SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH

-v-

ARCHWAY INSURANCE SERVICES, LLC, et al

INDEX NO. 653173/12

MOTION DATE

MOTION SEQ. NO. 001

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

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

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendants to dismiss the complaint is GRANTED to the extent that the fifth and sixth causes of action are dismissed and the remainder of defendants motion to dismiss is DENIED per the attached Decision and Order.

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

Dated: January 11, 2013

J.S.C.
MELVIN L. SCHWEITZER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH and AMERICAN HOME ASSURANCE COMPANY,	:	
Plaintiffs,	:	Index No. 653173/12
-against-	:	DECISION AND ORDER
ARCHWAY INSURANCE SERVICES, LLC, ALLIANCE NATIONAL INSURANCE COMPANY and HUGH JAMES AGNEW,	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

In this commercial action, defendants Archway Insurance Services, LLC (Archway), Alliance National Insurance Company (Alliance) and Hugh James Agnew (Agnew) move, pursuant to CPLR 3211, to dismiss the complaint.

Procedural and Substantive Background

Agnew is a resident of Pennsylvania. He is an insurance broker, who is chairman, president and owner of Archway, an insurance brokerage firm, registered in the State of Pennsylvania, with a principal place of business in Pennsylvania. Agnew is also the president, CEO and part owner of Alliance, an insurance company domiciled in New York.

In the complaint, plaintiffs allege that this court has jurisdiction over Agnew on the grounds that "the parties are doing business in New York, and the defendants' tortious actions caused injury to plaintiffs in New York" (aff of Kretzing, exhibit A at 2). The state of New York is not mentioned anywhere else in the complaint.

Plaintiff American Home Insurance (American) is an insurance company licensed under the laws of New York, with its principal place of business in New York. It is an affiliate of plaintiff National Union Fire Insurance (National). National is an insurance company licensed under the laws of Pennsylvania, with its principal place of business in New York.

Broadly described, the complaint alleges that defendants served as co-conspirators in a fraudulent scheme that caused the plaintiffs to pay millions of dollars on improper workers' compensation claims for entities that were never intended to be covered under their policies, and from whom plaintiffs did not receive any premiums. At the crux of the complaint are two principal allegations: (1) Agnew used Archway, the broker for the named insureds under the American policies at issue in this litigation, to misrepresent the nature of its clients' business operations. American alleges that Archway presented its clients to American as "temporary staffing businesses" when they were actually functioning as "professional employer organizations" (PEO); and (2) the defendants diverted many PEO claims to American policies that should have been covered under policies issued by Alliance.

As for the first allegation, the difference between insuring these two types of businesses, temporary staffing agencies and PEOs, is significant. PEOs and temporary staffing agencies both provide workforce services, but they function in very different ways. Temporary staffing agencies provide the workers to their clients for fixed periods of time, but those workers remain employees of the temporary staffing agency. PEOs, on the other hand, do not provide any workers to their clients. Instead, the PEOs provide administrative functions in connection with the management of the clients' entire work force, including, for example, the provision of workers' compensation insurance. Thus, when providing coverage to a PEO, the insurer may be

providing coverage to the employees of the PEO or to the employees of the PEO's clients. Coverage of PEOs, as opposed to temporary staffing agencies, is subject to different underwriting and regulatory rules, as well as a different schedule for premiums. Premiums for PEO's are generally higher.

According to the complaint: "[A]n insurer such as American would rate the risk of PEO coverage differently than the risk of temporary staffing coverage, and accordingly the cost for such coverage would be much different" (aff of Kretzing, exhibit A at 5).

With respect to the second broad allegation, according to plaintiffs, many of the PEO claims, which should have been covered under workers' compensation insurance policies issued by Alliance, were diverted for payment, by Agnew and Archway, to the American policies. These were claims arising from PEOs, and their clients, who were not named insureds under the American policies. Moreover, as part of this scheme to divert claims to American, it is alleged that Archway issued, and Agnew signed, false and fraudulent certificates of insurance, identifying American as the insurer of PEO clients of both the named insureds and those not named under the American insurance policies at issue here.

