business had
7 changed from the prior year that would warrant changing the
8 nature of his insurance coverage. Beach simply asked Garrett to
9 "sign here" and "write us a check." Beach followed these
10 practices in the summer of 2008.

11 In August 2008, Curtis contacted Garrett to inform him it
12 was time to renew his insurance policy for his construction
13 business. At the time of this communication, Garrett had
14 expiring commercial general liability coverage through Lincoln
15 General Insurance Company effective September 6, 2007, through
16 September 6, 2008 (Exhibit "A", Adv. Dkt. 41, p.11) (the "Lincoln
17 General Policy"), which excluded coverage for the construction of
18 tract housing, condominiums, apartments, townhouses, and
19 commercial buildings. Other than those specific exclusions,
20 however, Garrett's construction work in building new houses and
21 doing remodels and additions were all covered. Garrett
22 specifically told Curtis in July or August 2008 that he had
23 recently entered a contract to build the Plaintiffs' home in
24 Auburn, CA. With the assistance of Beach, Garrett completed
25 paperwork applying for 2008 to 2009 insurance identifying that
26 twenty percent (20%) of his work would be for "new" construction.

1 Garrett specifically asked Beach to renew all of the coverage he
2 had under the Lincoln General Policy. Curtis recommended that
3 Garrett obtain his next business insurance policy through
4 Navigators Insurance Company ("Navigators"), stating that the
5 Navigators policy provided the same coverage and limits as the
6 Lincoln General Policy but at a cheaper price. Based on Ms.
7 Curtis' representations, Garrett purchased a policy from
8 Navigators which went into effect from September 15, 2008,
9 through September 15, 2009 (Exhibit "D", Adv. Dkt. 116, p.135)
10 (the "Navigators Policy").

11 On July 3, 2008, Garrett and the Plaintiffs entered into the
12 Contractor Agreement. Construction of the home began in
13 September 2008. However, prior to commencing construction the
14 Plaintiffs asked that Garrett provide Wachovia with whatever
15 information it may require in order to approve disbursement of
16 the construction funds to the Plaintiffs. One of the things
17 Wachovia required was a certificate of liability insurance
18 (Exhibit "C", Adv. Dkt. 41, p.16) (the "Certificate") evidencing
19 that Garrett was insured. In late September 2008, Garrett
20 telephoned Curtis and told her that he needed the Certificate.
21 Beach provided the Certificate on or about September 30, 2008.

22 In May 2009, the Plaintiffs locked Garrett out of the house,
23 which caused him to file a release with the City of Auburn
24 indicating that he was no longer working on the project.
25 Sometime in 2010 or 2011, the Plaintiffs tendered a claim to
26 Navigators claiming damages as a result of Garrett's negligence.

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1 Navigators declined the tender, asserting that Garrett did not
2 have insurance coverage for his work on the construction project
3 because the Navigators Policy contained an exclusion for
4 "construction of new homes as a general contractor or developer."
5 On May 11, 2011, the Plaintiffs filed a complaint for damages
6 against Beach, Garrett dba Garrett Construction, Wachovia,
7 Digital Draw Network, Inc., and DOES 1 through 100 in Placer
8 County Superior Court, alleging many causes of action
9 (negligence, breach of warranty, breach of third-party
10 beneficiary contract, breach of fiduciary duty, etc.) and one
11 count of fraud (Exhibit "F", Adv. Dkt. 139, p.14).

12 **II. ANALYSIS**

13 The sole claim for relief remaining in the First Amended
14 Cross-Claim is the claim for relief for Beach's alleged breach of
15 fiduciary duty. Garrett alleges that, contrary to Beach's
16 representations and his requests, the Navigators Policy contained
17 an exclusion for construction of new homes, whereas the Lincoln
18 General Policy contained no such exclusion. Garrett further
19 alleges that but for the conduct of Beach, and its failure to
20 procure in September 2008 the same coverage from Navigators as
21 the coverage protecting Garrett under the Lincoln General Policy,
22 the Plaintiffs would not have sued him and he would not be forced
23 to defend himself in the bankruptcy court against the Plaintiffs'
24 claims. Furthermore, Garrett alleges that Beach breached its
25 fiduciary duty by exposing Garrett to liability for his work in
26 constructing a new home for the Plaintiffs because Beach failed

1 to obtain from Navigators a policy including all of the coverages
2 that protected Garrett under the Lincoln General Policy, in
3 particular coverage for the construction of new homes.

