IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No: 1:08-CV-0854

DUKE UNIVERSITY; DUKE UNIVERSITY HEALTH SYSTEM, INC.,	)	
Plaintiffs,	)	**PLAINTIFFS' RESPONSE TO THIRD-PARTY DEFENDANT UNITED EDUCATORS' MOTION TO DISMISS OR STAY THIRD-PARTY COMPLAINT**
v.	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,	)	
Defendant.		

UNREPORTED CASES

1. *Branch Banking and Trust Co. v. Lighthouse Fin. Corp.*, No. 04 CVS 1523, 2005 WL 1995410 (N.C. Super. Ct. July 13, 2005)

2. *Commercial Union Assur. Co., PLC v. Professional Divers of New Orleans, Inc.*, No. 95-2449, 1997 WL 39291 (E.D. La. 1997)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina,
Forsyth County,
Business Court.
BRANCH BANKING AND TRUST COMPANY,
Plaintiff,
v.
LIGHTHOUSE FINANCIAL CORP., Defendant.
No. 04 CVS 1523.

July 13, 2005.

{1} This matter is before the Court on defendant's motion for leave to file a second amended answer and counterclaim, defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and plaintiff's motion to dismiss defendant's counterclaims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After considering the briefs and oral arguments of both parties and for the reasons below, the Court: 1) grants leave to file a second amended answer and counterclaim in part and denies leave in part; 2) denies defendant's motion to dismiss pursuant to Rule 12(b)(6); and 3) grants in part and denies in part plaintiff's motion to dismiss defendant's counterclaims pursuant to Rule 12(b)(6).
Bell, Davis, and Pitt, P.A. by James R. Fox and D. Anderson Cameron for Plaintiff Branch Banking and Trust Company.

Tuggle Duggins & Meschan, P.A. by Robert C. Cone and David S. Meschan for Defendant Lighthouse Financial Corporation.

ORDER

I.

FACTUAL HISTORY

***1** {2} Plaintiff Branch Banking and Trust Company ("BB & T") is a banking corporation organized and existing under the laws of the State of North Carolina, with its principal office located in Forsyth County, North Carolina.

{3} Defendant Lighthouse Financial Corporation ("Lighthouse") is an asset-based lender organized and existing under the laws of the State of North Carolina, with its principal office located in Guilford County, North Carolina.

{4} The parties previously were involved in business transactions which were the basis of an adversary proceeding before the United States Bankruptcy Court for the Middle District of North Carolina, adversary proceeding number A-01-2016G (the "Adversary Proceeding").[FN1] The facts were ably presented in an opinion filed by the Bankruptcy Court on October 10, 2003.

FN1. Lighthouse was not a party to the Adversary Proceeding but, as Vendsourth's largest creditor, funded the Trustee's legal fees.

Vendsouth, Inc. ("Vendsouth"), the Debtor, was a wholesale distributor of foods, primarily snack foods, for sale in vending machines. Vendsouth was wholly owned either by Terrance Arth or by Terrance and Judy Arth. Terrance Arth was President of Vendsouth and Judy Arth, Terrance Arth's wife, served as the company's Secretary. Mark Sylvester was the company's Controller. Terrance Arth, Judy Arth and Mark Sylvester were the officers of Vendsouth ("Vendsouth Officers").

On May 21, 1997, Vendsouth and Lighthouse Financial Corp. ("Lighthouse") entered into a Loan and Security Agreement and Vendsouth signed a Demand Promissory Note in the amount of $ 1,000,000.00. This loan was secured by the inventory and accounts receivable of Vendsouth. Vendsouth initially established bank accounts at Centura Bank. Thereafter, in February of 1998, Vendsouth established three bank accounts at BB & T. Only two of the accounts were involved in the transactions giving rise to this proceeding, these being account no. 5211437903 (the "Operating Account")

and account no. 5211437881 (the "Blocked Account"). In establishing these accounts, BB & T, Vendsouth and Lighthouse entered into an agreement entitled "Agreement Relating to Deposit Account" which related to the Blocked Account (the "Blocked Account Agreement"). The Blocked Account was to be used by Vendsouth to deposit the collections from its accounts receivable. Vendsouth was to inform Lighthouse of the amount of the deposits made into the Blocked Account. Lighthouse was then authorized to withdraw the deposits daily by a check drawn on the Blocked Account. Lighthouse was authorized to withdraw the entire amount deposited in the account without regard to whether the funds had been collected. In effect, BB & T agreed to grant unlimited provisional credit to all checks deposited in the account. Thus, Lighthouse would clear the account by drawing a check on the account balance each day.

Vendsouth and BB & T also arranged for a cash management service which allowed the Operating Account to be used as a controlled disbursement account. This service was one of several "treasury services" that BB & T offered its customers. By accessing a computer system at BB & T, Vendsouth was able to determine, no later than 10:00 a.m. each day, the checks that would hit the Operating Account that day. Vendsouth could then communicate with Lighthouse and arrange for Lighthouse to wire transfer sufficient funds into the Operating Account so that all of the checks that would be presented that day would clear. As a result of the operation of the cash management service, any checks drawn on and presented for payment on the Operating Account after this information was provided to Vendsouth, which usually was no later than 10:00 a.m., would not clear until the following day. Thus, any such check drawn on the Operating Account and deposited in the Blocked Account would post on the Operating Account one day after the check was deposited in the Blocked Account and provisional credit had been granted. The result was a one-day float.

***2** In July of 1998, approximately five months after Vendsouth opened the accounts at BB & T, Vendsouth began perpetuating loan fraud against Lighthouse. Such loan fraud involved Vendsouth reporting fictitious sales to Lighthouse in order to receive loan advances from Lighthouse greater than it was legitimately entitled to receive. Vendsouth furthered the fraud by also reporting to Lighthouse fictitious collections of nonexistent receivables. The Blocked Account had been established to receive payments from customers of Vendsouth, i.e., payments on legitimate accounts receivable, and Vendsouth initially used the Block Account for that purpose. However, in July of 1998, Vendsouth began depositing its own checks drawn on the Operating Account into the Blocked Account ("on us" checks). Thereafter, between July 13, 1998, and November of 1999, Vendsouth, on a daily basis, deposited checks into the Blocked Account which were payable to Vendsouth and drawn off the Vendsouth Operating Account. These checks, which greatly exceeded the actual funds in the Operating Account, were not payments on accounts receivable of Vendsouth and were not on their face payments on accounts receivable of Vendsouth. However, BB & T accepted them for deposit into the Blocked Account and gave immediate provisional credit based upon them. These deposits created the impression that Vendsouth was receiving payments from customers, causing Lighthouse to make advances based on the "deposits". Also, because of the one-day float, Vendsouth was able to obtain the new advances from Lighthouse to "cover" the "on us" checks before the checks posted to the Operating Account. The result was a kiting scheme involving a circular movement of funds in which Vendsouth was "borrowing" funds from BB & T to pay Lighthouse (which occurred when BB & T paid the Lighthouse draws on the Blocked Account), and then borrowing from Lighthouse to repay BB & T (which occurred when Lighthouse wired funds into the Operating Account and those funds were used to cover the "on us" checks that had been deposited into the Blocked Account). This illicit scheme went undetected and continued with the amounts involved increasing as the scheme continued. During the period between July 1998 and November 1999, Vendsouth deposited in excess of 1,250 of these checks into the Blocked Account, aggregating in their total face amount in excess of $ 106,000,000.00. This scheme continued until BB & T caused its collapse on November 9, 1999.

On Friday, November 5, 1999, Vendsouth deposited four "on us" checks, written and drawn on the Operating Account, into the Blocked Account. These were check numbers 10589, 10590, 10591 and 10592, which totaled in the aggregate $ 976,616.13.

BB & T granted provisional credit based upon these checks and allowed Lighthouse to withdraw $ 986,431.95 from the Blocked Account pursuant to a check on the Blocked Account that had been issued by Lighthouse on November 4, 1999. Lighthouse then wired $ 895,000.00 into the Operating Account as a new advance to Vendsouth. This advance was used to cover four "on us" checks deposited prior to November 5, 1999, those checks being checks numbered 10584, 10585, 10586 and 10587 in a total amount of $ 899,462.35.