In connection with this lawsuit, American, through Archway, as insurance broker, provided insurance policies to three companies. Between 2005 and 2008, Archway obtained workers' compensation insurance from American for insureds Employment Systems Inc. (ESI), Mercer Ventures Inc. (Mercer) and Clearpoint Business Resources Inc. (Clearpoint). American issued an insurance policy to ESI for the period April 30, 2005 to April 30, 2006, and then renewed the policy for the period April 30, 2006 to April 30, 2007. ESI's insurance submissions described its operation as "temporary staffing" and its application describes its operation as

public sector staffing. The companies Solvis Group Inc. (Solvis) and Dalrada Financial Corporation (Dalrada) were named insureds under those policies. Unbeknownst to American, Dalrada was operating as a PEO and, as described above, many of its PEOs clients' claims were diverted by Archway to American's policies.

In September 2006, Dalrada acquired All Staffing and, at about that time, Dalrada obtained workers' compensation insurance through Alliance for All Staffing. Without American's consent, Dalrada, Alliance and All Staffing agreed that All Staffing's clients would be covered by the ESI policy provided by American, on which Dalrada was a named insured. The complaint alleges that these "dual and contradictory arrangements for insurance coverage of All Staffing clients both with Alliance National and American Home served no honest or legitimate purpose ..." (aff of Kretzing, exhibit A at 9).

As set forth in the complaint, American alleges that it began to discover this alleged fraudulent scheme when it got information from other lawsuits. For example, American discovered in October 2008, in a complaint filed by All Staffing against Alliance in the Court of Common Pleas in Pennsylvania, on or about September 2008, that All Staffing admitted that it never provided temporary staffing services, and that, instead, it operated as a PEO. American was previously unwilling to renew the ESI coverage because it had already suspected that claims from PEO clients were being diverted to this policy, and, therefore, the coverage ended in April 2007.

Plaintiffs also allege they got the following information from that lawsuit:

> "In the All Staffing lawsuit, Alliance National's representative John Edward Egan testified during his deposition that clients of All Staffing such as Townscapes, Job Connections, and Shellville, whose employee claims were wrongfully diverted to

> American Home, were 'approved client[s]''entitled to coverage under the Alliance National Worker's Comp policy issued to All Staffing.' However, in other court filings Alliance National alleged that it was 'agreed by Alliance, All Staffing and Dalrada that the employers listed were to be covered by the AIG [i.e., American Home] policy issued to Dalrada' (the 'Alleged Assignment')"

(aff of Kretzing, exhibit A at 12-13).

Additionally, in a separate lawsuit, American was sued as a third-party defendant by Bay Enterprises, Inc., a PEO. In that action, Bay Enterprises included, as an exhibit to its third party complaint, a certificate of insurance

> "purporting to be issued by Archway, signed by Agnew, dated January 22, 2008, that identifies workers' compensation coverage from American Home under the Clearpoint policy to temporary staffing employees placed with San Rafello Masonry. Based upon this certificate of insurance, Bay Enterprises sought a declaration that its leased employee was entitled to workers' compensation coverage from American Home. Absent discovery, it is presently unknown to what extent Archway and Agnew were involved in the attempted diversion of this PEO claim to American Home, although it is clear that the certificate of insurance was dated January 22, 2008 (identifying a policy period of February 28, 2007 to February 28, 2008)..."

(aff of Kretzing, exhibit A at 16).

American further alleges that on October 3, 2008, Archway provided written assurance to All Staffing and its clients that they were covered under the Alliance policy. American alleges that it cannot know the full extent of the fraudulent scheme to improperly direct PEO claims to American under the two policies.

> "For example, claims of employees of an entity identified on loss runs of the Clearpoint/Mercer policies as 'Emplify' were paid. No such entity was an insured under the Clearpoint/Mercer Policies. It is believed and averred that Archway and Agnew were involved in that improper diversion, but exactly how the wrongful diversion of Emplify claims occurred is presently unknown"

(aff of Kretzing, exhibit A at 15-16).

