New Hampshire Ins. Co. v Fresh Direct Holdings, Inc.
2015 NY Slip Op 31484(U)
August 5, 2015
Supreme Court, New York County
Docket Number: 651320/10
Judge: Anil C. Singh

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

NEW HAMPSHIRE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA AND NATIONAL UNION FIRE INSURANCE COMPANY Plaintiffs-Counterclaim Defendants, -against- FRESH DIRECT HOLDINGS, INC., Defendant-Counterclaimant.	Index No. 651320/10 DECISION AND ORDER Motion Sequence No. 005 and 006

ANIL C. SINGH, J.:

New Hampshire Insurance Company, American Home Assurance Company, Insurance Company of the State of Pennsylvania, and National Union Fire Insurance Company (collectively "AIG"), move pursuant to CPLR 3212 for summary judgment in the sum of $3,566,602.17 to recover premiums earned under insurance policies issued to Fresh Direct Holdings, Inc., ("FreshDirect") and to strike affirmative defenses and dismiss counterclaims asserted by defendant.

FreshDirect cross moves pursuant to CPLR 3212 for partial summary judgment with respect to AIG's Amended Complaint and FreshDirect's Third and Fourth Affirmative Defenses.

Background

AIG brought this action to recover premiums due primarily on two Workers' Compensation insurance policies as well as two groups of automobile, general liability, and

liquor liability policies AIG issued to Fresh Direct. The first workers compensation policy at issue ("the 2008 policy") was in effect from January 28, 2008 through January 28, 2009 (Policy No. WC 984-39-64). The second policy ("the 2009 policy") was in effect from January 28, 2009 through January 28, 2010 (Policy No. WC 009-84-3964). The automobile liability, general liability, and liquor liability policies were in effect from May 11, 2007 to May 11, 2008, and May 11, 2008 to May 11, 2009.

Each workers compensation policy was issued upon a quoted estimated premium, with the final premium to be determined after the policy period, upon the completion of an audit to determine if the assumptions upon which the estimated premium was based were borne out in fact, or actual experience during the policy period differed from those assumptions.

Facts Relating to Job Code Change

The court finds the following facts relating to the job code change. In 2002, the New York Compensation Insurance Rating Board ("CIRB") assigned a particular job code – 8033 – to a certain class of FreshDirect's employees. In connection with the procurement of FreshDirect's Workers Compensation Insurance for the year beginning January 28, 2007, FreshDirect enlisted the brokerage services of Frank Crystal & Co. ("Crystal"). On January 26, 2007, FreshDirect was bound by a guaranteed cost policy, 2007 policy, offered by one of AIG's subsidiaries. The AIG underwriter involved in issuing the 2007 policy was Vienna Siu. FreshDirect provided the job code, 8033, to AIG, which used that code as a basis for the estimated premium for the 2007, 2008, and 2009 policies subsequently. Around August 14, 2007, CIRB conducted an audit of FreshDirect's facilities.

On January 24, 2008, a guaranteed cost policy was bound by AIG, effective January 28, 2008 through January 28, 2009. The AIG underwriter involved in issuing the 2008 policy was Robert Baldauf. The relevant policy provisions governing the premium stated in Part Five are as follows:

> A. Our Manuals
> All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.
>
> B. Classifications
> These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.
>
> E. Final Premium
> The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy.
>
> G. Audit
> We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium.

On April 1, 2008, CIRB sent a letter directing AIG to issue an endorsement to the 2008 policy that changed the job code from 8033 (grocery retail) to job code 8034 (grocery wholesale) based on an audit that CIRB had conducted at FreshDirect's facilities in August 2007. Such directive is referred to as "criticisms" or "crits" in the business of Workers Compensation. CIRB

attached Digest Ruling D-58 Section III along with the directive, which defined wholesale transaction to include, "Sales made by firms that conduct sales via mail order, catalog or the Internet provided that handling or shipping of the actual merchandise to the customer is involved and regardless of whether the sales are made on a retail or wholesale basis." CIRB also mandated, "In accordance with the provisions of the Administrative Rules and Procedures Section of the New York Manual, [AIG] must issue an endorsement to show this correction. A copy of the endorsement must also be sent to my attention no later than 05/01/08." The application of a new job code resulted in increased premium, reflecting the greater risk associated with the types of tasks performed by the workers at issue.