***3** On Monday, November 8, 1999, Vendsouth deposited three "on us" checks, written and drawn on the Operating Account, into the Blocked Account. These were checks numbered 10610, 10611 and 10612, which totaled in the aggregate $ 850,570.17. However, on Monday, November 8, due to an apparent computer malfunction at BB & T, no information regarding which checks would clear the Operating Account that day was available and, therefore, Vendsouth was unable to determine how much money to request Lighthouse to wire into the Operating Account. BB & T informed Vendsouth to hold off and everything would double up on Tuesday, November 9. Thus, on Monday, November 8, 1999, Lighthouse did not make a wire transfer into the Operating Account and no checks cleared the Operating Account.

By the morning of Tuesday, November 9, 1999, Vendsouth had deposited, into the Blocked Account, seven "on us" checks totaling $ 1,827,186.20. These seven checks consisted of the "on us" checks that had been deposited on November 5 and November 8. BB & T had granted provisional credit for all seven checks. BB & T had also decided to stop allowing the deposit of "on us" checks and to end Vendsouth's kiting. But without a wire transfer from Lighthouse into the Operating Account there were insufficient funds available to allow the seven "on us" checks to clear.

On the morning of Tuesday, November 9, BB & T's computer system was again in operation and BB & T furnished to Vendsouth information about the checks that would clear the Operating Account that day. The figure furnished to Vendsouth consisted almost entirely of the $ 1,827,186.20 represented by the seven "on us" checks deposited on Friday, November 5 and Monday, November 8. In response to the information furnished by BB & T, Vendsouth requested Lighthouse to wire $ 1,977,000.00 into the Operating Account on November 9 at approximately 12:30 p.m., which Lighthouse did. Lighthouse then issued a check drawn on the Blocked Account in the amount of $ 1,986,718.08 and deposited it in its account at Bank of America.

BB & T used the $ 1,977,000.00 received from Lighthouse to fund the provisional credit that had been issued with respect to the seven "on us" checks deposited by Vendsouth on November 5 and 8 in the total amount of $ 1,827,186.20. Pursuant to the decision BB & T had earlier made to end the kite, BB & T refused to accept any further "on us" checks for deposit into the Blocked Account after November 8. Thus, at the end of the day on November 9, 1999, BB & T had no remaining risk from any provisional credit it had granted for "on us" checks and was issuing no further provisional credit for "on us" checks since it no longer was accepting any "on us" checks for deposit into the Blocked Account. On November 12, 1999, the check drawn by Lighthouse on the Blocked Account in the amount of $ 1,986,718.08 was returned "NSF" to Lighthouse.

The check-kiting scheme was effectively terminated through BB & T's actions on November 9 and at that point BB & T retained no risk from the check kite while Lighthouse was now owed a substantial sum of money that it could not collect from Vendsouth's accounts at BB & T.

***4** *Vendsouth, Inc. v. Arth*, No. 00-10112C-7G, 2003 Bankr.LEXIS 1437, at *2-10, 2003 WL 22399581 (Bankr.M.D.N.C. Oct. 10, 2003).

{5} Following Judge Stocks' opinion, BB & T and the Trustee in Bankruptcy reached a settlement which provided in part that BB & T would pay funds to the Bankruptcy estate in excess of two million dollars. Lighthouse will receive the vast majority of distributions to creditors in the bankruptcy proceeding.

{6} On April 2, 2004, plaintiff filed an amended complaint in this Court which seeks claims of relief for breach of contract, declaratory judgment, common law indemnity and contribution. On November 11, 2004, defendant filed an amended answer and counterclaim. Plaintiff seeks relief for counterclaims for breach of contract, common law fraud, unfair and

deceptive trade practices, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, unjust enrichment and punitive damages. On January 17, 2005, plaintiff filed a motion to dismiss defendant's counterclaim. On February 4, 2005, defendant filed a motion to dismiss pursuant to Rule 12(b)(6). In addition, on February 4, 2005, defendant filed a motion for leave to file a second amended answer and counterclaim. In defendant's proposed second amended answer and counterclaim, defendant seeks relief for counterclaims for breach of contract, common law fraud, unfair and deceptive trade practices, aiding and abetting fiduciary duty, aiding and abetting fraud, civil conspiracy, constructive fraud, unjust enrichment, constructive trust and punitive damages. Plaintiff opposes defendant's motion for leave to file a second amended answer and counterclaim which adds civil conspiracy, constructive fraud and constructive trust.

{7} The Court will first address defendant's motion to dismiss. Next, the Court will address plaintiff's motion to dismiss defendant's counterclaim. Lastly, the Court will address defendant's motion for leave to file a second amended answer and counterclaim.

II.

DEFENDANT'S MOTION TO DISMISS

A.

LEGAL STANDARD

{8} When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint ... are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB*, 85 N.C.App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true. *See Hyde v. Abbott Lab., Inc.*, 123 N.C.App. 572, 575, 473 S.E.2d 680, 682 (1996). The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *See id.*When considering a motion under Rule 12(b)(6), the court is not required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. *Sutter v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint should be dismissed under Rule 12(b)(6).*See Hudson Cole Dev. Corp. v. Beemer*, 132 N.C.App. 341, 511 S.E.2d 309 (1999). When applying this standard, it must be kept in mind that when fraud is alleged, the circumstances constituting fraud must be plead with particularity. N.C. R. Civ. P. 9(b); *see also Terry v. Terry*, 302 N.C. 71, 273 S.E.2d 674 (1981). Although the Court has recited the facts from Judge Stocks' opinion in order to put these claims in fuller context, the standard setout above has been applied.

***5** {9} This case raises difficult issues concerning a bank's responsibilities when it believes check kiting has occurred. There also exists the likelihood that some of Lighthouse's claims and damages alleged in the counterclaim will be significantly reduced when final distribution is made in the bankruptcy proceeding. By way of example only, liability and damages on a claim for unjust enrichment may not exist. Those are issues to be decided at a later date. These are 12(b)(6) motions.

B.

ANALYSIS

1. Breach of Contract

{10} BB & T's first claim of relief is for breach of contract and is based upon Paragraph 5 of the Blocked Account Agreement. The paragraph states:

> Borrower [Vendsouth] and Lender [Lighthouse] shall indemnify Bank against and hold it harmless from any and all liabilities, claims, costs, expenses, and damages of any nature (including but not limited to allocated costs of staff counsel, other reasonable attorney's fees, and any fees and expenses incurred in enforcing this Agreement) in any way arising out of or relating to disputes or legal actions concerning the Bank's providing of this service, this Agreement, any check (including any fees, claims or suits suffered by Bank arising out of or in connection with its depositing checks payable to or endorsed in favor of Borrower), including any claims by banks participating in loans by Lender to Borrower. This section does not apply to any cost or damage attributable to the willful misconduct of Bank. Lender

and Borrower's obligations under this section shall survive termination of this Agreement.

Blocked Account Agreement at ¶ 5.

{11} BB & T seeks indemnification for costs, expenses and attorney's fees incurred in connection with the Adversary Proceeding as well as continuing costs, expenses and attorney's fees after the final adjudication of the Adversary Proceeding. In addition, BB & T seeks the payment of all liabilities, if any, claims, costs, expenses, and damages incurred by BB & T as a result of the Adversary Proceeding. (Am. Compl. at ¶¶ 18-24.) Lighthouse argues that BB & T is not entitled to indemnification based upon the Blocked Account Agreement and that BB & T's claim for breach of contract fails to state a claim and should be dismissed in its entirety.

{12} The Court finds factual allegations sufficient to foreclose judgment at this stage. The questions of whether or not the contract is ambiguous or what the scope of the indemnity is meant to cover as well as the question of whether BB & T engaged in willful misconduct are all better suited for summary judgment rather than Rule 12(b)(6). Therefore, Lighthouse's motion to dismiss BB & T's claim for breach of contract is denied.

2. Declaratory Judgment

{13} BB & T seeks a declaration of its rights under the indemnification clause of the Block Account Agreement. “BB & T seeks a declaration that it has a valid right to indemnification by Lighthouse from all liabilities, claims, costs, expenses and damages, including attorney's fees, incurred or to be incurred in defense of or resulting from the Adversary Proceeding.”(Am. Compl. at ¶ 29). Lighthouse argues that BB & T is not entitled to indemnification and therefore BB & T's claim for declaratory judgment should be dismissed.

