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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

GREAT LAKES REINSURANCE  
(UK) PLC,  
  
Plaintiff,  
  
vs.  
  
GERARD H. DION,  
  
Defendant,  
  
AND RELATED CROSS-ACTIONS.

CASE NO. 09 CV 1781 JM  
(POR)  
  
**ORDER GRANTING  
MOTION TO DISMISS**  
  
Doc. No. 15

This is an action in admiralty on a marine insurance contract. Defendant, Counterclaimant, and Third Party Plaintiff Gerard H. Dion (“Dion”) owned the M/V Destino, which sank on May 15, 2009. (Doc. No. 9, Counterclaim, hereinafter “CC,” ¶¶ 5, 17). Dion had purchased an insurance contract on the M/V Destino from Plaintiff and Counterdefendant Great Lakes Reinsurance PLC (“Great Lakes”). (CC ¶ 7). Third Party Defendant Jarvis Insurance Agency, Inc. (“Jarvis”) brokered the purchase of the insurance policy. (CC ¶ 7). After the M/V Destino sank, Great Lakes declined coverage on the loss. (CC ¶ 18). Great Lakes sued Dion for a declaratory judgment that the loss was not covered; Dion countersued. (Doc. Nos. 1, 9). Great Lakes now moves to dismiss the third cause of action—for breach of the implied covenant of good faith and fair dealing—from Dion’s amended counterclaim. (Doc. No. 15).

1 The court finds this matter appropriate for decision without oral argument. *See* CivLR  
2 7.1(d)(1). For the following reasons, the court hereby GRANTS Great Lake’s motion to dismiss.

3 **I. BACKGROUND**

4 According to the counterclaim, Dion purchased the M/V Destino in 2005. (CC ¶ 5). He hired  
5 Jarvis to broker a marine insurance policy for the M/V Destino. (CC ¶ 5). Jarvis procured a policy  
6 on Dion’s behalf from Great Lakes. (CC ¶ 7). That policy was annually renewed through November  
7 4, 2009. (CC ¶ 7).

8 Two clauses of the insurance policy are relevant to this motion. First, the “Service of Suit”  
9 clause provides that “the Assured may serve process upon any senior partner in the firm of: LeBoeuf,  
10 Lamb, Greene & Macrae” in New York, NY. (Doc. No. 1, Ex. D at 13). Second, the policy contains  
11 a “Choice of Law” provision that provides,

12 It is hereby agreed that any dispute arising hereunder shall be adjudicated according  
13 to well established, entrenched principles and precedents of substantive United States  
14 Federal Admiralty law and practice but where no such well established, entrenched  
precedent exists, this insuring agreement is subject to the substantive laws of the state  
of New York.

15 (*Id.*).

16 Around the time of the policy’s last renewal, in late 2008, Great Lakes, Jarvis, and Dion  
17 exchanged various communications—the details of which are disputed—about the status of the M/V  
18 Destino. (CC ¶¶ 9-15). Based partly on these communications, Great Lakes denied coverage for the  
19 loss of the M/V Destino. (CC ¶ 18).

20 **II. LEGAL STANDARD**

21 A court should dismiss an action where a complaint fails to “state a claim upon which  
22 relief can be granted.” Fed. R. Civ. P. 12(b)(6). Therefore, a motion to dismiss should be granted  
23 where the complaint lacks either a “cognizable legal theory” or facts sufficient to support a  
24 cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). In  
25 evaluating the claim a court must “accept as true all of the allegations contained in [the]  
26 complaint.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

27 In testing the complaint’s legal adequacy, the court may consider material properly  
28 submitted as part of the complaint or subject to judicial notice. *Swartz v. KPMG LLP*, 476 F.3d

1 756, 763 (9th Cir. 2007). Furthermore, under the “incorporation by reference” doctrine, the court  
2 may consider documents “whose contents are alleged in a complaint and whose authenticity no  
3 party questions, but which are not physically attached to the [plaintiff’s] pleading.” *Janas v.*  
4 *McCracken (In re Silicon Graphics Inc. Sec. Litig.)*, 183 F.3d 970, 986 (9th Cir. 1999) (internal  
5 quotation marks omitted).

6 **III. DISCUSSION**

7 **A. CHOICE OF LAW**

8 The court must first determine what law applies to this case. The parties agree that  
9 *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (1992), governs this issue. Under *Nedlloyd*,  
10 the court first determines whether the choice of law has a substantial relationship to the parties or  
11 whether there is a reasonable basis for the parties’ choice of law. *Id.* at 466. If this first hurdle is  
12 leapt, the court then considers whether the choice of law is contrary to a fundamental policy of the  
13 forum state. *Id.*

14 The policy provides that the Assured may serve process on Great Lakes agent in New  
15 York. This creates a reasonable basis for the parties’ choice of law. *Great Lakes Reinsurance*  
16 *(UK) PLC v. Southern Marine Concepts, Inc.*, No. G-07-276, 2008 WL 6523861 (S.D. Tex.  
17 October 21, 2008). Moreover, the parties have not identified any fundamental policy of either  
18 California or admiralty law that conflicts with New York law. *See Nedlloyd*, 3 Cal. 4th at 468.  
19 Therefore, the court finds that the choice of law provision in the policy should be enforced, and  
20 New York Law shall apply.

21 ///

22 **B. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

23 New York does not recognize the tort of “bad faith” in the context of a first-party claim on  
24 an insurance contract. *Aquista v. New York Life Ins. Co.*, 730 N.Y.S.2d 272, 278 (N.Y.A.D. 2001).  
25 Rather, the rights and obligations of parties to an insurance contract are defined by that contract.  
26 *Id.* Therefore, Dion’s counterclaim for breach of the implied covenant of good faith and fair  
27 dealing must fail as a matter of law.


28 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, the court hereby GRANTS Great Lakes motion to dismiss.

3 **IT IS SO ORDERED.**

4 DATED: December 18, 2009

5   
6 Hon. Jeffrey T. Miller  
7 United States District Judge

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