The April 1, 2008 criticism letter was scanned into AIG's Work Tracking System (WTS), but no action was taken by AIG until October 13, 2008, when Jimmy Frazier, one of AIG's service center employees, discovered the outstanding criticism letter in the system and flagged the issue. Frazier sent a follow-up e-mail on December 22, 2008 to Siu and Simmons, a Chicago Service Center employee, and copied Baldauf. Siu also forwarded Frazier's December 22nd e-mail to Baldauf, but Baldauf took no action in response.

In the meantime, the underwriter handling FreshDirect had changed from Baldauf to Erin Osborne. Due to AIG's outdated database, Frazier had not been aware of the change of hands and sent Baldauf another follow-up e-mail on January 23, 2009. Baldauf finally forwarded Frazier's e-mail about the crit letters to Osborne on January 24, 2009. On or about January 27, 2009, FreshDirect renewed the insurance policy with AIG for January 28, 2009 to January 28, 2010 coverage period, using the 8033 job code instead of 8034. Part Five of 2009 policy used the identical contractual language to 2008 policy quoted above.

Frazier sent another round of e-mails to Baldauf on February 3, 2009, in which Siu was copied, in order to remind them of the outstanding crit letter. Siu forwarded Frazier's e-mail to Osborne, asking her if she handled FreshDirect. Osborne replied, "I do handle this, I'll take care of it" in a February 3rd email. However, AIG still did not issue any endorsements.

On March 10, 2009, CIRB sent a crit letter regarding the 2009 policy. CIRB urged AIG to "submit either an endorsement correcting the policy or a description of the operation" so that they could determine the appropriate code. Frazier contacted Osborne on March 25, 2009, informing her that fines may be imposed.

CIRB sent another letter on May 12, 2009, warning about the potential effect that the delay might have on the premium and possible imposition of fines. On the same day, AIG's auditor, Sohail John, visited FreshDirect's facility to conduct a final audit for the 2008 policy. During his visit, John informed William Vazoulas, Vice President of Finance at FreshDirect, that CIRB had issued crit letters to change the job code from 8033 to 8034.

Facts Relating to Endorsements

The court finds the following facts relating to the endorsements. According to the record submitted, AIG finally issued an endorsement to the 2008 policy on March 31, 2009 that deleted job code 8033 and added 8034. FreshDirect received a copy of that endorsement on November 11, 2009 from Crystal during a meeting.

AIG issued the endorsement for the 2009 policy on November 12, 2009. On or about March 1, 2010, Mr. Craco, the outside counsel for FreshDirect, received copies of endorsements dated March 31, 2009 and November 12, 2009 from AIG's in-house cousel, Mr. Nick Ritrivi. Mr. Craco forwarded the endorsements to FreshDirect on March 1, 2010.

Standard of Review on Summary Judgment

The standards for summary judgment are well settled. The proponent of a motion for summary judgment "must make a prima facie showing of entitlement of judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 384 (2005). Once the movant makes such a showing, the burden shifts to the non-movant to demonstrate the existence of factual issues meriting a trial. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Although the court must scrutinize the motion papers in a light most favorable to the opposing party (*Negri v. Stop and Shop Inc.*, 65 N.Y.2d 625 (1985)), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v. Global Mfg. Corp.*, 34 N.Y.2d 338 (1974)).

Discussion

AIG argues that it is entitled to payment of additional premiums that were incurred as a result of job code change. FreshDirect argues that AIG should be barred from recovery of additional premiums because AIG did not issue the endorsements to 2008 and 2009 policies in a timely fashion. In addition, FreshDirect contends that since FreshDirect never received the endorsements from AIG, their workers compensation policies were not properly amended to apply job code 8034. The key issue of the case thus revolves around whether the endorsements dated March 31, 2009 and November 12, 2009 were effective.