***6** {14} The Court finds factual allegations discussed above sufficient to foreclose judgment at this stage. Therefore, Lighthouse's motion to dismiss BB & T's claim for declaratory judgment is denied.

3. Common Law Indemnity

{15} BB & T seeks common law indemnity for any determination of liability and damages on allegations of tort claims in the Adversary Proceeding. BB & T claims that acts and omissions of Lighthouse proximately caused or contributed to the injury and damages alleged by the Trustee for Vendsouth. Lighthouse seeks dismissal of this claim due to the existence of an express indemnity clause in the Blocked Account Agreement. In addition, Lighthouse argues that BB & T has no right to indemnification due to BB & T's alleged intentional torts.

{16} BB & T seeks common law indemnity as an alternative basis for relief. Pursuant to Rule 8(a)(2) of the North Carolina Rules of Civil Procedure, alternative claims for relief are permitted. At this stage in the proceedings, dismissal of properly pled claims in the alternative is unwarranted. The proper stage of the proceedings to consider this issue is at the summary judgment stage. Therefore, Lighthouse's motion to dismiss BB & T's claim for common law indemnity is denied.

4. Contribution

{17} To the extent that BB & T is found liable to Vendsouth in the Adversary Proceeding, BB & T seeks contribution from any parties whose acts or omissions contributed to such liability. BB & T claims entitlement to contribution against such other tortfeasors, including Lighthouse, for their pro rata share of any award in favor of Vendsouth and against BB & T. (Am.Compl.¶¶ 36-38.) Lighthouse argues that contribution is precluded by the express indemnity provision in the Blocked Account Agreement. Further, Lighthouse opposes the claim for contribution due to BB & T's alleged intentional torts.

{18} BB & T seeks contribution as an alternative basis for relief. Pursuant to Rule 8(a)(2) of the North Carolina Rules of Civil Procedure, alternative claims for relief are permitted. At this stage in the proceedings, dismissal of properly pled claims in the alternative is unwarranted. The proper stage of the proceedings to consider this issue is at the summary judgment stage. Therefore, Lighthouse's motion to dismiss BB & T's claim for contribution is denied.

III.

PLAINTIFF'S MOTION TO DISMISS THE

COUNTERCLAIM

A.

LEGAL STANDARD

{19} The standards for dismissal of a counterclaim are the same as the standards that govern the dismissal of a complaint. In addition to the standards set forth above in Part II.A, a claim should be dismissed when the existence of a meritorious affirmative defense, such as the statute of limitations, appears on the face of the counterclaim. *See* *Forsyth Memorial Hospital, Inc. v. Armstrong World Industries, Inc.*, 336 N.C. 438, 444 S.E.2d 423 (1994).

B.

ANALYSIS

1. Breach of Contract

***7** {20} Pursuant to North Carolina General Statute Section 1-52(a), a claim for breach of contract is subject to a three-year statute of limitations. The counterclaim was filed by Lighthouse on November 12, 2004. The alleged act or acts that Lighthouse contends give rise to its claim for breach of contract are alleged to have occurred on or before November 8, 1999. Therefore, the counterclaim for breach of contract is time barred by the statute of limitations and BB & T's motion to dismiss the counterclaim for breach of contract is granted.

2. Fraud

{21} Pursuant to North Carolina General Statute Section 1-52(9), a claim for fraud is subject to a three-year statute of limitations. A cause of action for fraud accrues upon the discovery of the facts constituting the fraud. Discovery of fraud as used in the statute means actual discovery or the time when fraud should have been discovered. *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C.App. 477, 485, 593 S.E.2d 595, 601 (2004) (citing *Calhoun v. Calhoun*, 18 N.C.App. 429, 197 S.E.2d 83 (1973).

{22} Issues of fact regarding when Lighthouse became aware of certain facts and their relevancy preclude judgment on the pleadings at this time. Therefore, BB & T's motion to dismiss the counterclaim for fraud is denied.

3. Unfair and Deceptive Trade Practices

{23} When a claim for unfair and deceptive trade practices is based upon fraud, the limitations period begins to run when the plaintiff discovers or should have discovered the fraud. *Nash v. Motorola*, 96 N.C.App. 329, 331, 385 S.E.2d 537, 538 (1989), *review allowed*, 326 N.C. 483, 392 S.E.2d 94,*aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1990). The same issues of fact discussed above preclude judgment at this stage in the proceedings on the claim for fraud. Therefore, the claim for unfair and deceptive trade practices which is based upon the alleged fraud cannot be dismissed. BB & T's motion to dismiss the counterclaim for unfair and deceptive trade practices is denied.

4. Aiding and Abetting Breach of Fiduciary Duty

{24} A claim for aiding and abetting breach of fiduciary duty is governed by the three-year statute of limitations of North Carolina General Statute Section 1-52. Where a claim is essentially grounded in contract, the three-year statute of limitations applies. *See* *Tyson v. North Carolina National Bank*, 305 N.C. 136, 141, 286 S.E.2d 561, 565 (1982). However, a ten-year statute of limitations governs a claim for aiding and abetting breach of fiduciary duty which arises from constructive fraud. *See* *NationsBank of North Carolina, N.A. v. Parker*, 140 N.C.App. 106, 535 S.E.2d 597 (2000). In this case, Lighthouse alleges fraud and constructive fraud arising from BB & T's alleged acts and omissions in shifting the loss caused by Vendsouth's fraud to Lighthouse. Sufficient allegations of fact preclude judgment at this stage in the proceedings on the claim for fraud and constructive fraud. The claim for aiding and abetting breach of fiduciary duty arises from the alleged constructive fraud. Thus, sufficient allegations of fact preclude judgment at this stage in the proceedings on the claim for aiding and abetting breach of fiduciary duty. Therefore, to the extent that North Carolina recognizes a cause of action for aiding and abetting breach of fiduciary duty, BB & T's motion to dismiss the counterclaim for aiding and abetting breach of fiduciary duty is denied.

5. Aiding and Abetting Fraud

***8** {25} No North Carolina state court has recognized

a claim for aiding and abetting fraud.[FN2]Recently, this Court addressed this issue and held that North Carolina courts should not recognize a claim for aiding and abetting fraud. The Court reasoned,

> FN2. In the Adversary Proceeding Judge Stocks ruled that he thought the state courts would recognize aiding and abetting fraud. For the reasons set forth below, this Court believes his reliance on *Blow v. Shaughnessy*, 88 N.C.App. 484, 364 S.E.2d 444 (1988) was misplaced.

> This Court cannot distinguish [ ][a] claim [for aiding and abetting fraud] from a direct fraud claim. There must be direct knowledge and intent to defraud. If that is required, the claims are redundant. Why would it be prudent to engraft the requirements of knowledge and intent on an aiding and abetting fraud claim under these circumstances? Unintended consequences will result from the elimination of those requirements. If professionals such as accountants and lawyers could be held liable for fraud when their clients used their services to defraud a third party without the professionals' intent to participate in the fraud, the costs of such services would be prohibitive to all but the affluent. Such professionals would either have to incur the expense of investigation into how their services were being used or be placed in the position of insurers of their clients' honesty. Either burden would add an unacceptable cost to the provision of necessary and desirable services. Also, it seems illogical to impose liability for aiding and abetting fraud based upon a lower level of scienter than fraud itself. Nor would it be consistent with the cases in which the North Carolina courts have based joint liability on comparable culpability. Without knowledge and similar intent, there can be no joint effort or concert in action.
>
> *Sompo Japan Ins. Inc. v. Deloitte & Touche*, LLP, 2005 NCBC 2, at ¶ 10 (No. 03CVS5547, Guilford County Super. Ct. June 10, 2005)(Tennille, J.).

Therefore, BB & T's motion to dismiss the counterclaim for aiding and abetting fraud is granted.

6. Unjust Enrichment

{26} A claim for unjust enrichment is governed by the three-year statute of limitation of North Carolina General Statute Section 1-52. Where a claim is essentially grounded in contract, the three-year statute of limitations applies. *See Tyson v. North Carolina National Bank*, 305 N.C. 136, 141, 286 S.E.2d 561, 565 (1982). However, a ten-year statute of limitations governs a claim for unjust enrichment pleaded on the basis of constructive fraud. *See Adams v. Moore*, 96 N.C.App. 359, 385 S.E.2d 799 (1989), *rev. den.*, 326 N.C. 46, 389 S.E.2d 83 (1990). In this case, Lighthouse alleges fraud and constructive fraud arising from BB & T's alleged acts and omissions in shifting the loss caused by Vendsouth's fraud to Lighthouse. Sufficient allegations of fact preclude judgment at this stage in the proceedings on the claim for fraud and constructive fraud. The claim for unjust enrichment arises from the alleged constructive fraud. Thus, issues of fact preclude judgment at this stage in the proceedings on the claim for unjust enrichment. Therefore, BB & T's motion to dismiss the counterclaim for unjust enrichment is denied.

7. Punitive Damages

***9** {27} Punitive damages may be sought for fraud. N.C. Gen.Stat. § 1D-15(a). Here, defendant counterclaims for fraud. There are sufficient allegations to preclude judgment on defendant's counterclaim for fraud at this stage in the proceedings. Therefore, BB & T's motion to dismiss the counterclaim for punitive damages is denied.

IV.

MOTION TO AMEND

A.

LEGAL STANDARD

{28} Pursuant to North Carolina Rules of Civil Procedure Rule 15, the Court may grant leave to file an amended pleading. The rule states:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse

> party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. R. Civ. P. 15(a). Thus, the Court is free to allow defendant leave to amend its answer when justice so requires.

B.

ANALYSIS

{29} Defendant's motion for leave to file a second amended answer is allowed in part and denied in part. The additional factual allegations are permitted. The new counterclaims for civil conspiracy and constructive fraud are allowed subject to the findings of the original fraud claim.

{30} The North Carolina Court of Appeals has recently addressed the question of the adequacy of pleadings alleging "constructive fraud." *See* *Toomer v. Branch Banking and Trust Company*, No. COA04-599, 2005 N.C.App. LEXIS 1188, 2005 WL 1429867 (June 21, 2005). In that case there were no allegations of fraud, only breach of fiduciary duty. The Court of Appeals held: "Noticably absent is the required assertion that UCB sought to benefit itself. Indeed, plaintiffs' complaint characterizes UCB's behavior as 'erroneous.' Accordingly, plaintiffs have not asserted claims for constructive fraud." *Toomer*, 2005 N.C.App. LEXIS 1188, at *18-19, 2005 WL 1429867.

{31} The Court of Appeals so held even though the "errors" allegedly significantly increased the trustee funds.

{32} In this case, defendant has alleged fraud by BB & T and specifically alleged that the fraudulent acts were taken to benefit BB & T to the detriment of defendant. (Am. Answer and Countercl. at 13, 16.) There are sufficient allegations to preclude judgment on these claims at this stage in the proceedings.

{33} Defendant seeks the imposition of a constructive trust as alternative claim for relief. "A constructive trust arises when one obtains legal title to property in violation of a duty owed to another." *United Carolina Bank v. Brogan*, 155 N.C.App. 633, 635-36, 574 S.E.2d 112, 114-15 (2002) (citations omitted). Ordinarily, constructive trusts "arise from actual or presumptive fraud and usually involve the breach of a confidential relationship." *Id.* at 635, 574 S.E.2d at 114. Constructive trusts are "imposed by courts of equity to prevent the unjust enrichment or the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." *Id.* at 636, 574 S.E.2d 112,574 S.E.2d at 115.Where adequate remedies at law exist to pursue claims of fraud, the equitable remedy of a constructive trust is unwarranted. *Old Line Life Ins. Co. v. Bollinger*, 161 N.C.App. 734, 738, 589 S.E.2d 411, 413 (2003).

***10** {34} Lighthouse seeks a constructive trust based on BB & T's alleged acts or omissions of misconduct including fraud, civil conspiracy with the officers and directors of Vendsouth and the aiding and abetting of the fraud on Lighthouse. (Def.'s Second Am. Answer at ¶ 59.) Adequate remedies at law exist for the claims for which Lighthouse seeks imposition of a constructive trust. Therefore, the motion for leave to file an amended answer to assert a counterclaim for constructive trust is denied.

CONCLUSION

{35} Based upon the foregoing, it is hereby Ordered, Adjudged, and Decreed:

1. Defendant's motion to dismiss pursuant to Rule 12(b)(6) is DENIED.

2. Plaintiff's motion to dismiss the counterclaim for breach of contract is GRANTED.

3. Plaintiff's motion to dismiss the counterclaim for fraud is DENIED.

4. Plaintiff's motion to dismiss the counterclaim for unfair and deceptive trade practices is DENIED.

5. Plaintiff's motion to dismiss the counterclaim for aiding and abetting fiduciary duty is DENIED.

6. Plaintiff's motion to dismiss the counterclaim for

aiding and abetting fraud is GRANTED.

7. Plaintiff's motion to dismiss the counterclaim for unjust enrichment is DENIED.

8. Plaintiff's motion to dismiss the counterclaim for punitive damages in DENIED.

9. Plaintiff's motion for leave to file a second amended answer and counterclaim is GRANTED with respect to the additional factual allegations and the additional counterclaims for civil conspiracy and constructive fraud.

10. Plaintiff's motion for leave to file a second amended answer and counterclaim is DENIED with respect to the additional counterclaim for constructive trust.

{36} The parties shall jointly report to the Court any distribution to Lighthouse from the Vendsouth bankruptcy estate.

SO ORDERED, this the 13th day of July 2005.

N.C.Super.,2005.
Branch Banking and Trust Co. v. Lighthouse Financial Corp.
Not Reported in S.E.2d, 2005 WL 1995410 (N.C.Super.), 2005 NCBC 3

END OF DOCUMENT

United States District Court, E.D. Louisiana.
COMMERCIAL UNION ASSURANCE CO. PLC, et al,
v.
PROFESSIONAL DIVERS OF NEW ORLEANS, INC., et al.
Civ.A. No. 95-2449.

Jan. 29, 1997.

ORDER AND REASONS

DUVAL, District Judge.

***1** The following motions are before the Court:

1) Motion to Dismiss the Complaint for Declaratory Judgment filed by Professional Divers of New Orleans, Inc. ("Professional Divers") (Doc. No. 35)

2) Motion to Dismiss filed by Alexander & Alexander, Inc. (Doc. No. 37);

3) Cross-Motions for Summary Judgment filed by Underwriters [FN1] (Doc. No. 32) and the Cross Entities [FN2] (Doc. No. 46); and

FN1. "Underwriters" are plaintiffs Commercial Union Assurance Co. PLC, The Tokio Marine & Fire Insurance Co. (U.K.) Ltd., the Yorkshire Insurance Company, Ltd. L A/C, Ocean Marine Insurance Co., Ltd., Zurich RE (U.K.) Ltd., Northern Assurance Company, Ltd. M A/C, Indemnity Marine Assurance Co., Ltd., Sphere Drake Insurance PLC No. 1 A/C, Phoenix Assurance Public Limited Company, The Threadneedle Insurance Co., Ltd. and Terra Nova Insurance Company Limited.

FN2. The "Cross Entities" are Cross Offshore Corporation, Cross Marine Inc. and Ocean Salvage Corporation.

4) Motion to Dismiss for Lack of Jurisdiction over the Person of Defendant, Pursuant to FRCP Rule 12(B)(2) filed by S.B.J. Marine & Energy (Doc. No. 52).

This declaratory judgment action was brought on July 27, 1995, by Underwriters seeking a declaration from this Court that there is no coverage available under Underwriters' CGL policy with respect to an injury sustained by Ralph Bellamy, a diver employed by Professional Divers.[FN3]

FN3. The Court will use Louisiana law in the interpretation of the subject policy as the policy was delivered in Louisiana and all parties agree that Louisiana law governs. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368 (1955).