4 (a) **Legal Standard**

5 Federal Rule of Civil Procedure 56, made applicable to this
6 proceeding by Bankruptcy Rule 7056, provides that summary
7 judgment is appropriate if the pleadings, depositions, answers to
8 interrogatories, admissions on file, and declarations, if any,
9 show that there is "no genuine issue of fact and that the moving
10 party is entitled to judgment as a matter of law." "The initial
11 burden of showing the absence of a material factual issue is on
12 the moving party. Once that burden is met, the opposing party
13 must come forward with specific facts, and not allegations, to
14 show a genuine factual issue remains for trial." DeHorney v.
15 Bank of America N.T.&S.A., 879 F.2d 459, 464 (9th Cir. 1989); see
16 also, Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S.Ct.
17 2548, 2553, 91 L.Ed.2d 265, 278-280 (1986). On summary judgment,
18 all reasonable inferences to be drawn from the underlying facts
19 must be viewed in the light most favorable to the nonmoving
20 party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
21 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting
22 United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993,
23 8 L.Ed.2d 176 (1962)).

24 (b) **Discussion**

25 Beach now asserts that it is entitled to summary judgment as
26 a matter of law under two independent theories. First, it
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1 alleges that the undisputed material facts show that Garrett has
2 failed to establish all elements for a cause of action for breach
3 of fiduciary duty. Specifically, it claims that Garrett has
4 failed to show that his damages were proximately caused by
5 Beach's alleged breach of fiduciary duty because the claims being
6 made by the Plaintiffs would not have been covered under either
7 the Lincoln General Policy or the Navigators Policy. In other
8 words, Beach's alleged failure in September 2008 to obtain for
9 Garrett the same coverages contained in the Lincoln General
10 Policy is irrelevant because "new construction" coverage under
11 the Lincoln General Policy would have excluded coverage for
12 abandonment of the construction project as well as substandard
13 and defective work that had to be repaired or replaced.
14 Allegedly, neither the Navigators Policy nor the Lincoln General
15 Policy would have covered these activities, so the result would
16 have been the same even if the Navigators Policy included
17 coverage for "new construction." Therefore, Beach asserts that
18 there is no causal connection between its alleged breach and
19 Garrett's alleged damages.

20 Second, Beach argues that Garrett's claim is barred by the
21 two-year statute of limitations made applicable to professional
22 negligence claims by Cal. Code Civ. P. § 339. In support of its
23 position, Beach again relies substantially on Hydro-Mill and
24 related California and federal authorities in arguing that the
25 nature of Garrett's claim, i.e., the gravamen of the action, is
26 truly professional negligence. Furthermore, when negligence and
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1 fiduciary duty claims overlap regarding a breach of the duty of
2 care, the nature of the claim is negligence and is thus subject
3 to a two-year statute of limitations. Beach therefore asserts
4 that Garrett cannot circumvent the two-year statute of
5 limitations by simply re-labeling the claim as a breach of
6 fiduciary duty in order to take advantage of the four-year
7 statute of limitations under Cal. Code Civ. P. § 343.

8 The court takes up Beach's statute of limitations argument
9 first.

10 **(1) *The Statute of Limitations for Garrett's Breach of Fiduciary***
11 ***Duty Claim is Two Years Pursuant to Cal. Code Civ. P. § 339***

12 The court concludes that Beach should be entitled to
13 judgment as a matter of law because Garrett's claim for breach of
14 fiduciary duty is governed by the two year statute of limitations
15 applicable to professional negligence claims as set forth in Cal.
16 Code Civ. P. § 339, and is therefore time barred.