I. Entitlement to Additional Premium

To establish a *prima facie* case of entitlement to payment, the insurer must present the business record that contains the insurance application, audit worksheets, resulting invoices, and statement of accounts for balance due. *Commissioners of the State Insurance Fund v. Country Carting, Inc.*, 265 A.D.2d 158 (1st Dep't 1999) (citing *Commissioners of State Ins. Fund v. Allou Distrib.*, 220 A.D.2d 217 (1st Dep't 1995)). The burden then shifts to the insured to present a defense to the insurer's entitlement to payment. For example, the insured may demonstrate that it did not receive the benefits owed to it under the insurance policy. *See Family Coatings, Inc. v. Michigan Mut. Ins. Co.* 170 A.D.2d 816 (3rd Dep't 1991). Alternatively, the insured may demonstrate a breach of an express policy provision. *Commissioners of the State Ins. Fund v. Photocircuits Corp.*, 20 A.D.3d 173 (1st Dep't 2005). AIG submitted the policies, audit worksheets, and the resulting invoices for the policies in question. Since FreshDirect has not submitted any evidence to the contrary, AIG has established a *prima facie* showing that it is entitled to payment as a matter of law.

In addition to making a prima facie case for entitlement to payment, AIG has also submitted evidence that the amount it seeks to recover is protected by the filed rate doctrine. The filed rate doctrine bars actions against federal and state-regulated entities, because "the doctrine holds that any 'filed rate' – that is, one approved by the governing regulatory agency [here, the Insurance Department] – is per se reasonable and unassailable in judicial proceedings brought by ratepayers." *W. Park Associates, Inc. v. Everest Nat. Ins. Co.*, 113 A.D.3d 38, 46 (2nd Dep't 2013) (quoting *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2nd Dep't 1994)). However, applying the filed rate doctrine does not necessarily bar every claim related to something subject to a filed rate (*See AT&T v. Central Office Tel.*, 524 U.S. 214 (1981)). Application of the filed rate doctrine is proper in this case because AIG has shown that its insurance rates are based on

CIRB regulation. According to an affidavit submitted by Ira Feuerlicht, Vice President for AIG Global Casualty, AIG bases off its calculation of premium on class code values approved by CIRB, and applicable multipliers and deviations are also approved and available to the public.

In its defense, FreshDirect cites to *Temporary Services Inc. v. AIG*, 388 S.C. 348 (2010), a South Carolina case that held that a loss cost multiplier was not a filed rate. FreshDirect argues that due to the amendment to New York's Insurance Law, effective in October 2008, each insurer was required to file its own loss cost multiplier. Such loss cost multiplier may or may not include a loss cost modifier, an adjustment or deviation from the approved rates that represents the insurer's own loss and loss adjustment expense experience. The Insurance Law of New York deems loss cost filing to be rate filings, *see* Ins. Law 2304(h), but is silent as to the loss cost multiplier and the loss cost modifiers. Consequently, FreshDirect believes that loss cost multiplier and modifier should not be deemed a filed rate, and thus prevent AIG from being afforded the protection of the filed rate doctrine.

Temporary Services is distinguishable from the present case. In 2000, South Carolina passed an act that categorized workers compensation policies as one of the exempt commercial policies that do not require prior approval by the Department of Insurance. *E.g.*, S.C. Code Ann. § 38-73-910; 2000 S.C. Acts 235. Under South Carolina's law, workers compensation policies are not required to be filed with the DOI, which renders the filed rate doctrine inapplicable altogether.

New York does not have such a statute. Whether there is a loss cost modifier or not, the insurer must file with the CIRB for appropriate rates. As New York Insurance Law section 2314 specifically states, "no authorized insurer shall…charge or demand a rate or receive premium that departs from the rates, rating plans, classifications, schedules, rules and standards on behalf of

the insurer..." N.Y. CLS Ins. 2314. Therefore, AIG has made out a *prima facie* case that it is entitled to a judgment for recovery of premium.

II. Endorsements

FreshDirect has repeatedly alleged that it never received the endorsements from AIG, and that endorsements to 2008 and 2009 policies were untimely and therefore invalid. The court disagrees. In fact, FreshDirect's continuous assertion that AIG had never issued the endorsements is directly contradicted by evidence.