Background

Louisiana Land and Exploration hired Ocean Salvage Corporation ("Ocean Salvage") to perform plug and abandon work on wells at Vermillion 104. In order to perform the work, Ocean Salvage chartered a jack up vessel, the SOUTHERN CROSS V, from Cross Marine, Inc. ("Cross Marine"). Both Ocean Salvage and Cross Marine are wholly owned subsidiaries of Cross Offshore Corporation ("Cross Offshore"). Indeed, Cross Offshore operates solely through its subsidiaries and does not, in its own name and with its own personnel and equipment, perform any offshore and/or oilfield related work.

Ocean Salvage hired Professional Divers to provide its services to complete the LL & E job pursuant to a Cross Offshore Corporation Blanket Subcontractor Agreement (Doc. 61, Exh. "G"). The agreement was entered into on May 20, 1994 between Professional Divers, and "CROSS OFFSHORE CORPORATION, and its operating affiliates, Cross Marine, Inc. and Ocean Salvage Corporation." (Doc. 61, Exh. "G", p. 1). Article 15 of the Agreement contains a cross indemnity agreement wherein, *inter alia*, Professional Divers agrees to "defend, indemnify and hold harmless" the Cross Entities from claims brought by Professional Divers' employees. Professional Divers

agreed to do so "whether [the injury was] caused in whole or in part by the negligence, fault and/or strict liability of the indemnitees, or by the defect of any equipment, property and/or vessel of any indemnitee." *Id.* at 4. Article 17 contains the agreement to procure adequate insurance coverage which included: "Comprehensive General Liability Insurance with the watercraft exclusion removed from the policy and including contractual liability insurance covering SUBCONTRACTORS's obligations under this Agreement, with limits not less than $5,000,000." *Id.* p. 5. All insurance policies were to name the Cross Entities as additional assureds and waive underwriters' rights of subrogation against all indemnitees to be indemnified by Professional Divers. *Id.* p. 6.

Professional Divers negotiated its CGL policy through its agent, Alexander & Alexander, in particular, through Mr. Nigel Gladwell. Mr. Gladwell negotiated the terms and conditions of the CGL policy through S.B.J. Marine and Energy ("SBJ") and, in particular, Mark Roberts. Eventually insurance was placed with Underwriters that are plaintiffs herein. It is the terms and conditions of that policy that are at issue.

***2** On January 8, 1995, Bellamy, a Professional Divers' employee, was injured in a diving accident when a lance, owned by Ocean Salvage, ran through Bellamy's foot. The lance was suspended from a crane attached to the SOUTHERN CROSS V, which ship was owned by Cross Marine. The lance was being used to remove mud from around a casing below the mudline in order that the casing could be removed.

Bellamy initially brought suit against Professional Divers and Ocean Salvage in state court. Apparently, the petition was amended eventually to include Cross Marine and Cross Offshore. According to the Cross Entities the negligence alleged as to Cross was as follows:

(a) Refusing to clean the area of debris and trash where [Bellamy] was assigned to work;

(b) Manufacturing and providing petitioner with an unsafe tool, namely a lance without an emergency shut off device, without trigger operation, and without other safety features that caused and/or contributed to the petitioner's injury;

(c) Using an unsafe procedure to remove the platform leg when a safer procedure was available; and

(d) Any and all other acts of negligence and/or fault which may be proven at the trial of this matter or discovered prior thereto.

(Doc. 46, p. 4).[FN4] However, Mr. Bellamy in his petition categorized himself as a "diver and a seaman and a member of the crew of the vessel known as SOUTHERN CROSS 5." (Petition for Damages, ¶ 3). Furthermore, Bellamy alleged that he was the Jones Act employee of Professional Divers and that the injury occurred in the territorial waters of Louisiana.

> FN4. The Court has not been provided with Bellamy's pleadings except his initial Petition for Damages. Apparently, he filed two amended petitions, the contents of which are unknown to the Court. The Cross Entities make mention of certain exhibits contained in an appendix attached to Doc. 46; however, such an appendix was not provided to the Court and is not in the record. The Court contacted counsel twice and has not received any supplemental pleadings in this regard.

Informal demands were initially made on behalf of Cross Marine and Ocean Salvage against Professional Divers for provision of defense, indemnity and insurance coverage. Underwriters responded by providing a defense to these parties pursuant to a reservation of rights. Subsequently, Underwriters filed the instant Declaratory Judgment action in federal court.

Underwriters contend that there is no coverage provided because:

(1) Ocean Salvage and Cross Marine were not added as additional assureds;

(2) The policy does not provide contractual liability coverage to Professional Divers since this claim arose out of bodily injury to an employee of Professional Divers; and

(3) The policy excludes coverage for protection and indemnity and charterer's liability.

Cross Offshore was later added to the state court suit, at which time Cross Offshore made demand upon

Professional Divers for defense and indemnity. There is no contention on the part of Underwriters that Cross Offshore is not an Additional Assured under the terms of the policy. Nonetheless, Underwriters continued to deny coverage to all of the Cross Entities for this occurrence.

A preliminary pre-trial conference was held in this matter on April 9, 1996. The pre-trial conference was set for August 28, 1996, and trial was to commence on September 9, 1996. In May of 1996, leave was granted to Professional Divers to submit additional pleadings, and on May 28, 1996, Alexander and Alexander were brought into this case by Professional Divers. (Doc. 15). On July 3, 1996, the Court held a status conference wherein Professional Divers sought to add SBJ Marine & Energy to the case by way of an Amended Third-Party Complaint and Counterclaim which was then filed on July 19, 1996. At the July status conference, the pre-trial conference was continued to October 24, 1996 with trial to commence on November 12, 1996.

***3** After participating and indeed initiating a good portion of the amendments to pleadings that required the continuance of the trial of this matter, and more than a year after the subject declaratory judgment was filed, on September 23, 1996, Professional Divers moved in state court for leave to file a Third Party Complaint therein. The subject of that pleading was the wrongful denial of coverage by Underwriters. That motion was granted on September 26, 1996.

Nonetheless, the subject Motion for Summary Judgment was filed by Underwriters on September 24, 1996.[FN5] On October 4, 1996, the Motion to Dismiss based on the pendency of the matter in state court by Professional Divers was filed. On October 24, 1996, a status conference was held at which it was determined because of the addition of SBJ and the time constraints upon SBJ, a continuance of the trial was required. On October 28, 1996, SBJ then filed its Motion to Dismiss based on lack of personal jurisdiction.

> FN5. Leave was required for the expedited hearing of the motion; thus, the motion was not actually filed into the record until September 27, 1996.

The state court action with respect to the personal injury of Mr. Bellamy was settled on December 18, 1996. The coverage matter was severed and is presently the subject of an exception of *lis pendens.*

While there are five motions pending herein, the subject matter of them can be reduced to three: (1) whether this cause of action should be dismissed under the Court's discretion with respect to entertaining actions for declaratory judgment; (2) whether the subject policy provides coverage; and (3) whether this Court has personal jurisdiction over SBJ. The Court will first address the Motions to Dismiss filed by Professional Divers and Alexander and Alexander.

I. Motions to Dismiss filed by Professional Divers and Alexander and Alexander

The United States Supreme Court has made clear that it is within the sound discretion of the district court to decide whether to entertain a suit brought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a).[FN6] *Wilton v. Seven Falls Co.,* 115 S.Ct. 2137 (1995). As stated by the United State Court of Appeals for the Fifth Circuit, "district court is 'not required to provide declaratory judgment relief', and it is a matter for the district court's sound discretion whether to decide a declaratory judgment action." *Rowan Companies, Inc. v. Griffin,* 876 F.2d 26, 28 (5th Cir.1989). *See also Magnolia Marine Transport v. Laplace Towing Corp.,* 964 F.2d 1571, 1581 (5th Cir.1992).

> FN6. The complaint in question is styled "Complaint for Declaratory Judgment" but the specific statutory basis for such judgment is not specifically cited in the complaint.

In order to determine whether dismissal is appropriate, certain factors have been suggested by the Fifth Circuit in *Rowan.* These factors include:

(1) whether there is another pending state proceeding in which the matters in controversy between the parties may be fully litigated;

(2) whether the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping.

(3) whether there are possible inequities in permitting the declaratory plaintiff to gain precedence in time and forum; and

***4** (4) whether the suit is inconvenient for the parties or witnesses.

Torch, Inc. v. LeBlanc, 947 F.2d 193, 194 (5th Cir.1991); *Rowan*, 876 F.2d at 29. None of these factors takes precedence over the others, and the district court has discretion to consider as many of the variables as it wishes. *Torch Inc. v. LeBlanc*, 947 F.2d 193, 195 (5th Cir.1991).