17 The court acknowledges that it has twice previously ruled on
18 the issue of the nature of Garrett's claim for breach of
19 fiduciary duty. First, the court's minute order entered April
20 30, 2013 (Adv. Dkt. 33), ruling on the First Beach Motion to
21 Dismiss, stated that, in viewing the cross-claim in the light
22 most favorable to Garrett, the claim could not be treated as a
23 claim other than a breach of fiduciary duty. Second, the court's
24 minute order entered August 6, 2013 (Adv. Dkt. 65), ruling on the
25 Second Beach Motion to Dismiss, reaffirmed the court's prior view
26 that construed the claim as a breach of fiduciary duty based on
27 the general California state law definition of a fiduciary

1 relationship. Despite these prior rulings, the court now
2 concludes, in light of the additional briefing that has been
3 provided on this matter, which includes citations of authority
4 that were not available to the court when it made the prior
5 rulings, that the gravamen of Garrett's claim for relief is
6 professional negligence and is therefore barred by a two year
7 statute of limitations.

8 The court does not adopt Beach's argument that the court's
9 prior rulings do not preclude a finding in Beach's favor for
10 purposes of the Motion simply because different standards apply
11 to motions to dismiss and motions for summary judgment. Rather,
12 the court's conclusion is rooted in the longstanding choice of
13 law principles enumerated by the Supreme Court in Erie Railroad
14 Company v. Tompkins, 304 U.S. 64 (1938), commonly referred to as
15 the "Erie Doctrine." Specifically, the Court in Erie held that
16 in diversity of citizenship cases, the law to be applied in any
17 case is the law of the state, as declared either by its
18 legislature in a statute or by its highest court in a decision.
19 Erie, 304 U.S. at 78. Although the court recognizes that the
20 present case is not based on diversity of citizenship, the Erie
21 Doctrine has been found applicable to non-diversity cases as
22 well. 19 C. Wright & A. Miller, Fed. Practice and Procedure §
23 4520 (2d ed. 2014) ("It frequently is said that the doctrine of
24 Erie Railroad Company v. Tompkins applies only in diversity of
25 citizenship cases; this statement simply is wrong"). Federal
26 courts have applied state law where, as here, there is pendent or
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1 supplemental jurisdiction. Id.; Felder v. Casey, 487 U.S. 131,
2 151 (1988) (the Erie Doctrine applies equally to state law claims
3 that are brought to the federal courts through supplemental
4 jurisdiction); Hoyos v. Telecorp Communications, Inc., 488 F.3d
5 1, 5 (1st Cir. 2007) ("a federal court sitting in diversity or
6 exercising supplemental jurisdiction over state law claims must
7 apply state substantive law, but a federal court applies federal
8 rules of procedure to its proceedings").

9 As the court stated in its minute order entered August 6,
10 2013, under California law it is unclear whether there is a
11 fiduciary relationship between an insurance broker and an
12 insured. Croskey et al., Cal. Practice Guide: Insurance
13 Litigation (The Rutter Group 2011) P 2:65.20, p.2-37 (noting that
14 under California Insurance Code section 1733, a broker acts in a
15 fiduciary capacity when it receives and holds premium payments
16 from the insured or premium refunds from the insurer due the
17 insured); Workmen's Auto Ins. Co. v. Guy Carpenter & Co., Inc.,
18 194 Cal.App.4th 1468 (2011) (holding that a broker could not be
19 sued for breach of fiduciary duty; Hydro-Mill, 115 Cal.App.4th at
20 1156 ("it is unclear whether a fiduciary relationship exists
21 between an insurance broker and an insured"); Eddy v. Sharp, 199
22 Cal.App.3d 858 (1988) ("where the agency relationship exists
23 there is not only a fiduciary duty but an obligation to use due
24 care"). However, the existence of a fiduciary relationship
25 between the parties is merely ancillary to Beach's main argument,
26 i.e., that under California law, when allegations of professional
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1 negligence subsume all allegations for breach of fiduciary duty,
2 the claim for relief should be analyzed as a professional
3 negligence claim subject to a two year statute of limitations
4 regardless of whether it was labeled as a claim for breach of
5 fiduciary duty.