The facts are clear that FreshDirect received copies of the endorsements issued on March 31, 2009 and November 12, 2009. AIG may not have delivered copies of the endorsements directly to FreshDirect, but nothing in the policies expressly imposed a duty on the insurer to send copies of the endorsements to the insured directly. The court does not now hold that an insurer has no obligation to give notice to the insured about the changes in policies, as it would be against public policy. This court is merely pointing out that the contract was silent as to the exact manner in which the insured was supposed to be given notice about the endorsements. Given that the 2008 and 2009 policies are clear and unambiguous on their face, "the interpretation of their terms is a matter of law for the court." *Town of Harrison v. National Union Fire Ins. Co. of Pittsburg, Pa.*, 89 N.Y.2d 308, 316 (1996) (citing *Hartford Acc. & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 172 (1973)).

AIG had the endorsements delivered to FreshDirect's agents, Crystal and Mr. Craco on November 11, 2009 and March 1, 2010, respectively. It is well established "an insurance broker is an agent of the insured." *Kamyr, Inc. v. St. Paul Surplus Lines Ins. Co.*, 152 A.D.2d 62, 65 (3rd Dep't 1989). Mr. Craco was also an agent of FreshDirect as he was its outside counsel. It is

well established that a notice given to an agent is a notice given to the principal when the agent is acting within the scope of his employment. Both AIG and FreshDirect admitted that no one from AIG could ascertain exactly when the endorsements were delivered to Crystal, even though FreshDirect said in their submission of material facts that they received a copy of the March 31, 2009 endorsement from Crystal during their meeting on November 11, 2009. Such uncertainty is immaterial in this particular instance, because the agents in this case forwarded the endorsements to their principal without any unreasonable delay. FreshDirect cannot claim that it never received the endorsements from AIG, and so the issue turns on the timeliness of delivery.

Regarding the issue of timeliness, FreshDirect contends that AIG should have issued the endorsements within 30 days of receiving the crit letters per the CIRB manual. Assuming that the 2008 and 2009 policies incorporated the CIRB manual by reference, the court still did not find any contractual language in the manual nor in the policies themselves that required AIG to deliver copies of the endorsements to the insured within 30 days of issuance. All that is clear is that AIG was required to issue the endorsements and file them with the CIRB, not the insured, within the 30-day period.

AIG's position is supported by the contract itself. Part Five section G of the 2008 and 2009 policies state that the insurer reserves the right to conduct audits within three years of the expiration of the policies in order to calculate the actual amount of premium owed. A reasonable interpretation of the policies is that AIG had three years after the expiration of a policy to conduct the final audit to determine the exact amount of premium, and that AIG also had the same three years to issue endorsements to the policies for accurate calculation of the final premium. The 2008 policy expired on January 2009, and 2009 policy expired on January 2010. AIG had until

2012 and 2013, respectively, to execute the audits and issue endorsements. AIG met the deadlines by sending the endorsements to Mr. Craco on March 1, 2010.

III. Affirmative Defenses

1. Third Affirmative Defense – Failure to Perform

FreshDirect contends in its third affirmative defense that AIG is barred from recovery because it failed to discharge its contractual duty. In order for AIG to bring a breach of contract claim to recover the premium, AIG must show 1) the existence of an agreement; 2) adequate performance of the contract by the plaintiff; 3) breach of the contract by the defendant; and 4) damages. *See Wasau Business Insurance Co. v. Sentosa Care LLC*, 10 F. Supp. 3d 444, 454 (S.D.N.Y. 2014). FreshDirect's entire argument, rests on the premise that AIG materially breached its contractual duty because it failed to issue the endorsements in a timely manner. As the court has discussed at length in the previous section, AIG issued the endorsements in the time frame inferred from the 2008 and 2009 policies. FreshDirect's third affirmative defense should be stricken.

2. Fourth Affirmative Defense – Equitable Estoppel

Alternatively, FreshDirect asks the court to bar AIG's recovery of premium based on the grounds of equitable estoppel. AIG counters by alleging that FreshDirect tried to conceal the fact that CIRB conducted an audit in 2007 at FreshDirect, estopping FreshDirect from bringing an equitable estoppel claim by the doctrine of unclean hands. Generally, to be afforded the protection of equitable estoppel, the asserting party must establish as to their adversary: (1) conduct which amounts to a false representation or concealment of material facts…which is

calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert, (2) intention, or at least expectation, that such conduct shall be acted upon by the other party, (3) knowledge, actual or constructive of the real facts. As related to the party claiming the estoppel, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon which changes his position prejudicially. *Michaels v. Travelers Indem. Co.*, 257 A.D.2d 828, 829 (3rd Dep't 1999) (citing *State Bank of Albany v. Fioravanti*, 70 A.D.2d 1011, 1012-1013 (3rd Dep't 1979)).