While there was a pending state action in which all of the matters in controversy could have been fully litigated when this matter was actually filed, the underlying personal injury claim has been settled at this point. Thus, there is no argument with respect to the state court being in a better position to try this matter as the personal injury case was never tried by it.

In a manner of speaking this suit was filed "in anticipation" of litigation as the personal injury suit which formed the basis of this claim was already pending in state court, and the matter could have been resolved there. Thus, to a degree Underwriters were engaged in forum shopping. And indeed, Underwriters are gaining precedence in time and forum; however, the equities in that respect preponderate in favor of the Underwriters for the reasons which follow.

The amount of time between the filing of this case in federal court by Underwriters, and Professional Divers' amending the state court action to include the coverage issue was more than one year. During that time, Professional Divers actively defended this matter and participated in a third-party practice adding Alexander and Alexander and SBJ to the action in federal court. Professional Divers participated in discovery and numerous status conferences prior to its moving to dismiss this matter. The Motion to Dismiss was not filed until after the Motion for Summary Judgment was filed.

Finally, the issue of convenience is not applicable here as the state court action is pending in the 25th Judicial District court for the Parish of Plaquemines at Pointe a la Hache, Louisiana. Each forum is equally accessible to the litigants.

This Court believes that because (1) the coverage issue has been extensively briefed in this Court; (2) Professional Divers waited an inordinately long amount of time prior to moving to dismiss this suit; and (3) judicial economy would not be served in dismissing this suit and making the parties litigate the coverage issue in state court where the underlying personal injury suit has been settled, the Motion to Dismiss brought by Professional Divers must be DENIED. Furthermore, while the Court recognizes that Alexander & Alexander was just recently brought into this matter and did not participate as actively as SBJ in the federal court action, judicial economy likewise requires the Court to order that Alexander & Alexander's Motion to Dismiss be DENIED as well.

II. Cross-Motions for Summary Judgment Filed by Underwriters and the Cross Entities

As previously noted, Underwriters contend that no coverage is provided to the Cross Entities under the subject CGL policy because:

***5** (1) Ocean Salvage and Cross Marine were not added as additional assureds;

(2) The policy does not provide contractual liability coverage to Professional Divers since this claim arose out of bodily injury to an employee of Professional Divers; and

(3) The policy excludes coverage for protection and indemnity and charterer's liability.

The Cross entities have filed a cross-motion seeking a declaration that the CGL policy issued by Underwriters provides coverage for the liabilities asserted against the Cross Entities by Bellamy. In addition, each seeks reformation of the policy if the Court should find that the policy itself does not provide for the outcome each party seeks.

A. Standard with Respect to a Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The party seeking summary judgment bears the exacting burden of demonstrating that there is no actual dispute as to any material fact in the case ... in assessing whether the movant has met this burden, the courts should view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion.... All reasonable doubts about the facts should be resolved in favor of the non-moving litigant.... Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the factual inferences that should be drawn from these facts.... If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment.

Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547, 548 (5th Cir.1987) (quoting *Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir.1982).

With this standard in mind, the Court turns to the issues presented by the relevant cross-motions.

B. Additional Assured Status and The Negotiations and Issuance of the Subject Policy

The parties disagree concerning the coverage provided as to additional assured status under the subject CGL policy. The first conflict centers on whether there was a blanket additional assured endorsement to this policy or whether "additional assureds" were subject to prior approval by the Underwriters. The second conflict concerns whether the inclusion of Cross Offshore Corporation in the list of "additional assureds" acts to include the other two Cross entities-Cross Marine and Ocean Salvage-as additional assureds.

The confusion over the blanket additional assured endorsement arises because apparently on November 8, 1994, SBJ issued a "cover note", number RA043610N, to Alexander and Alexander evidencing the terms and conditions of coverage. At page 2 of that document, it states, "Additional Assured and/or Waivers of Subrogation and/or notice clauses as required by written contract to be agreed by Underwriters." (Doc. 32, Exh. "G"). Thus, Underwriters contend that it was not their intent to issue a policy with a "blanket" endorsement.

***6** There is correspondence, deposition testimony and affidavits that indicate that the Underwriters did not agree to a "blanket additional assured" clause, rather they apparently agreed as per SBJ'S Mark Roberts' faxed letter to Alexander & Alexander to cover a list of parties as additional assureds as follows:

Further our various correspondence and for good orders sake confirm we have obtained CGL underwriters agreement as follows:-

Assured advises the attached companies on the certificate hold list may require to be named and waived if they make a successful contract bid.

Therefore is [sic] is hereby noted and agreed include if required the attached as additional named assured and waive rights of subrogation against them accordingly as required by contract.

Our documentation follows.

(Dep. of Gladwell, Exh. C01-123, Fax. of 31-Oct-94) (emphasis added). This language was then modified by fax the next day. "Further our fax 31 October 1994 please note final line of penultimate paragraph should finish "as required by written contract". (Dep. of Gladwell, Exh. C01-106, Fax of 1-Nov-94) (emphasis added). On November 1, 1994 an "updated list" of certificate holders for Underwriters, which included "Cross Offshore Corporation" was sent to Mark Roberts at SBJ. (Dep. of Gladwell, Exh. C01-109, Fax of November 1, 1994). On November 2, 1994, the following fax was received by Alexander and Alexander from Mark Roberts:
Thanks your updated list 1st November 1994 which underwriters have agreed accordingly.

(Dep. of Gladwell, Exh. C01-105, Fax of 2-Nov-94).

Nonetheless, on December 12, 1994, the Institute of London Underwriters (ILU) issued a policy with a blanket endorsement which states in the conditions section, "Loss payable clause and/or Additional Assured and/or Waivers of Subrogation and/or notice clauses as required by contract." Indeed, in the body of the Commercial General Liability Coverage form, which is apparently contained in every copy of the policy provided to the Court contains the following

language, in relevant part:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION 1-COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage' to which this insurance applies....

2. Exclusions.

This insurance does not apply to:

b. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.

An "insured contract" is defined in Section V of the CGL Coverage Form as:
***7** f. that part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law n the absence of any contract or agreement.

(Doc. 1, Exh. "A").

Underwriters opine that "the inclusion of the blanket additional assured condition by SBJ was a mistake as underwriters never agreed to provide blanket additional assured coverage." (Doc. 32, p. 5). After this case arose, on May 24, 1996, the Underwriters then unilaterally "amended" this condition with the addition of the words "to be agreed by leading underwriters." (Doc. 32, Exh. "B").

To further confuse the matter, the December 12, 1994 policy itself, disregarding the "conditions" section, contains the following endorsement dated November 29, 1994:

PROFESSIONAL DIVERS OF NEW ORLEANS

It is hereby noted and agreed effective inception include Santa Fe Energy Resources, Inc., Santa Fe Energy Operating Partners, L.P., Santa Fe Energy partners, L.P. and Santa Fe Pacific Exploration Company are named as Additional Insured with respect to work performed by this Assured Pursuant to the master contract executed between certificate holder and the Insured.

It is further agreed to include the attached wording respect Chevron U.S.A. Inc.

Subject otherwise to declaration terms and conditions.

Assured advised the attached may require to be named and waived if they make a successful contract bid.

Therefore is is (sic) hereby noted and agreed include (sic) if required the attached as additional named assured and waive rights of subrogation against them accordingly as required by contract.

Subject otherwise to declaration terms and conditions.

(Doc. 1, Exh. "A", p. 6) (emphasis added). Thus, the terms of the policy and the terms listed in the conditions section are not consistent.

By letter dated December 12, 1994, Nigel Gladwell apparently delivered to Professional Divers the applicable insurance policies. (Dep. of Gladwell, Exh. CO1-68, Letter of December 12, 1994). He believes that he delivered the Cover Note to the CGL policy RA043610N which states that "Additional Assured and/or Waivers of subrogation and/or notice clauses as required by written contract to be agreed by Underwriters." (Dep. of Gladwell, pp. 71-73). Indeed, in those materials, at CN-5, there is an Addendum No. 2 which speaks to an attached list concerning additional assureds. It is Gladwell's understanding that the ref-

erenced "list" would be the one earlier referred to that was faxed and accepted by Underwriters on November 1 and 2, 1994. (Dep. of Gladwell, Exh. C01-109, Fax of November 1, 1994 and Dep. of Gladwell, Exh. C01-105, Fax of 2-Nov-94).