American also issued, through Archway, workers' compensation insurance policies to Mercer for the period from February 28, 2005 to February 28, 2006, and then renewed that coverage for February 2006 to February 2007. Coverage was again renewed for the period February 28, 2007 to February 28, 2008, under the name Clearpoint. American advised its insureds that its workers' compensation coverage was for temporary staffing and not for PEO operations. During the underwriting process, Mercer's operations were described as temporary staffing.

Under the ESI policies, American paid approximately $197,000 for claims submitted for employees at entities named Townscapes, Inc., Job Connections Services, Inc. and Shellville Services, under a reservation of rights. Following the expiration of the ESI policies, in late 2008, American discovered that many claims submitted under the Mercer policies involved workers at the same entities as those under the ESI policies, such as Townscapes, Inc., Job Connections Services, Inc. and Shellville Services. Yet, according to American, it was never disclosed that the same entities, included as named insureds under the ESI policies, would be included under the Mercer policies. American further alleges that these entities were also covered under the Alliance policy. It is this dual coverage, according to American, that evidences the wrongful diversion of Alliance's claims to American.

Moreover, American alleges that it is this wrongful diversion of claims that led to the fraudulent certificates of insurance by Agnew and Archway. Plaintiffs have annexed alleged fraudulent certificates of insurance to the complaint.

In the complaint, plaintiffs allege that Dalrada entered into a service agreement with Clearpoint/Mercer "purporting to make Dalrada's PEO clients also clients of Mercer ..." (aff of Kretzing, exhibit A at 10-11).

In 2012, plaintiffs commenced an action against these same defendants in federal court, seeking relief for the conduct alleged here under the RICO statute, along with supplemental state claims of fraud. In that action, Hón. William H. Pauley III, District Judge for the Southern District of New York, issued a decision, dismissing plaintiffs' claims. In that decision, the court illuminated the nature of the fraud alleged here as follows:

> "The alleged fraudulent scheme exploited the difference between the cost of insuring a temporary staffing agency and a PEO. Temporary staffing agencies provide clients with temporary workers to fill gaps in their clients' workforce. Temporary workers are employees of the temporary staffing agency, not the client. In contrast, PEOs do not provide temporary workers, but obtain workers' compensation insurance and perform other administrative services for their clients entire workforce. Thus, workers' compensation insurance for temporary staffing agencies is relatively inexpensive because it covers only the agency's temporary workers. However, coverage for a PEO extends to the entire workforce of the PEO's clients, and is therefore significantly more expensive. By holding itself out as a temporary staffing agency, a PEO can defraud an insurer. The PEO charges its clients higher premiums to insure the entire workforce, while obtaining inexpensive insurance as a temporary staffing agency. While passing off any injured client-employees as temporary workers, the PEO pockets the difference between the high premiums it charges its clients and the low cost of the temporary agency insurance. Plaintiffs claim that Defendants helped orchestrate this fraudulent scheme"

(aff of Laurel R. Kretzing, exhibit E at 2-3).

This is precisely the fraudulent scheme that plaintiffs allege took place here. As set forth in the complaint, between 2005 and 2008, American issued workers' compensation policies to several clients of Archway, including ESI, Dalrada, Solvis, Mercer and Clearpoint. Plaintiffs allege that Archway, as insurance broker, obtained insurance from American for its clients, who

were in fact PEOs, and clients of PEOs, but falsely informed American that the insurance was for temporary employment agencies. By doing this, Archway was able to obtain insurance with a smaller premium, because American believed it was providing insurance to a lesser number of employees. Furthermore, according to the complaint, Archway, Agnew and Alliance agreed that Alliance would provide coverage to these same entities, but would not pay out on the claims. Instead, plaintiffs allege, those claims were diverted to the coverage provided by American.

Plaintiffs commenced this action in September of 2012, alleging fraud against all defendants, equitable subrogation against Alliance and negligent misrepresentation against Archway and Agnew.