Based on the facts submitted, there is enough evidence to conclude that AIG had actual knowledge of the code change both when it carried out the 2008 policy and when it entered into the 2009 policy. Frazier's emails about the crit letters were sent to all the underwriters that had been in charge of FreshDirect, and also its supervisor, Christopher Tanoff. Frazier's e-mail was sitting in Osbourne's inbox when she was negotiating the terms of the renewal. AIG cannot fall back on blind ignorance when such ignorance was caused by their systematic failure of communication.

Yet, the equitable estoppel claim must be dismissed, as FreshDirect cannot assert that it had no access to the means of finding out about the crit letters or the code change. On August 14, 2007, CIRB conducted an audit at FreshDirect's facilities. FreshDirect could have inquired about the result of such audit. FreshDirect is not forbidden from communicating directly with the CIRB. FreshDirect demonstrated that it knew how to get in touch with CIRB by arranging a phone call in November 2009 among Ackerman, the CFO of FreshDirect, Moore, Senior Vice President of Business Affairs, and CIRB officials. Clearly, FreshDirect was not without means of having knowledge of the criticism letters or the code change.

IV. Counterclaims

1. First Counterclaim - Fraud

FreshDirect alleges AIG acted fraudulently in order to extort larger amount of premium by disobeying the CIRB directives and withholding information about the job code change until FreshDirect lost its right to cancel the 2008 and 2009 policies. AIG contends that FreshDirect's counterclaims for fraud and negligent misrepresentation fail because they are duplicative of the underlying breach of contract claim, there was no reasonable reliance, no scienter, and no special relationship giving rise to a duty. FreshDirect rebuts that the claims for fraud and breach of contract are not duplicative since the breach of contract claim pertains to the 2008 policy and the fraud claim pertains to the 2009 policy, and because each seeks different forms of relief. FreshDirect also contends that there is evidence of scienter, issues of fact as to reliance, and an existence of a special relationship since AIG had special expertise and knowledge about the job code change.

The essential elements of fraud that the claimant must establish under New York law are: misrepresentation of a material fact, scienter, reliance, and injury. *See RBE N. Funding, Inc. v. Stone Mtn. Holdings, LLC*, 78 A.D.3d 807, 809 (2nd Dep't 2010). *Barclay Arms v. Barclay Arms Assoc.*, 74 N.Y.2d 644, 647 (1989). It is highly likely that AIG had the requisite scienter when it entered into the 2009 contract with FreshDirect. As discussed above in equitable estoppel, AIG is imputed with having had actual knowledge about the code change and its consequences because crit letter had been internally circulated amongst its key actors months before negotiations began to renew the contract. Issuing the 2009 policy with job code 8033 instead of the proper code despite having knowledge of CIRB's mandate constitutes strong evidence of recklessness. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) ("[A] 'strong inference' of

fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness").

FreshDirect's claim for fraud fails, however, as it cannot prove reasonable reliance. Reasonable reliance is a necessary element for any claim based upon fraud, *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996); *VisionChina Media Inc. v. Shareholder Representative Services, LLC*, 109 A.D.3d 49 (1st Dep't 2013), and negligent misrepresentation. *Eiseman v. State of New York*, 70 N.Y.2d 175, 187 (1987). "Reasonable reliance is a condition which cannot be met where ... a party ha[d] the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fail[ed] to make use of those means." *Gomez-Jimenez v. New York Law School*, 103 A.D.3d 13 (1st Dep't 2012) (quoting *Arfa v. Zamir,* 76 A.D.3d 56, 59 (1st Dep't 2010)) (citing *New York City School Constr. Auth. v. Koren–DiResta Constr. Co.,* 249 A.D.2d 205, 205–06 (1st Dep't 1998). Any reliance on the alleged misrepresentation could not have been justified where "one to whom alleged misrepresentation is made had means to discover the truth by the exercise of ordinary intelligence, yet fails to do so, there can be no showing justifiable reliance to support a claim of fraud" *Peach Parking Corp. v. 356 W. 40th St., LLC,* 42 A.D.3d 82, 87 (1st Dep't 2007) (quoting *Stuart Silver Assoc. v. Baco Dev. Corp.*, 245 A.D.2d 96, 98-99 (1st Dep't 1997)).