6 The Erie Doctrine directs the court to follow state statutes
7 or the rule of decision of the Supreme Court of California. 17A
8 James Wm. Moore et al., Moore's Federal Practice § 124.20[1] (3d
9 ed. 2004) ("When state law provides the rule of decision under
10 the Erie doctrine, federal courts must generally accept a
11 decision of the state's highest court as a definitive statement
12 of state law"); West v. American Tel. & Tel. Co., 311 U.S. 223,
13 236 (1940) ("the highest court of the state is the final arbiter
14 of what is state law. When it has spoken, its pronouncement is
15 to be accepted by federal courts as defining state law unless it
16 has later given clear and persuasive indication that its
17 pronouncement will be modified, limited or restricted").

18 Here, neither party has cited any Supreme Court of
19 California decision that definitively decides whether an
20 insurance broker has fiduciary duties to the insured outside the
21 areas of premium payments and refunds. The court is unaware of
22 such any such decision. In such a situation, federal courts are
23 instructed to predict the way the highest state court would rule
24 if presented with the issue. 17A James Wm. Moore et al., Moore's
25 Federal Practice § 124.22[3]; Aetna Casualty & Surety Co. v.
26 Sheft, 989 F.2d 1105, 1108 (9th Cir. 1993) ("When a decision
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1 turns on applicable state law and the state's highest court has
2 not adjudicated the issue, a federal court must make a reasonable
3 determination of the result the highest state court would reach
4 if it were deciding the case"). In performing this function, "in
5 the absence of direct authority the federal court may look to
6 state high court decisions in related or analogous cases for an
7 indication of how the state's highest court is likely to rule.
8 Similarly, considered dicta of the state's highest court is
9 persuasive evidence of how the state's highest court might rule.
10 In absence of other authority, federal courts may follow the
11 considered dicta of the state's highest court." 17A James Wm.
12 Moore et al., Moore's Federal Practice § 124.22[3]. This court
13 construes the reference to "state high court" decisions to refer
14 to state intermediate appellate court decisions.

15 Based on the foregoing, the most closely related Supreme
16 Court of California case for purposes of the Motion appears to be
17 Vu v. Prudential Property & Casualty Insurance Company, 26
18 Cal.4th 1142 (2001). Vu involved a plaintiff whose home was
19 damaged in the Northridge earthquake of 1994. At the time of the
20 earthquake, the plaintiff maintained homeowner's insurance
21 through Prudential, and the policy contained a one-year suit
22 clause providing that no action could be brought unless it was
23 started within one year of the date of the loss. The plaintiff
24 timely contacted Prudential to report that his home had been
25 damaged, and Prudential sent an adjuster to inspect the
26 residence. The adjuster concluded that the amount of damage to
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1 the plaintiff's dwelling was far below the policy deductible.
2 Prudential subsequently issued the plaintiff a check for damage
3 to appurtenant structures, which was covered separately from his
4 dwelling. Long after the one-year statute of limitations had
5 expired, the plaintiff discovered additional property damage
6 which far exceeded his policy deductible. He informed Prudential
7 of the newly discovered damage and requested coverage. However,
8 Prudential declined on the ground that the one-year statute of
9 limitations had expired. Although the decision involved a
10 reconsideration of the doctrine of estoppel as set forth in Neff
11 v. New York Life Insurance Company, 30 Cal.2d 165 (1947), the
12 court addressed the insurer-insured relationship in dictum:

13 The insurer-insured relationship, however, is not a
14 true "fiduciary relationship" in the same sense as the
15 relationship between trustee and beneficiary, or
16 attorney and client (see Croskey et al., Cal. Practice
17 Guide: Insurance Litigation (The Rutter Group 2000) ¶
18 11:150, p. 11-31.) It is, rather, a relationship often
19 characterized by unequal bargaining power (see Steven
20 v. Fidelity & Casualty Co. (1962) 58 Cal.2d 862,
21 879-884, 27 Cal.Rptr. 172, 377 P.2d 284) in which the
22 insured must depend on the good faith and performance
23 of the insurer (see Cates Construction, Inc. v. Talbot
24 Partners (1999) 21 Cal.4th 28, 44, 86 Cal.Rptr.2d 855,
25 980 P.2d 407; Egan v. Mutual of Omaha Ins. Co., supra,
26 24 Cal.3d 809, 819, 169 Cal.Rptr. 691, 620 P.2d 141).
27 This characteristic has led the courts to impose
28 "special and heightened" duties, but "[w]hile these
'special' duties are akin to, and often resemble,
duties which are also owed by fiduciaries, the
fiduciary-like duties arise because of the unique
nature of the insurance contract, not because the
insurer is a fiduciary." (Love v. Fire Ins. Exchange
(1990) 221 Cal.App.3d 1136, 1148, 271 Cal.Rptr. 246;
see Hassard, Bonnington, Roger & Huber v. Home Ins. Co.
(S.D.Cal.1990) 740 F.Supp. 789; Croskey et al., supra,
¶ 11:150, p. 11-31.).

26 Vu v. Prudential Property & Casualty Insurance Company, 26

1 Cal.4th at 1150-51.

2 Accordingly, the Supreme Court of California suggests that
3 there is no fiduciary relationship in an insurer-insured
4 relationship. This is persuasive but not controlling on the
5 issue before this court as the parties in the instant case were
6 in an insurance broker-insured relationship, not an insurer-
7 insured relationship. Furthermore, the court in Vu does not
8 address the issue raised in the Motion, i.e, how to analyze a
9 claim for relief for purposes of determining the applicable
10 statute of limitations where negligence and fiduciary duty claims
11 allegedly overlap regarding a breach of the duty of care.

12 In the absence of clear guidance from the highest court of
13 the state, "federal courts should follow decisions of
14 intermediate state appellate courts unless persuasive data
15 indicate that the highest state court would decide the issue
16 differently." 17A James Wm. Moore et al., Moore's Federal
17 Practice §§ 124.20[2], 124.22[3]. Both parties have cited to an
18 abundance of intermediate California state court opinions.
19 However, the court is persuaded that, given the authorities
20 presented, the Supreme Court of California would likely find that
21 there is no fiduciary relationship between an insurance broker
22 and an insured, and that the applicable statute of limitations is
23 determined by the nature of the right sued upon, the primary
24 interest affected by the defendant's wrongful conduct, or the
25 gravamen of the action. In so holding, the court is persuaded
26 that Hydro-Mill and the various intermediate California appellate
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1 and federal district court decisions which follow its rationale
2 are not anomalies in California; rather, they appear to be the
3 law in California on these issues. Hydro-Mill, 115 Cal.App.4th
4 at 1154, 1158 ("To determine the statute of limitations which
5 applies to a cause of action it is necessary to identify the
6 nature of the cause of action, i.e., the 'gravamen' of the cause
7 of action... '[T]he nature of the right sued upon and not the form
8 of action nor the relief demanded determines the applicability of
9 the statute of limitations under our code.' ...What is significant
10 for statute of limitations purposes is the primary interest
11 invaded by defendant's wrongful conduct...If an insurer is not a
12 fiduciary, then arguably, neither is a broker"); Pascual v. Wells
13 Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 112061, *12 (N.D. Cal.
14 2013) (citing to Hydro-Mill); Nor-Cal Products, Inc. v. XL
15 Insurance America, Inc. et al., 2012 U.S. Dist. LEXIS 159964, *5
16 (E.D. Cal. 2012) ("Because an insurance broker is not a fiduciary
17 under California law, claims denominated 'breach of fiduciary
18 duty' are analyzed as professional negligence claims" (citing to
19 Hydro-Mill)); Motorist Commercial Mutual Insurance Company fka
20 American Hardware Mutual Insurance Company, et al. v Kevin
21 Anthony Soltis, MCM Insurance Agency, Inc., 2013 U.S. Dist. LEXIS
22 181871, *13 (E.D. Cal. 2013) ("this Court joins numerous others
23 in refusing to expand the doctrine of fiduciary duty to include
24 insurance brokers"); Mark Tanner Construction, Inc. v HUB
25 International Insurance Services, Inc., 224 Cal.App.4th 574, 586
26 (March 10, 2014) ("other than when handling an insured's money, a
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1 broker's duty - whether or not phrased a fiduciary duty - is no
2 greater than the duty to use reasonable care and diligence in
3 procuring insurance").