On the third and fifth causes of action, in which plaintiffs allege fraud and negligent misrepresentation against Agnew and Archway with respect to the ESI policy, plaintiffs seek $6,992,921. Plaintiffs explain these damages by stating that American and National relied upon false representations made by the two defendants in choosing to insure ESI, and "ESI has subsequently defaulted on its obligations to American Home and National Union in the amount of $6,992,921" (aff of Kretzing, exhibit A at 20). Plaintiffs allege that the invoice unpaid by ESI represents the reimbursement of losses that American would not have insured or paid but for the fraud of Agnew and Archway.

On the fourth and sixth causes of action, in which plaintiffs allege fraud and negligent misrepresentation against Agnew and Archway with respect to the Mercer/Clearpoint policies, plaintiffs seek $3,178,505 in damages. Again, plaintiffs explain that they incurred these damages because Mercer/Clearpoint defaulted on the policies that were procured through the brokering of Agnew and Archway. The amount unpaid on the Mercer/Clearpoint invoice, $3,178,505,

represents reimbursement for losses American paid that it should not have paid, but for the fraud of Agnew and Archway.

Defendants now move to dismiss the complaint on the grounds that: (1) there is no personal jurisdiction over Agnew; (2) plaintiffs have not pled fraud or misrepresentation with particularity; (3) plaintiffs' damages did not result from reliance on defendants' alleged misrepresentation; and (4) plaintiffs' claim for equitable subrogation is barred by the applicable statute of limitations.

Discussion

Standard for Motion to Dismiss

On a motion to dismiss, the "court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]; *see also Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Thus, the court must determine whether a cognizable cause of action can be discerned from the complaint, and not whether it has been properly stated (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but [may] only ... determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*Skillgames, LLC*, 1 AD3d at 250), citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

"However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, LLC, 1 AD3d at 250, citing

Caniglia v Chicago Tribune-N.Y. News Syndicate, 204 AD2d 233, 233-234 [1st Dept 1994]). Under 3211 (a) (1), where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Personal Jurisdiction over Agnew

Agnew moves to dismiss the amended complaint pursuant to CPLR 3211 (a) (8), which states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the court has not jurisdiction of the person of the defendant ... ."

Since Agnew is not a New York resident, he is not subject to personal jurisdiction in New York unless plaintiffs prove that New York's long-arm statute confers jurisdiction over him based on his contacts within the state (*Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept 2009]). "The burden rests on plaintiffs, as the parties asserting jurisdiction" (*id.*).

A defendant in New York may be subject to personal jurisdiction pursuant to CPLR 301 and 302. Under CPLR 301, a foreign corporation is subject to the jurisdiction of New York courts "'if it has engaged in such a continuous and systematic course of "doing business" here that a finding of its "presence" in this jurisdiction is warranted," (*Holness v Maritime Overseas Corp.*, 251 AD2d 220, 222 [1st Dept 1998], quoting *Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990]). "The court must be able to say from the facts that the corporation is 'present' in the State 'not occasionally or casually, but with a fair measure of permanence and continuity'" (*Landoil*, 77 NY2d at 33-34 [internal citation omitted]). There is jurisdiction over an individual on similar grounds as long as the individual "is doing business in

New York as an individual rather than on behalf of a corporation" (*Brinkmann v Adrian Carriers, Inc.*, 29 AD3d 615, 617 [2d Dept 2006], citing *Laufer v Ostrow*, 55 NY2d 305, 313 [1982]).

Here, there is no proof submitted to the court to establish that Agnew engaged in systematic and continuous business in New York as an individual. The complaint offers no information concerning Agnew's presence in the State. Plaintiffs' memorandum of law states that Agnew was present in New York as an officer and owner of Archway and Alliance, and he signed "fraudulent" certificates of insurance, which state that American, a New York-based insurance company, is the insurer. Additionally, plaintiffs' memorandum of law indicates that Agnew attended a meeting on February 3, 2011 in New York to discuss Alliance National's poor financial results, and that on or about April 10, 2007, a certificate of insurance signed by Agnew, and issued by Archway, identifying American as the insurer, was filed with the State of New York Department of Labor in Albany. Again, these acts do not establish that Agnew engaged in systematic and continuous business in New York.

The court finds on these facts that Agnew is not subject to personal jurisdiction under CPLR 301.