While the court is unconvinced of AIG's allegation that FreshDirect was actively trying to hide the fact that the CIRB audit occurred in 2007, FreshDirect had the means to follow up on the result of the audit. Contacting the CIRB to ask about the result does not seem to be an undue burden to be placed on FreshDirect. FreshDirect was not forbidden from contacting the CIRB directly, nor were there any substantial obstacles to communication. FreshDirect could also have

asked AIG if there had been any communication between AIG and CIRB after the audit. Because FreshDirect had the reasonable means and opportunity to ascertain the facts before renewing the workers compensation policy, FreshDirect's complaint for fraud is dismissed.

2. Second Counterclaim - Negligent Misrepresentation

Alternatively, FreshDirect alleges negligent misrepresentation with regards to the renewal of the 2008 policy. "A claim for misrepresentation requires plaintiff to demonstrate (1) 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; (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.2d 144, 148 (2007). *See also*, *Parrot v. Coopers & Lybrand*, 95 N.Y.2d 479, 484 (2000); *Murphy v. Kuhn*, 90 N.Y.2d 266, 270 (1997). A special relationship may be established with respect to "persons who possess unique or specialized expertise, or who are in special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011) (quoting *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996)). However, "no special relationship of trust or confidence arises out of an insurance contract between the insured and the insurer; the relationship is legal rather than equitable." *Batas v. Prudential Ins. Co. of Am.*, 281 A.D.2d 260, 264 (1st Dep't 2001) (quoting 68A N.Y. Jur.2d, Insurance, 651).

Given that a special relationship of trust or confidence does not arise out of an insurance contract, FreshDirect would have had to present compelling evidence to show that FreshDirect and AIG had something more than an arms-length relationship. FreshDirect did not submit any evidence to demonstrate such a relationship. Even if they had such evidence, FreshDirect had

access to knowledge about the job code change directed by CIRB. Therefore, the court cannot agree with FreshDirect's claim that AIG's knowledge about the code change qualifies as special expertise that would impose an additional duty to speak with care.

Both the fraud and negligent misrepresentation claims should be dismissed because they are duplicative of the breach of contract claims. "Where a claim for relief is based upon the same facts as an underlying breach of contract claim, and there is no allegation of breach of duty that is collateral or extraneous to the contract between the parties, or no damages are alleged that are not recoverable under a contract measure of damages, misrepresentation claims should be dismissed for failure to state a claim for relief." *Bridgestone/Firestone, Inc. v. Recovery Credit Services, Inc.*, 98 F.3d 13, 19-20 (2d Cir. 1996); *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 318, 320 (1995) (cause of action for fraud dismissed because it was duplicative of cause of action for breach of contract); Auble v. Doyle, 38 A.D.3d 1264, 1266 (4th Dep't 2007) ("claim for negligent misrepresentation fails as a matter of law because it is not based on circumstances extraneous to the performance of the contract").

FreshDirect tries to distinguish the third and fourth counterclaims from misrepresentation counterclaims by asserting that the former concerns the 2009 workers compensation policy, and auto and general liability policies, whereas the latter concerns the 2008 and 2009 policies only. It requests contractual damages for the former, and declaratory and punitive damages for the latter. As for the source of additional duty, FreshDirect cites to the CIRB manual that required timely issuance of endorsement.

FreshDirect's claim for relief for fraud and negligent misrepresentation are based on the same facts as the breach of contract claim. Essentially, FreshDirect is dissatisfied with the fact that AIG used 8034 instead of 8033 in the final premium calculation. The fraudulent inducement

part is that AIG renewed the policy by offering the premium rate at job code 8033 instead of 8034, and the breach part is that they used job code 8034 in setting the final premium. They both concern the performance of the contract at a pre-determined job code, rather than on circumstances extraneous to the performance. Even though FreshDirect cites CIRB manual as its source of additional duty, the court is not convinced that such duty was owed to the insured. Rather, AIG owed such duty to CIRB, but not the insured. As the language in the 2008 and 2009 policies show, there was no provision in the contract that obligated AIG to notify FreshDirect of job code changes within a certain time frame, nor were they ever prohibited from changing the job code. Fraud and negligent misrepresentation claims are thus dismissed for failure to state a claim for relief.

3. Third Counterclaim - Breach of Contract

As the court has already determined that AIG's application of 8034 job code was not a breach of contract and that endorsement to the 2009 policy was timely issued, the court dismisses the breach of contract claim for AIG's use of job code 8034 instead of 8033.

4. Remaining Counterclaims

In its fourth counterclaim, FreshDirect brings a breach of contract claim with respect to the general liability and automobile liability policies. FreshDirect alleges that the contract required plaintiff to conduct an audit; that plaintiff failed to conduct an audit; and that an audit would have resulted in a determination that Fresh Direct was entitled to a refund of premiums in the total amount of $16,601.

AIG seeks to dismiss the fourth counterclaim, contending that FreshDirect did not permit AIG to conduct the final audits for these policies. Accordingly, AIG billed the final premium in accordance with the methodology set forth in the policies.

In opposition to the motion, defendant exhibits the sworn affidavit of William Vazoulas, FreshDirect's Vice President, Finance. Mr. Vazoulas asserts that it is untrue that FreshDirect refused to allow AIG to perform an actual audit of the general liability and automobile policies at issue in this case. Further, he contends that he specifically invited AIG to send an auditor to FreshDirect's facility to conduct such an audit, and AIG declined (Affidavit of William Vazoulas dated December 2, 2014, p. 3, para. 6).

In addition, counsel for FreshDirect asserts that, after the commencement of this action, counsel also extended an invitation to conduct a physical audit to AIG's counsel, and AIG again declined. Counsel argues that, had AIG done an actual audit for the year in question, it would have seen that FreshDirect was operating a smaller truck fleet than previously.

The Court finds that the sworn affidavit of William Vazoulas is sufficient to create an issue of fact regarding whether FreshDirect did not permit AIG to conduct the final audit for the general liability and automobile policies. Therefore, summary judgment to dismiss the fourth counterclaim is denied.

FreshDirect's fifth counterclaim alleges negligence, errors and omissions. It is well-established that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" *Kasem v. Phillip Morris, USA*, 244 A.D.2d 532, 532 (2nd Dep't 1997) *quoting Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389; and that if there is no legal duty independent of the contract, the cause of action to recover damages for negligence should be dismissed. *Kasem,* 244 A.D.2d. at 533.

FreshDirect's claim for negligence is based on the same set of facts and reasoning as its breach of contract claim in that because of AIG's delay in issuing endorsements earlier, FreshDirect sustained some form of damages. FreshDirect did not demonstrate an independent duty that AIG owed to FreshDirect to warrant a tort negligence claim extraneous to the breach of contract claim. FreshDirect's fifth counterclaim should be dismissed.

Conclusion

The court grants AIG summary judgment with regard to liability to recover premium owed from the 2008 and 2009 policies. Plaintiff's motion seeks a a money judgment in the sum of $3,566,602.17. The Court has carefully reviewed the documentary evidence and sworn affidavits, but there is insufficient documentary evidence or sworn affidavits making out a prima facie case as to the amount of damages. Accordingly, there are triable issues of fact arising on plaintiff's motion for summary judgment relating to the amount of damages to which plaintiff is entitled.

The court finds that the endorsements to delete job code 8033 and insert 8034 were timely issued and delivered, and denies partial summary judgment to FreshDirect. FreshDirect's affirmative defenses and counterclaims are dismissed, except for FreshDirect's fourth counterclaim with respect to auto and general liability policies against National Union Fire Insurance Company.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted with regard to liability for recovery of premium owed for 2008 and 2009 policy; and it is further

ORDERED that summary judgment for plaintiff to dismiss defendant's affirmative defenses and counterclaims is granted, except that it is denied with respect to defendant's fourth counterclaim; and it is further

ORDERED that defendant's motion for partial summary judgment is denied; and it is further

ORDERED that a trial on plaintiff's damages and defendant's fourth counterclaim shall be had before the court; and it is further;

ORDERED that counsel are directed to appear for a pre-trial conference in Room 218, 60 Centre Street, on October 14, 2015, at 11:00 AM.

Date: August 5, 2015

ENTER:

Anil C. Singh