The "additional assured" list that was the subject of these faxes and attached to the policy was generated by computer by Alexander & Alexander. As explained by Gladwell, the computer only "picked up" the first company listed of the affiliated companies that would be covered. Cross Offshore Corporation was thus included, but Cross Marine and Ocean Salvage Corporation were not. (Dep. of Gladwell, p. 67). In an affidavit presented to the Court with respect to this motion, Mr. Gladwell opines that it "was the understanding during the negotiations with SBJ and Underwriters that Underwriters were agreeing to provide additional assured status to all customers of Professional Divers." (Doc. 59, Affidavit of Gladwell, p. 3, ¶ 10). This additional coverage was to be provided for a flat additional premium "irrespective of the actual number of customers which were on the list." *Id.* at ¶ 12. Gladwell maintains that "it was the mutual intention of Professional Divers and Underwriters that all customers of Professional Divers, including Cross Marine, Inc. and Ocean Salvage Corporation, be given additional assured status and the list of such customers was submitted to Underwriters to notify Underwriters of the names of such customers." *Id.* at ¶ 17.

***8** Considering that the list was approved within a day by Underwriters, it would appear unlikely that any independent research into those companies sought to be named as additional assured on the Professional Divers' policy occurred. It is further interesting to note, according to Mr. Gladwell, that Commercial Union Assurance Company P.L.C., which is the lead underwriter on the instant Professional Diver policy, provided comprehensive general liability insurance coverage to Cross Offshore Corporation and its operating affiliates, Cross Marine and Ocean Salvage.

Underwriters contend that if the Court were to find that the December 12, 1994, policy containing the blanket provision were applicable, then the Court should reform the policy based on the "intent" of the parties. Likewise, the Cross Entities and Professional Divers contend that in the event the Court "reforms" the policy to exclude the blanket waiver, then the Court should "reform" the additional assureds list so as to include all of the Cross Entities.

The determination of intent is a question of fact. *Motors Ins. Co. v. Bud's Boat Rental, Inc.*, 917 F.2d 199 (5th Cir.1990). The Court finds that considering the conflicting position with respect to intent of the parties, this Court must deny summary judgment on the issue of additional assured and reformation. There is simply no agreement on the material facts that would provide a basis for judgment.

B. Third Party Oil Exclusion and Coverage with Respect to Bellamy as "Employee" of Professional Divers

Underwriters contend that the following exclusion eliminates any coverage under the CGL policy for Bellamy's injury:

THIRD PARTY OIL EXCLUSIONS-"OCCURRENCE"-1.12.88

Notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:

1. *EMPLOYEES:*

c. Any liability of whatsoever nature of the Assured to any other party arising out of bodily and/or personal injury to or illness or death of any Employee of the Assured, including without limiting the generality of the foregoing any such liability for (i) indemnity or contribution whether in tort, contract or otherwise and (ii) any liability of such other parties assumed under contract or agreement.

With regard to this argument, Underwriters rely on two cases- *Storebrand Arendal A/S v. Point Marine, Inc.*, 1990 WL 66401 (E.D.La. May 15, 1990) (Duplantier, J.), *aff'd* 923 F.2d 853 (5th Cir.1991) and *Duhon v. Mobil Oil Corp.*, 12 F.3d 55 (5th Cir.1994).

In *Arendal*, Trahan was an employee of Regal. Regal had entered a charter party with Point Marine to assume all risks of liability in connection with injury of its employees and to indemnify and hold Point Marine harmless from any and all claims brought by Regal employees. Trahan was injured and brought suit. The

CGL and MEL insurer of Regal filed suit for a declaration that they did not owe Point Marine a defense or indemnity.

***9** There was a Third Party Oil Exclusion similar to the one before the Court, and it contained a provision for contractual liability coverage, similar to the instant one. Judge Duplantier found that the Third Party Oil Exclusion "trumped" the contractual liability coverage:

the introductory language of the Third Party Oil Exclusion" clearly states that it will apply "[n]otwithstanding anything to the contrary contained in the policy." The obvious intent of the endorsement is to exclude liability for injuries to employees, such as Trahan.

Id. at 2. This opinion did not address the issue of whether the "assured" language should be construed selectively as will be explained in relation to the *Pullen* case.

The other case relied on is one in which a party had been given the opportunity to purchase and an "actions over/indemnity buy-back" endorsement which Underwriters contend is necessary to override the Third-Party Oil Exclusion. In that case, because of the knowing refusal to buy the endorsement, the court found that reformation was not indicated. *Duhon v. Mobil Oil Corp.*, 12 F.3d 55 (5th Cir.1994).

Defendants contend that under Louisiana law, in particular *Pullen v. Employers' Liability Assurance Corp.*, 89 So.2d 373 (La.1956), the subject exclusion is inapplicable with respect to the indemnity sought by the Cross Entities, because Bellamy was not an employee of any Cross entity, rather he was employed by Professional Divers. As Judge Vance characterized the *Pullen* decision in *Insurance Co. of N. America v. West of England Shipowners Mutual Ins. Assoc.*, 890 F.Supp. 1296 (E.D.La.1995):

In *Pullen*, plaintiff was injured in the course and scope of his employment while helping to load a dragline onto a truck. Defendant Mitchell was operating the dragline during loading when it came into contact with an electric wire, electrocuting the plaintiff. A policy of insurance covered plaintiff's employer as an insured. In addition, the policy had an omnibus clause that covered any person using the dragline as an "insured." Therefore, plaintiff's employer and Mitchell, the alleged tortfeasor, were both "insureds" under the policy. Plaintiff's widow sued Mitchell and the insurance carrier. The insurer denied coverage under the policy based on the following exclusion:

This policy does not apply:

(c) to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(d) to bodily injury to or sickness, disease or death of an employee of the insured while engaged in the employment of the insured.

Id. 89 So.2d at 374 (emphasis added).

The insurer argued that since plaintiff was an employee of an insured who was injured while engaged in his employment, the exclusion applied. Plaintiff argued that since he was not an employee of Mitchell, the exclusion did not apply. The issue before the Court was whether defendant mitchell was "the insured" referred to in the exclusion or whether the employer's status as an insured controlled to bar coverage. The Court ruled that since Mitchell was the only insured whom the plaintiff sought to hold liable, "the insured" referred to in the exclusion, for purposes of that case, was Mitchell, and the employer's status as an insured did not affect the coverage of claims asserted against Mitchell. *Id.* at 377-78. Therefore, the exclusion did not apply. The Court stated:

***10** Insofar as the pleadings are concerned, there is no other insured [other than Mitchell] involved in this proceeding. But even if any other insured or any number of insureds were involved directly or indirectly and whether or not their liability was sought, the test of identification for exclusion must be applied to each specifically and not to all collectively.

Id. (emphasis added).

Id. at 1300.

This Court believes that there are material questions with regard to the intent of the parties and precisely what the Third Party Oil Exclusion sought to exclude with regard to coverage under these policies that pre-

clude granting summary judgment. If Underwriters' position is correct, then the correspondence between Alexander and Alexander and SBJ concerning additional assureds and the need to obtain contractual liability coverage, and the resulting inclusion of the additional assured coverage-however broad-was nonsensical and meaningless. The Court believes a decision in this regard requires testimony from those who negotiated the policy and perhaps expert testimony from the industry itself with regard to the purpose of such an exclusion. Thus, this basis of the cross-motions will not support entry of judgment.

C. The Effect of the Condition "Excluding Protection and Indemnity and Charterers Liabilities"

Underwriters contend that the phrase "Excluding Protection and Indemnity and Charterers Liabilities" contained in the conditions section of the policy automatically works to exclude coverage for the instant injury. Cross contends that it is entitled to judgment that this exclusion does not preclude coverage "due to the fact that the allegations of fault contained in Bellamy's petition against Cross does not allege any fault in the operation of a vessel for which P & I or charterer's liability coverage may provide." (Doc. 46, p. 16).

Generally, insurance coverage under a P & I policy extends only to the liability the insured incurs in its capacity as an owner, operator or charter of the vessels named in the policy. *Motors Ins. Co. v. Bud's Boat Rental, Inc.*, 917 F.2d 199, 203 (5th Cir.1990). As there are no allegations of which the Court is aware that Professional Divers owned, operated or chartered the vessels in question, it is unlikely that it would have P & I insurance to cover the loss at issue. Furthermore, the loss sought to be covered is one which arises as a result of Professional Divers' contractual obligation to the Cross Entities, which generally should be the type of liability covered under this CGL policy. *See generally* *Taylor v. Lloyd's Underwriters of London*, 1994 WL 118303, p. 4-5 (E.D.La. March 25, 1994), *aff'd in part*, 47 F.3d 427 (5th Cir.1995). This belief is further buttressed by the fact that the policy specifically excludes the Watercraft Exclusion.

The Conditions of the CGL policy also states "Comprehensive General Liability as per CGT01 11 88 Form with exclusion G of Coverage A in respect of Watercraft deleted. That notation results in the following parsing to determine the coverage language.

***11** Exclusion "G" states:

g. "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft "auto or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

With the exclusion of this exclusion, there would apparently be coverage for an occurrence so arising.

In addition, the phrase previously noted that allegedly excludes from coverage those occurrences covered by P & I and Charterer's Liability insurance ("Excluding Protection and Indemnity and Charterers Liabilities") is not clear. Generally, as seen in the cases cited by Underwriters, such an exclusion is more precise. In some instances the language of such a condition makes plain that there is no coverage under the subject CGL policy if the occurrence is covered by a specific P & I policy. Sometimes there is even a warranty in the policy that such other coverage exists. Another example noted is one where the exclusion itself makes clear that it is irrelevant whether such other insurance is obtained. Here, there is no such clarity.

Furthermore, it simply is not clear to the Court what the phrase itself means in light of the exclusion of the Watercraft Exclusion. Finally, the Court is unclear with respect to the allegations in the petition and amending petitions concerning Bellamy's status and Professional Diver's involvement in the subject accident which is necessary to a determination of a coverage issue in this regard.

Thus, because of the conflict between the conditions section cited and the existence of material questions of fact, the Court finds that it must DENY summary judgment in this respect as well.

Motion to Dismiss of SBJ Based on Lack of Personal Jurisdiction

SBJ contends that this Court cannot exercise jurisdiction over it because it is a London brokerage firm who:

has no ties to the United States." The principal place of business of defendant is located in London, England,

and the policy of insurance was placed in England; as such, this Court lacks jurisdiction over the person of the defendant.

(Doc. 52, ¶ 2). For the reasons that follow, the Court finds no merit in this motion.

"To meet a challenge to *in personam* jurisdiction prior to trial, plaintiff need only make a *prima facie* showing of jurisdiction, so that the allegations of the complaint are taken as true except as controverted by the defendant's affidavits and conflicts in the affidavits are resolved in plaintiff's favor." *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784 (5th Cir.1990), *citing Travelers Indemnity Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir.1986), *modified on other grounds*, 836 F.2d 850 (1988).

Where a nonresident defendant is amenable to service of process under the forum state's long-arm statute and the exercise of jurisdiction comports with the due process clause of the fourteenth amendment, personal jurisdiction attaches. *Id.* at 786. Because the Louisiana long-arm statute extends personal jurisdiction over non-residents to the same limits allowed by federal due process, the inquiry as to whether the Court can exercise personal jurisdiction over SBJ collapses into one. Only if the Court finds that SBJ has had sufficient "minimum contacts" with Louisiana "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,' " can this Court maintain jurisdiction over SBJ. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Pedalahore v. Astropark, Inc.*, 745 F.2d 346, 348 (5th cir.1984), *reh. denied, en banc*, 751 F.2d 1258 (5th Cir.1984).

***12** It is irrefutable that minimum contacts with a forum state may arise incident to either a federal court's "specific jurisdiction" or "general jurisdiction." *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir.1990). A court may exercise specific jurisdiction when a cause of action arises out a defendant's purposeful contact with the forum. *Asarco*, 912 F.2d at 786.

Where a cause of action does not arise out of a foreign defendant's purposeful contacts with the forum, however, due process requires that the defendant have engaged in "continuous and systematic contacts" in the forum to support the exercise of "general" jurisdiction over that defendant ... [C]ontacts of a more extensive quality and nature are required.

Id., citing Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1361-62 (5th Cir.1990). In the instant case, the Court finds that specific jurisdiction is present over SBJ.

As stated in *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir.1993):

The "minimum contacts" prong, for specific jurisdiction purposes, is satisfied by actions, or even just a single act, by which the non-resident defendant "purposefully avails itself of the privilege of conducting activities with the forum state, thus invoking the benefits and protection of its laws." The non-resident's "purposeful availment must be such that the defendant "should reasonably anticipate being haled into court" in the forum state.

The Supreme Court has stated that a defendant's placing of its product into the stream of commerce with the knowledge that the product will be used in the forum state is enough to constitute minimum contacts. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). The Fifth Circuit is among the circuits that have interpreted World-Wide Volkswagen to hold that "mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111, 107 S.Ct. 1026, 1031, 94 L.Ed.2d 92 (1987) (citing *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir.1984).

...

In the years after Asahi, the Fifth Circuit has continued to follow the original "stream-of-commerce" theory established in the majority opinion of World-Wide Volkswagen, and has rejected the "stream-of-commerce-plus" theory advocated by the Asahi plurality.

Id. (footnotes omitted). SBJ conducted business with Alexander and Alexander situated in New Orleans, Louisiana. To that end, it faxed materials into the state

and indeed earned a commission for its work for Alexander and Alexander. The Court has cited in detail in this document the flow of information between these two entities. SBJ sought to arrange and was instrumental in placing coverage with Underwriters knowing that that policy was to be delivered in Louisiana. It was certainly foreseeable that if SBJ did not place the type of coverage for which the insureds believed they had contracted, SBJ would be held accountable in Louisiana. Specific jurisdiction can be exercised over SBJ.

***13** With respect to whether exercising jurisdiction comports with "fair play and substantial justice," the Court must:

consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. [The court] must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi Metal Ins. Co. v. Superior Court of California, 480 U.S. 102, 115, 107 S.Ct. 1026, 1033 (1987). Certainly, in this day, the burden is not overly burdensome on the foreign defendant. Indeed, defendants in this action contend that Mr. Mark Roberts of SBJ was in Louisiana on business on May 4, 1995, November 15 and 16, 1996, and February 19, 1996. (Doc. 67, Exh. "B"). Louisiana certainly has an interest in the resolution of this coverage dispute arising out of an accident that occurred in its territorial waters and involving economic consequences for certain of its corporations. Furthermore, considering the on-going dispute in Louisiana, this Court provides the most efficient venue for the resolution of this controversy. Thus, fair play and substantial justice are served by finding SBJ subject to the jurisdiction of this court. Thus, the motion to dismiss must be DENIED. Accordingly,

IT IS ORDERED that:

1) Motion to Dismiss the Complaint for Declaratory Judgment filed by Professional Divers of New Orleans, Inc. ("Professional Divers") (Doc. No. 35) is DENIED;

2) Motion to Dismiss filed by Alexander & Alexander, Inc. (Doc. No. 37) is DENIED;

3) Cross-Motions for Summary Judgment filed by Underwriters (Doc. No. 32) and the Cross Entities (Doc. No. 46) are DENIED; and

4) Motion to Dismiss for Lack of Jurisdiction over the Person of Defendant, Pursuant to FRCP Rule 12(B)(2) filed by S.B.J. Marine & Energy (Doc. No. 52) is DENIED.

IT IS FURTHER ORDERED that a preliminary pre-trial conference be set by the Courtroom Deputy and this matter be place on the trial calendar forthwith.

E.D.La.,1997.
Commercial Union Assur. Co., PLC v. Professional Divers of New Orleans, Inc.
Not Reported in F.Supp., 1997 WL 39291 (E.D.La.)

END OF DOCUMENT