A defendant in New York may be subject to long-arm jurisdiction pursuant to CPLR 302 (a) (1), (2) or (3), which provide:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> "1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

> "2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> "3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ... ."

Under CPLR section 302 (a) (1), a plaintiff must prove two prongs: that a defendant both transacted business within the state, and that the cause of action arose from that transaction (*Copp v Ramirez*, 62 AD3d at 28). Although what constitutes the transaction of business under the statute has not been precisely defined, the courts have offered the principle that "'[p]roof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted'" (*Josef's Organic Corp. v Equipment Relocation Servs. Inc.*, 23 Misc 3d 1129[A], *3-4, 2009 Slip Op 51000[U][Sup Court, Kings County 2009], quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). "[U]nder 302 (a) (1), there must be 'some articulable nexus' between the business transacted in New York and the causes of action sued upon" (*EAC Sys. v Chevie*, 154 AD2d 813, 814 [3d Dept 1989]).

Here, plaintiffs offer these facts to support the argument that this court has personal jurisdiction over Agnew: (1) Agnew is the chairman, president and 100% owner of Archway, which does business in New York; (2) Agnew is the president, CEO and 39.25% owner of Alliance, a New York insurance company; (3) Agnew signed and issued fraudulent certificates of

insurance, listing American, a New York-based company, as the insurer; (4) Agnew entered the jurisdiction for a meeting on February 3, 2011 at the New York State Insurance Department (NYSID) to discuss Alliance's poor financial results on its September 30, 2010 quarterly statement; (5) on or about April 10, 2007, Agnew issued a certificate of insurance, signed by Agnew, identifying American as the insurer, which was issued to the State of New York Department of Labor. On the other hand, defendants argue that Agnew is not subject to personal jurisdiction because he did not transact business in his individual capacity, he acted only in his capacity as officer of the defendant corporations, and that any of the actions he undertook were unrelated to the subject matter alleged in this action.

The court analyzes these facts against the requirements of CPLR 302 (a) (1), as the Court of Appeals addressed the same issue before it in *Kreutter v McFadden Oil Corp.* (71 NY2d 460). In *Kreutter*, the plaintiff, who alleged that the defendants committed fraud, sought to obtain jurisdiction over an individual defendant, Downman, who formed two Texas corporations, which were also defendants in the lawsuit. At the time of the subject transaction with plaintiff, Downman exercised management control of one of the corporations, and he had a direct ownership interest in that corporation.

Although Downman did not physically enter the jurisdiction of the state, plaintiff sought jurisdiction over him because he acted on behalf of the nondomiciliary defendant corporations, who transacted business in New York. Downman argued that as an officer in the corporation, he was protected by the "fiduciary shield doctrine," and therefore could not be subject to jurisdiction here as an individual.

The Court explained that this doctrine "provides that an individual should not be subject to jurisdiction if his dealings in the forum State were solely in a corporate capacity" (*Kreutter*, 71 NY2d at 467). In assessing jurisdiction over the individual pursuant to CPLR 302 (a) (1), the Court of Appeals said of the plaintiff's argument for jurisdiction over Downman, "[h]e seeks to acquire jurisdiction over an individual who was a primary actor in the transaction with him in New York, not some corporate employee in Texas who played no part in it" (*Kreutter*, 71 NY2d at 470). The Court noted that "Downman represented two corporations during their participation in purposeful corporate acts in this State and if he acted improperly in representing them, the fact that he acted for one or both of the corporations should not necessarily relieve him from responding to plaintiff's claims against him" (*id.*).

The Court of Appeals found that there was no reason to adopt the fiduciary shield doctrine in New York. It noted that when the United States Supreme Court considered the doctrine in the context of similar facts, it held that it is "constitutionally permissible to subject an individual participating in a transaction in a foreign State to long-arm jurisdiction even though his contacts with the forum were made in a corporate capacity" (*id.* at 471).