4 Here, Garrett alleges in the First Amended Cross-Claim that
5 he relied on Beach and its representative, Curtis, to procure for
6 Garrett an insurance policy which provided the same coverage for
7 "new construction" of houses as the Lincoln General Policy did.
8 Had Beach done so, the Plaintiffs would not have sued him and he
9 would not be forced to defend himself in this adversary
10 proceeding. These are the same allegations that formed the basis
11 of Garrett's claim for negligence in the original cross-claim.
12 The court concludes that Garrett's claim for breach of fiduciary
13 duty, regardless of appellation, amounts to a claim of
14 professional negligence. Hydro-Mill, 115 Cal.App.4th at 1159.

15 In his opposition to the Motion, Garrett relies
16 predominantly on Eddy v. Sharp, 199 Cal.App.3d 858 (1988) and
17 Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange
18 County, Inc., 85 Cal.App.4th 1042 (2000) in arguing that, as his
19 insurance broker, Beach owed him fiduciary duties under general
20 principles of agency law and breached those duties by failing to
21 procure for him the same coverage under the Navigators Policy
22 that he had under the Lincoln General Policy. Accordingly, he
23 argues that a four year statute of limitations should apply to
24 his breach of fiduciary duty claim. The court is not persuaded.

25 Eddy merits a brief discussion. There, an insurance agent
26 representing multiple insurance companies sent the plaintiffs a
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1 proposal to insure their commercial and residential properties
2 through Great American Insurance Company ("Great American"). The
3 proposal contained a list of eight exclusions, none of which
4 excluded a loss caused by water backing up through sewers or
5 drains (this event eventually occurred, and Great American denied
6 coverage to the plaintiffs). The plaintiffs sued the insurance
7 agent and Great American under theories of negligent
8 misrepresentation, breach of the contract to insure, and
9 reformation of contract. Eddy is an appeal of an entry of
10 summary judgment in favor of the defendants as to all claims.
11 Garrett correctly points out that the court in Eddy states that
12 "[I]f an insurance agent is the agent for several companies and
13 selects the company with which to place the insurance or insures
14 with one of them according to directions, the insurance agent is
15 the agent of the insured...Where the agency relationship exists
16 there is not only a fiduciary duty but an obligation to use due
17 care." Eddy, 199 Cal.App.3d at 865. However, this statement
18 appears to be dictum. It was made in the context of determining
19 what legal duties are owed by an insurance agent to an insured
20 under a theory of negligent misrepresentation when an insurance
21 agent fails to accurately inform the insured of a policy's
22 provisions. Several courts have also determined this part of the
23 Eddy opinion to be dictum. Hydro-Mill, 115 Cal.App.4th at 1158;
24 Motorist Commercial Mutual Insurance Company, 2013 U.S. Dist.
25 LEXIS at *12 (acknowledging the language in Eddy as dictum and
26 going on to find that the Supreme Court of California's
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1 subsequent opinion in Vu is binding for the principle that an
2 insurer is not a fiduciary for its insured). To the extent Eddy
3 is followed, it appears to be a minority view in California.
4 Equally important is the fact that the court in Eddy was not
5 confronted with the issue presently before the court, i.e., which
6 limitations period applies to a claim in which allegations of
7 professional negligence and breach of fiduciary duty overlap.

8 Westrec is unpersuasive for the same reason that it did not
9 confront the issues presented in the Motion. While it is true
10 that the court in Westrec affirmed a jury verdict which found
11 that a defendant-insurance broker breached a fiduciary duty by
12 placing an insurance policy at a premium higher than the best
13 available price, it did so in the context of determining whether
14 the trial court erred in denying the defendant's request for a
15 judgment notwithstanding the verdict. In so holding, the
16 standard it used was whether or not reasonable inferences could
17 be drawn from the evidence supporting the verdict. It was not
18 decisively determining whether an insurance broker and insured
19 are in a fiduciary relationship under California law, nor was it
20 determining the applicable statute of limitations when
21 allegations of professional negligence and breach of fiduciary
22 duty overlap regarding a breach of the duty of care.

23 Accordingly, the court concludes that Garrett's claim for
24 breach of fiduciary duty is governed by a two year statute of
25 limitations. Garrett stated in his opposition to the First Beach
26 Motion to Dismiss that his claim accrued on August 1, 2009, the
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1 day he became aware that the Plaintiffs' claim was denied
2 coverage by Navigators (Adv. Dkt. 25, p.3, lines 20-22). Beach
3 has not since disputed this. The original cross-claim, which
4 alleged a claim for relief for breach of fiduciary duty, was
5 filed on January 24, 2013, well after the two year statute of
6 limitations under Cal. Code Civ. P. § 339 had expired.

7 **(2) The Court Declines to Reach the Issue of Whether Beach's**
8 **Alleged Breach of Fiduciary Duty Proximately Caused**
9 **Garrett's Damages**

10 Because the court has concluded that Garrett's claim for
11 breach of fiduciary duty is time barred by a two year statute of
12 limitations, the court declines to address the issue of whether
13 or not Beach's alleged breach of fiduciary duty proximately
14 causes Garrett's damages, which necessarily would involve a
15 factual determination as to whether Garrett's alleged actions
16 would have been covered under both the Lincoln General Policy and
17 the Navigators Policy. The court has already concluded that
18 Beach is entitled to judgment as a matter of law.

19 **(3) The Court Declines to Reach the Various Evidentiary**
20 **Objections Raised by the Parties**

21 Finally, the court acknowledges that both parties have
22 raised a series of objections to the evidence in the record (Adv.
23 Dkts. 142 and 147). The evidentiary objections pertain to
24 factual allegations raised in various declarations and
25 depositions, some of which reference certain exhibits. The
26 court's ruling on the Motion, however, is not rooted in any
27 genuine factual dispute between the parties. Rather, the court's
28 conclusion that Garrett's breach of fiduciary duty claim is

1 barred by a two year statute of limitations is a legal conclusion
2 based on the application of the Erie Doctrine and this court's
3 interpretation of the current law in California on the issues
4 presented. Sustaining or overruling each evidentiary objection
5 would not alter the court's conclusions.

6 **III. RECOMMENDATION**

7 For all of the above reasons, IT IS HEREBY RECOMMENDED that
8 Beach's motion for summary judgment be granted.

9 These findings and recommendations are submitted to the
10 United States District Judge assigned to the case, pursuant to
11 the provisions of 28 U.S.C. § 157(c)(1). Although section
12 157(c)(1) does not contain the procedural provisions found in 28
13 U.S.C. § 626(b)(1), the court recommends utilizing the same
14 procedure. Accordingly, within fourteen days after being served
15 with these findings and recommendations, any party may file
16 written objections with the court and serve a copy on all
17 parties. Such a document should be captioned "Objections to
18 Bankruptcy Judge's Report and Recommendation." Failure to file
19 objections within the specified time may waive the right to
20 appeal the District Court's order. Turner v. Duncan, 158 F.3d
21 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th
22 Cir. 1991).

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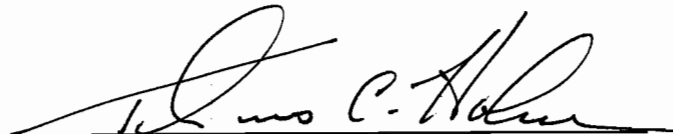
24 Dated: July 11, 2014

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Thomas C. Holman
United States Bankruptcy Judge