Finally, the Court in *Kreutter* found that, because the plaintiff obtained jurisdiction over the corporate defendant, and because Downman would be its principal witness and therefore would appear in New York for that purpose, notions of fairness are not offended by exercising jurisdiction over him (*id.*); *see also Josef's Organic Corp. Equipment Relocation Servs. Inc.*, 23 Misc 3d 1129[A] at *5-6). Moreover, the Court of Appeals has held that, in an action alleging fraud against a corporation and its officers, the "corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand

to gain personally" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008][internal quotation marks and citations omitted]).

In the complaint, plaintiff alleges that Alliance is domiciled in New York and that this court has jurisdiction over both corporate defendants as they "are doing business in New York ..." (aff of Kretzing, exhibit A at 2). Defendants do not dispute these statements. Defendants offer no argument that either Archway or Alliance are not subject to jurisdiction in New York. Plaintiffs further allege that Agnew signed fraudulent certificates of insurance that identified American, a company located in New York, as the insurer and that one of these certificates was filed with the New York Department of Labor in Albany. Based upon the actions Agnew took with respect to the subject transactions, the allegations of fraud and Agnew's role as owner and officer of the two defendant corporations, the court finds he is subjected to jurisdiction in New York.

Here, as in *Kreutter*, plaintiffs seek to acquire jurisdiction over Agnew, who was a primary actor in brokering the sale of the subject insurance. Agnew was not some corporate employee who played no part in the transaction. Instead, according to the complaint, "Archway and Agnew" represented that the named insureds were temporary employment agencies, rather than PEOs, and that they both directed claims from these PEOs to American policies. The complaint further alleges that Agnew signed the alleged fraudulent certificates of insurance, naming American as the insurer.

Finally, Agnew would likely be the principal witness for the defendant corporations and would have to enter the jurisdiction for that purpose. Thus, as the Court stated in *Kreutter*, "the inconvenience he faces if made a party to the suit individually is minimal ..." (*Kreutter*, 71 NY2d

at 471). Finally, plaintiffs have alleged Agnew's knowledge and participation in the fraud. Accordingly, the court finds that Agnew is subject to the jurisdiction of this court.

Fraud and Misrepresentation

In order to establish fraud, a plaintiff must prove: "a material representation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). "Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action" (*Pludeman*, 10 NY3d at 492). Also, pursuant to CPLR 3016 (b), a fraud claim must be set forth in detail (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]).

According to the Court of Appeals:

> "The purpose of section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. We have cautioned that section 3016 (b) should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud.' Thus, where concrete facts 'are peculiarly within the knowledge of the party' charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings"

(*Pludeman*, 10 NY3d at 491-492 [quotation marks and citations omitted]).

Defendants argue that plaintiffs' claims should be dismissed because they are not pled with sufficient particularity, pursuant to CPLR 3016 (b). Specifically, defendants state that, instead of factual details, including "who made the representation, exactly to whom it was made, and which specific entity was involved" (defendants' memorandum of law at 12), plaintiffs simply set forth legal conclusions, which is not sufficient (*see Brown v Wolf Group Integrated Communications, Ltd.*, 23 AD3d 239, 239-240 [1st Dept 2005][cause of action for fraud must

specify actual words or actions used to deceive]; *Orchid Constr. Corp. v Gonzales*, 89 AD3d 705, 707-708 [2d Dept 2011][the complaint must include specific dates and items of alleged misrepresentation].

Defendants further argue that much of the detailed allegations in the complaint refer to statements made by non-party co-conspirators, like representatives of Dalrada, but not to those of the named defendants.

Moreover, defendants argue that the first cause of action should be dismissed for lack of particularity. The first cause of action alleges that "defendants Alliance National, Archway and Agnew were, as set forth above, essential participants in the above-described fraudulent piggy-backing scheme perpetrated upon American Home ..." Defendants argue that this cause of action is not fraud, but is, instead, a claim for aiding and abetting fraud, and should be dismissed for a similar lack of specificity.

Defendants additionally take the position that plaintiffs' allegations contain apparent quotes or paraphrases from documents that are not annexed to the complaint, that the quotes are offered in a way to obscure the truth of their content, and that, as a result, plaintiffs' complaint does not identify what claims they paid based upon the alleged false representations of defendants.

According to defendants, the following omissions in plaintiffs' papers reflects this lack of required particularity in the allegations: (1) in its submission to the court, plaintiffs omitted a footnote when quoting All Staffing's petition against Alliance in the 2008 Court of Common Pleas' action. In the footnote, All Staffing noted that Alliance had funded all but two of the claims on the list; and (2) plaintiffs ignored the email and "list" referred to in Alliance's response

in that action, which is an October 28, 2008 email that stated that "Archway represented coverage existed but neither AIG nor Alliance will acknowledge the existence of coverage for a limited number of claims on the attached list" (defendants' memorandum of law, at 15). Defendants argue that these statements, omitted by plaintiffs, are key in highlighting plaintiffs' failure to identify any particularities about the subject paid claims; what amounts they paid, when, to what claimant and what company the claimant worked for at the time of the injury.

This leads to defendants' argument that plaintiffs cannot establish causation between their damages and defendants' alleged fraudulent statements, and that plaintiffs' losses were, instead, caused by ESI and Clearpoint/Mercer's defaults on their obligations to pay additional premiums. In an April 2011 letter, plaintiff notified the Federal District Court that Clearpoint was in bankruptcy and ESI was listed as suspended by the California Secretary of State. Thus, defendants argue, because plaintiffs have not set forth any specific unpaid claims as damages, plaintiffs' losses are actually losses to be sought as contract damages in an action against nonparties ESI, Mercer, and Clearpoint.

Despite the lack of precise detail, such as exactly when and where statements were made, plaintiffs offer enough facts to support the elements of a claim for fraud. The fraud claim as set forth in the complaint is not conclusory. Instead, according to the standard for particularity set forth by the Court of Appeals, plaintiffs' complaint paints a picture that prior to the sale of insurance by American to either ESI or Mercer, Agnew and Archway, in insurance applications and/or verbal representations, made allegedly false statements about the nature of the businesses that American was about to insure. Those statements led to the sale of insurance for temporary staffing agencies, which turned out to be, unbeknownst to plaintiffs, PEOs.

Specifically, plaintiffs' complaint offers facts that Archway was instrumental in procuring workers' compensation insurance from plaintiffs for temporary employment for ESI and Mercer/Clearpoint. American issued the policy to ESI based upon the description in the applications that ESI's operation was a temporary staffing agency. Subsequent to the issuance of this policy, Dalrada, a named insured, Alliance and All Staffing, agreed, without American's input, that All Staffing would likewise be covered under the ESI policy. American later discovered, however, after paying claims, that All Staffing and Dalrada operated as PEOs and not as temporary staffing agencies. American alleges that ESI is also a PEO.

According to American, defendants wrongly diverted to American PEO claims from ESI clients that should have been paid by Alliance. These claims were paid on behalf of insureds who were not named in American's policies, and who operated as PEOs, or as the clients of PEOs. The complaint describes this diversion of claims as follows:

> "[t]his occurred in a surreptitious and fraudulent manner as the claims were falsely presented as arising from employees of named insureds who had been sent on temporary staffing arrangements. As a result, American Home improperly paid claims for workers it never insured and for whom it never received premiums. In fact, unbeknownst to American Home, the co-conspirators charged and retained either entirely or virtually entirely premium [sic] from their PEO clients"

(aff of Kretzing, exhibit A, ¶ 19).

Agnew, on behalf of Archway, allegedly signed false certificates of insurance for these PEO clients, employees that were not meant to be included in the American policies, listing American as the insurer. Plaintiffs have annexed copies of alleged fraudulent certificates of insurance to their complaint.

Likewise, American alleges that Archway provided false information to American in connection with the Mercer/Clearpoint insurance policy. Mercer's insurance submissions to American described its business as "offering comprehensive solutions to companies' 'staffing needs.' During the underwriting process, Mercer's operations were further described as temporary staffing to American Home as follows: 'day labor (40% of revenues); temp to hire placements - mid term assignments (32%) and long term assignments (28%)'" (aff of Kretzing, exhibit A, ¶ 38). Clearpoint's renewal submission likewise identifies Clearpoint as "'multi state staffing for long and short term contracts'" (aff of Kretzing, exhibit A, ¶ 39). American further alleges that, based upon that false information, American unknowingly provided workers compensation insurance, under the Clearpoint policy, to, among others, Bay Enterprises, a PEO, and to an entity named "Emplify."

Plaintiffs allege that their damages arise from Agnew and Archway's fraudulent scheme, because if they had not deceived American, American would not have paid claims on the ESI or Mercer/Clearpoint policies. American sent bills to ESI and Mercer/Clearpoint seeking reimbursement for these deceptive claims. Thus, the unpaid invoices upon which ESI and Mercer/Clearpoint defaulted represent American's damages resulting from the fraud, and now American seeks reimbursement for those claims that American wrongly paid.

Although the plaintiffs do not provide examples of which specific claims were unpaid or of the exact times and dates when defendants made misrepresentations, the complaint offers more than legal conclusions; it provides a factual framework, notifying defendants of the mechanics of the alleged fraudulent scheme. Therefore, the court will not dismiss the fraud claim.

In order to establish a claim for negligent misrepresentation, a plaintiff must prove: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information (*MatlinPatterson ATA Holdings LLC*, 87 AD3d at 840; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296 [1st Dept 2011]). "Generally, a special relationship does not arise out of an ordinary arm's length business transaction between two parties" (*MBIA Ins. Corp*, 87 AD3d at 296).

Here, there are no allegations to establish that the relationship between the parties to this action was anything other than an arm's length business relationship between sophisticated commercial entities. The claims for negligent misrepresentation are dismissed.

Equitable Subrogation and Statute of Limitations

Finally, defendants argue that plaintiffs' claim for equitable subrogation against Alliance should be dismissed as it is time-barred. Defendants take the position that the court should apply the three-year statute of limitations for personal injury actions to this claim. According to defendants, since plaintiffs' subrogation claim is derived from those personal injury claims of the employees who filed for workers compensation insurance, that claim has a three-year statute of limitations. Plaintiffs contend, however, that they stand in the shoes of their insured, ESI, and not the individual employees, who was contractually entitled to insurance coverage from Alliance, and not from American, for these claims. Plaintiffs therefore believe the six-year statute of limitations is appropriate.

In their complaint, plaintiffs allege, in the second cause of action, that American's funds were used to pay workers' compensation claims "arising from employees of customers of All

Staffing" (aff of Kretzing, exhibit A at 18-19), even though Alliance was the insurer for those claims. The payment of these claims was done without the knowledge or consent of American, who had not agreed to have those claims "moved" to its policies. Because American's funds were used to pay those claims, despite the fact that Alliance was contractually responsible for them, American seeks reimbursement from Alliance as the equitable subrogee of those claimants.

The nature of a subrogation claim is that the claim "is derivative of the underlying claim and that the subrogee possesses only such rights as the subrogor possessed, with no enlargement or diminution" (*Walker v Stein*, 305 AD2d 972, 974 [4th Dept 2003][citations omitted], *affd Allstate Ins. Co. v Stein*, 1 NY3d 416 [2004]).

> "It is so well settled as not to require discussion that an insurer who pays claims against the insured for damages caused by the default or wrongdoing of a third party is entitled to be subrogated to the rights which the insured would have had against such third party for its default or wrongdoing"

(*Allstate Ins. Co*, 1 NY3d at 422 [internal quotation marks and citations omitted]).

Here, American paid workers compensation claims that it believes were not paid by Alliance on its contract with ESI. Because American alleges that it is now subrogated to ESI's right to enforce those contractual rights for payment, the six-year statute of limitations applies, and the cause of action should not be dismissed based on the statute of limitations.

Accordingly, it is

ORDERED that the motion to dismiss brought by defendants Archway Insurance Services, LLC, Alliance National Insurance Company and Hugh James Agnew is granted to the extent that the fifth and sixth causes of action are dismissed and the remainder of the defendants' motion to dismiss is denied; and it is further

ORDERED that the defendants are directed to file an answer within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary status conference at 26 Broadway, 10th Floor, on August 26, 2013, at 11:30 a.m.

Dated: July 11, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER