SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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LEADING INSURANCE GROUP INSURANCE COMPANY, LTD. (U.S. BRANCH) and LEADING INSURANCE SERVICES, INC.,

Plaintiffs,

Index No. 651049/15

Motion Sequence Nos. 001 and 002

- against -

FRIEDMAN LLP and ACTUARIAL RISK CONSULTANTS, LLC,

Defendants.

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SCARPULLA, J:

Plaintiffs Leading Insurance Group Insurance Company, Ltd. (U.S. Branch) ("LIGUSB") and Leading Insurance Services, Inc. ("LIS," together with LIGUSB, "LIG") bring this action against Friedman LLP ("Friedman") and Actuarial Risk Consultants, LLC ("ARC"), in connection with their performance of audit, accounting, and related services for LIG. Friedman now moves (in motion sequence number 001) to dismiss the complaint as against it, pursuant to CPLR § 3211 (a) (1) and (7). ARC also moves (in motion sequence number 002) to dismiss the complaint as against it, pursuant to CPLR § 3211 (a) (7) and (8). Motion sequence numbers 001 and 002 are consolidated for disposition.

Unless indicated otherwise, the following facts are taken from the complaint and are presumed to be true for purposes of the instant motions.

"LIGUSB is the U.S. Branch of a foreign insurance company and LIS is the United States Manager of LIGUSB pursuant to applicable New York law." Licensed as

an insurance company in New York, LIGUSB is monitored by the New York Department of Financial Services ("NYDFS") and must submit annual financial statements ("Statutory Financial Statements") that conform with New York's Statutory Accounting Practices ("SAP"). The Statutory Financial Statements are required to be audited by an independent certified public accountant according to Generally Accepted Auditing Standards ("GAAS") and SAP. The Statutory Financial Statements must be accompanied by the accountant's opinion letter, "certifying, among other things, that the Statutory Financial Statements are fairly stated in all material respects in accordance with SAP." The Statutory Financial Statements include a statement of the insurance company's loss reserves, which "include the estimated liability for investigating and settling unpaid insurance claims or losses, both known . . . and unknown." LIG used an internal actuary to establish the loss reserves for LIGUSB's 2012 Statutory Financial Statements.

Pursuant to an engagement letter ("Engagement Letter"), dated October 24, 2012, Friedman agreed to perform an independent audit of LIGUSB's Statutory Financial Statements for the year ending in December 21, 2012. In pertinent part, the Engagement Letter stated that: Friedman would "plan and perform the audit to obtain reasonable assurance about whether financial statements are free from material misstatement;" "[t]he objective of [the] audit is the expression of an opinion about whether [LIG's] financial statements are fairly presented, in all material respects, in conformity with accounting practices prescribed or permitted by the [NYDFS];" and the "audit [would] be conducted in accordance with auditing standards generally accepted in the United States of America." The Engagement Letter also contained the following qualifications, that: LIG

"[was] responsible for establishing and maintaining internal controls, including monitoring ongoing activities;" "[b]ecause of the inherent limitations of an audit, combined with the inherent limitations of internal control, and because [Friedman would] not perform a detailed examination of all transactions, there [was] a risk that material misstatements may exist and not be detected by [Friedman], even though the audit is properly planned and performed in accordance with U.S. generally accepted auditing standards;" and the "audit is not designed to provide assurance on internal control or to identify deficiencies in internal control."

LIG also alleges that, from October 2012 to April 2014, "Friedman actively sought and solicited additional business from LIG and agreed to perform various non-audit services," including acting "as a financial consultant and accountant to LIG."

ARC is a New Jersey limited liability company with its principal place of business in New Jersey. In connection with the audit, Friedman engaged ARC as its actuarial consultant "to conduct an independent peer review of the work, calculations and conclusions of LIG's actuary." On or about May 22, 2013, ARC submitted its "Audit Support Memorandum" ("Audit Support Memo") to Friedman. LIG alleges that Friedman and ARC "did nothing more that passively 'rubber stamp' the opinion and conclusions of LIG's internal actuary based upon ARC's cursory review of LIG's internal actuary's statement of opinion and report, in lieu of performing necessary, appropriate and adequate audit procedures."

On or about May 31, 2013, Friedman delivered the final, audited Statutory Financial Statements and Schedules, provided an independent auditors' report regarding

these documents, and submitted its "Accountant's Qualification an Internal Control letter to LIGUSB's Board of Directors and Stockholders." LIG alleges that it relied on Friedman's representations to satisfy it "that (i) LIG's internal controls and accounting policies, including its procedures and methods for establishing loss reserves, were reasonable and appropriate and (ii) LIGUSB's statutory financial statements were free of material misstatement and fairly presented LIGUSB's statutory financial condition."

Subsequent to the 2012 audit, LIG avers that it used "Friedman to perform various other accounting, consulting, advisory and tax-related services, for which LIG paid Friedman substantial fees." "On or around September 13, 2013, LIG again engaged Friedman to perform the independent audit of LIGUSB's financial statements for the year end[ing] December 31, 2013."

In approximately October 2013, "NYDFS advised LIG that red flags existed in LIG's loss reserve estimates in its recent financial statements and required that LIG engage an independent external actuary to conduct a peer review of LIG's internal actuary's findings at LIG's own expense." LIG complied and, in approximately February 2014, "LIG discovered that its carried loss reserves were inadequate, contrary to what Friedman had concluded and reported in connection with its audit." According to LIG, because its prior loss reserves were considerably understated, it had "to take immediate action to increase its reserves by approximately $37,000,000" and to "take aggressive and immediate measures to increase and improve its related internal controls and procedures."

LIG alleges that, as a result of Friedman's failure to detect the errors in LIGUSB's Statutory Financial Statements, LIG suffered a number of negative consequences,

including: "the imposition by the NYDFS of an order dated March 7, 2014 restricting LIGUSB from issuing new policies and writing new business," causing a loss of income greater than $69,600,000 for 2014; having "to pay numerous professionals and consultants to advise and assist LIG in connection with the regulatory action;" having "to secure an emergency $45,000,000 capital contribution from its parent company in order to cure the surplus impairment and avoid being forced into liquidation by the NYDFS" and, thereby, "incur[ring] increased and additional accounting-related fees;" and being required to pay for NYDFS's "own full financial and actuarial audit of LIGUSB's 2012 and 2013 financial statements." According to LIG, "even though Friedman was still engaged as a CPA, financial advisor and independent auditor for LIG, Friedman was uncooperative and evasive in responding to demands from the NYDFS, as well as requests from LIG to assist with the NYDFS investigation and examination." LIG alleges that "Friedman's conduct only served to impede and undermine LIG's efforts to rebuild its damaged credibility with the NYDFS."

LIG alleges that "[i]n or around April of 2014, LIG discontinued its use of Friedman's services." On approximately June 3, 2014, "Friedman announced to the NYDFS that it was withdrawing its 2012 audit opinion of LIGUSB." LIG alleges that the withdrawal of Friedman's opinion "was inconsistent with SAP and insurance industry standards concerning the correction of errors in financial statements previously filed with regulating authorities," and that "Friedman also knew, or should have known, that its action to recall its audit opinion would be damaging to LIG."

In or about March, 2015, LIG commenced this action. The six-count complaint asserts causes of action for: (1) professional malpractice against Friedman and ARC; (2) breach of contract against Friedman; (3) negligent misrepresentation against Friedman; (4) breach of fiduciary duty against Friedman; (5) gross negligence against Friedman; and (6) unjust enrichment against Friedman and ARC. These pre-answer motions to dismiss ensued.

Discussion

"[O]n a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 (1st Dept 2004). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). "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 v Brody*, 1 AD3d 247, 250 (1st Dept 2003). Where the defendant seeks to dismiss the complaint based upon documentary evidence, "the documentary evidence [must] utterly refute[] 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).

A. Friedman's Motion to Dismiss (Motion Sequence Number 001)

i. Professional Malpractice (First Cause of Action)

Friedman contends that the claim of accounting malpractice must be dismissed because: LIG fails to allege how Friedman departed from the accepted standards of practice; the causal chain is too attenuated and speculative to satisfy the proximate causation element; and LIG fails to plead actual damages that resulted from the alleged malpractice and, instead, seeks to recover consequential damages. In addition, Friedman contends that the malpractice action is barred by the express terms of the Engagement Letter. LIG counters that it sufficiently pleads all elements of a professional malpractice claim and that it is not required to come forward with proof at this juncture.

To state a claim for professional negligence, the complaint must allege "that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury." *D.D. Hamilton Textiles v Estate of Mate*, 269 AD2d 214, 215 (1st Dept 2000).

Here, Friedman contends that the complaint fails to specify how Friedman allegedly deviated from acceptable standards of practice. In particular, it points to the allegation that a subsequent, independent actuary identified certain "red flags" that Friedman "inexplicably failed to identify," without identifying those red flags or describing what Friedman should have done differently. However, the complaint contains numerous allegation detailing the ways in which LIG believes Friedman deviated from professional standards of care, including that it failed to comply with GAAS and SAP by, among other things, failing to implement appropriate and adequate

audit procedure to verify the accuracy of the Statutory Financial Statements. *See* complaint, ¶¶ 6, 37-41, 57, 59-63, 98-101.

Moreover, this is a pre-answer motion to dismiss. Therefore, LIG need not "pro[ve] that there was a departure from accepted standards of practice," but rather, it need only make the necessary allegations. *See D.D. Hamilton Textiles*, 269 AD2d at 214-215 (finding, in the context of a motion for summary judgment, that plaintiffs failed to prove defendant accountant's work fell below applicable standards of care); *see also EBC I, Inc.*, 5 NY3d at 19. Ultimately, LIG alleges that Friedman failed to identify deficiencies with LIG's loss reserves; whether this failure "was [due to] a departure from professional accounting standards . . . is a question that requires expert evidence for its resolution." *Berg v Eisner LLP*, 94 AD3d 496, 496 (1st Dept 2012) (reversing dismissal).

Friedman also argues that "[p]laintiffs' hypothetical causal chain and their gross speculation as to what Plaintiffs ***and [NY]DFS*** could or would have done, is . . . insufficient as a matter of law to satisfy the proximate causation element." Friedman argues that this is particularly so because damages are attributable to LIG's own failure to maintain adequate loss reserves. Friedman argues that LIG merely speculates about losses suffered and improperly seeks to recover consequential damages, including $69,600,000 in lost new business.

Nothing in the complaint warrants dismissal at this early stage. LIG alleges that, "[b]ased on Friedman's audit and opinion . . . LIG found no reason to make adjustments to its estimated loss reserves, its methods and procedures for establishing its loss reserves, or other related business conduct." In addition, LIG alleges that, because of

Friedman's clean audit, "LIG's discovery of the understated reserves was belated, [and it] was forced to make emergency adjustments to correct the understated loss reserves," which caused it to incur additional costs and suffer "significant regulatory action by the NYDFS." As such, "[t]he complaint sufficiently asserts that 'but for'" Friedman's failure to identify the understated loss reserves, LIG would have been able to take corrective actions sooner and would have avoided incurring costs in connections with its emergency measures. *Fielding v Kupferman*, 65 AD3d 437, 442 (1st Dept 2009) (finding proximate cause sufficiently alleged where plaintiff alleges that "he would not have incurred the tax liability that resulted from the withdrawal of funds from his retirement account," but for defendants' incorrect advice).

The complaint also sufficiently pleads damages. "At this early stage of the proceedings, plaintiff[s are] not obliged to show . . . that [they] actually sustained damages, but only that damages attributable to [defendants' conduct] might be reasonably inferred." *Id.* (citations and internal quotation marks omitted). The complaint contains sufficient allegations to allow such an inference. *See* complaint, ¶¶ 79-85; 107.

Lastly, Friedman contends that the professional malpractice claim should be dismissed because of the qualifications contained in the Engagement Letter. "While, with limitations, an accountant and client may contractually agree that the accountant is not to perform certain services, thereby absolving the accountant of liability for not performing them," here, nothing in the Engagement Letter entitles Friedman to a dismissal of LIG's claims. *Cumis Ins. Socy. v Tooke*, 293 AD2d 794, 798 (3d Dept 2002), citing *Italia Imports v Weisberg & Lesk,* 220 AD2d 226, 226-227 (1st Dept 1995).

While the Engagement Letter stated that LIG "[was] responsible for establishing and maintaining internal controls," and that "there [was] a risk that material misstatements may exist and not be detected," it also provided that "[Friedman's] audit [would] be conducted in accordance with auditing standards generally accepted in the United States of America," and "[Friedman] [would] plan and perform the audit to obtain reasonable assurance about whether financial statements [were] free of material misstatement," and were "in conformity with accounting practices prescribed or permitted by the [NYDFS]." As the malpractice claim is based on Friedman's alleged failure to comply with applicable auditing standards, Friedman is not entitled to dismissal of the claim based on the Engagement Letter's qualifications. *Compare Cumis Ins. Socy.*, 293 AD2d at 798 (finding engagement letters did not entitle defendant accountant to summary judgment because, "[n]otwithstanding the fact that the [engagement] letters place[d] responsibility on [the insured] for '[t]he proper recording of transactions, safeguarding of assets, and the financial statements,' and warn[ed] that irregularities and defalcations may not be detected, the letters indicate[d] that the audit [was] designed to 'provide reasonable assurance of detecting errors and irregularities that [were] material to the financial statements'" and "the letters expressly bound defendant to review [the insured]'s financial statements in accordance with GAAP and to conduct its audit in accordance with GAAS"), *with Italia Imports,* 220 AD2d at 226 (affirming dismissal of complaint against defendant accountant, where "[t]here was no agreement to perform a 'review' or an 'audit' of [plaintiff]'s financial condition" and "the engagement letter expressly disclaimed any duty to discover wrongdoing and defalcations").

Accordingly, I deny Friedman's motion to dismiss the first cause of action.

ii. Breach of Contract (Second Cause of Action)

Friedman contends that the breach of contract claim must be dismissed as redundant of the professional malpractice claim. Friedman also reiterates its earlier causation argument, as it does for all of the causes of action, with the exception of the gross negligence and unjust enrichment claims. LIG counters that it may plead alternative causes of action based on the same facts and that, in any event, the breach of contract claim is based on Friedman's independent failure to comply with the terms of the Engagement Letter.

To state a cause of action for breach of contract, plaintiffs must allege "the existence of a contract, the plaintiff[s'] performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). "[A] breach of contract claim premised on the [professional]'s failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim." *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38-39 (1st Dept 1998); *see also Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 (1st Dept 2002) (dismissing breach of contract claim as redundant when it was "predicated on the same allegations and [sought identical] relief" as the malpractice claim).

The breach of contract claim is based on Friedman's representations in the Engagement Letter. According to LIG, Friedman breached the agreement when it did not, among other things, "independently verify the work of LIGUSB's internal actuary

and instead, passively rubber-stamped the internal actuary's work and relied upon it in support of its own opinion instead of performing proper audit procedures." The Engagement Letter's numerous representations, describing the audit to be conducted, are nothing more than explicit statements of Friedman's professional responsibilities as an independent auditor. This much is clear when comparing the Engagement Letter's statements with the duties of care Friedman allegedly breached under various professional practices, standards and codes of conduct, as listed under the complaint's professional malpractice claim. *Compare* complaint, ¶ 44 and exhibit 1, *with id.*, ¶¶ 101, 102.

While the Engagement Letter contains explicit promises regarding the steps Friedman was to undertake in conducting its audit, "[m]aking such ordinary obligations express terms of an agreement does not remove the issue from the realm of negligence . . . nor can it convert a malpractice action into a breach of contract action." *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 542-543 (2004) (dismissing breach of contract claim as a malpractice claim barred by the statute of limitations, where the plaintiff alleged that architect breached "an express contractual provision stating that the plans, drawings and specifications [would] comply with the relevant building code," because "while compliance with the relevant building code may have been a particular bargained-for result, that result [was] not inconsistent with an architect's ordinary professional obligations").

To the extent that LIG relies on *Fund of Funds, Ltd. v Arthur Andersen & Co.* (545 F Supp 1314 [SD NY 1982]) and *Common Fund for Non-Profit Orgs. v KPMG Peat*

Marwick LLP (2000 WL 124819, 2000 US Dist LEXIS 785 [SD NY, Feb. 2, 2000, No. 96-Civ-0255 (MGC)]), these cases are not binding on me, and I do not find these cases persuasive in light of *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)* and the allegations in this complaint.

Accordingly, Friedman's motion to dismiss the second cause of action for breach of contract is granted.

iii. Negligent Misrepresentation (Third Cause of Action)

Friedman contends that the negligent misrepresentation claim must be dismissed as redundant of the professional malpractice claim. In addition, it contends that LIG failed to adequately plead the elements of the claim. LIG counters that it states a claim for negligent misrepresentation and that the claim is based on facts distinct from the malpractice claim, namely "Friedman's negligence in connection with communicating information to LIG."

"It is well settled that [a] claim for negligent misrepresentation requires the plaintiff to demonstrate (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." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 (2011) (citation and internal quotation marks omitted). Where the cause of action for negligent representation "arise[s] from the same allegations and seek[s] identical relief" as a malpractice claim, it is duplicative and should be dismissed. *See Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669, 669 (1st Dept 2012).

Here, LIG alleges that "Friedman misled LIG by misrepresenting its expertise, capabilities and competency for performing the required audit and accounting services it agreed to provide and then failed to provide competent, experienced and/or adequate audit partners, principals, staff and specialists." They further allege that "Friedman also made numerous misrepresentations in connection with the performance of it[s] audit services, including" that: it performed the audit in compliance with GAAS and in accordance with applicable professional standards; the "Statutory Financial Statements were free from material misstatements" and that the loss reserve estimates were adequate; it obtained sufficient evidence to reach these conclusions; and that those employed to perform the audit had the necessary skill and training. In sum, the negligent misrepresentation claim arises out of the same facts as the malpractice claim, *i.e.*, Friedman's alleged failure to perform the audit in accordance with professional standards.[1] In addition, both claims seek identical relief. Accordingly, the third cause of action is dismissed as duplicative of the malpractice claim. *See Sun Graphics Corp.*, 94 AD3d at 669 (dismissing negligent misrepresentation claim as "redundant of the legal malpractice claim").

iv. Breach of Fiduciary Duty (Fourth Cause of Action)

Friedman contends that the breach of fiduciary duty claim must be dismissed because it did not owe LIG a fiduciary duty. Friedman also argues that the claim is

[1] During oral argument, LIG's attorney mentioned a letter, which Friedman allegedly sent to LIG, containing numerous misrepresentations about specific actions taken during the course of the audit. This letter is not mentioned in, or annexed to, the complaint. 9/30/15 tr at 24.

redundant of the professional malpractice claim and fails to state a basis for punitive damages. LIG counters that the complaint sets forth allegations demonstrating that "there was a relationship of higher trust than which would arise from the contract alone" and that this fact-specific inquiry should be left for the factfinder, as should the issue of punitive damages.

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." *Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 (1st Dept 2011). "Generally, there is no fiduciary relationship between an accountant and his client. A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation." *Friedman v Anderson*, 23 AD3d 163, 166 (1st Dept 2005) (citation and internal quotation marks omitted). Where the claim for breach of fiduciary duty "arise[s] from the same allegations and seek[s] identical relief" as a malpractice claim, it is duplicative and should be dismissed. *See Sun Graphics Corp.*, 94 AD3d at 669; *see also Schwartz v Leaf, Salzman, Manganelli, Pfiel & Tendler, LLP*, 123 AD3d 901, 902 (2d Dept 2014).

Here, the relationship between LIG and Friedman was a "conventional business relationship" and LIG may not convert it into "a fiduciary relationship by mere allegation." *Friedman*, 23 AD3d at 166 (citation and internal quotation marks omitted). In addition, the breach of fiduciary duty claim is duplicative of the malpractice claim, as both are based on Friedman "departing from the required standard of care and providing

incompetent services to LIG as its auditor and accountant," and the claims seek identical damages. *See Sun Graphics Corp.*, 94 AD3d at 669; *Schwartz*, 123 AD3d at 902.

As the complaint fails to allege that "defendant's conduct was []either wantonly dishonest []or aimed at the public, the claim for punitive damages should . . . be[] dismissed." *Apple Bank for Sav. v PricewaterhouseCoopers LLP*, 70 AD3d 438, 438 (1st Dept 2010).

For the foregoing reasons, I dismiss the fourth cause of action.

v. Gross Negligence (Fifth Cause of Action)

Friedman contends that the gross negligence claim must be dismissed as none of the allegations rise to the level of gross negligence, and that, in any event, the claim for punitive damages is improper. LIG counters that whether Friedman's conduct constitutes gross negligence is an issue of fact to be left for the fact-finder, as is the issue of punitive damages.

"Ordinarily the question of gross negligence is a matter to be determined by the trier of fact." *Lubell v Samson Moving & Stor.*, 307 AD2d 215, 216 (1st Dept 2003), citing *Food Pageant v Consolidated Edison Co.*, 54 NY2d 167, 172-173 (1981). "'[G]ross negligence differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing.'" *Lubell*, 307 AD2d at 216 (internal quotation marks omitted), quoting *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 (1993). "[W]here plaintiff's allegations amount, at most, to ordinary negligence, they do not meet

the foregoing standard" and the gross negligence claim should be dismissed. *Lubell*, 307 AD2d at 217.

Here, aside from the conclusory allegation that "Friedman acted willfully or with conscious and/or reckless disregard," the complaint merely states a claim for professional negligence. In addition, as with the breach of fiduciary duty claim, punitive damages are not warranted. *Apple Bank for Sav.*, 70 AD3d at 438. I therefore dismiss the fifth cause of action. *See Lubell*, 307 AD2d at 217.

vi. Unjust Enrichment (Sixth Cause of Action)

Friedman contends that the unjust enrichment claim may not be maintained in the face of the Engagement Letter, which dictated the parties' relationship. It also argues that all fees paid were "in exchange for the bargained-for services." LIG counters that the unjust enrichment claim is sufficiently pleaded, because the complaint alleges a relationship that extended beyond the audit covered by the Engagement Letter.

A claim for unjust enrichment

> is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. . . . An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.

Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 (2012) (internal citations omitted). "[A] valid and enforceable written contract governing a particular subject matter" will prohibit a claim for unjust enrichment unless "the contract does not cover the dispute in issue."

Ashwood Capital, Inc. v OTG Mgt., Inc., 99 AD3d 1, 10 (1st Dept 2012) (citations and internal quotation marks omitted).

Here, the complaint alleges that LIG has paid Friedman "fees of not less than $285,053.25," and that "[t]he services to be performed by Friedman and ARC for or on behalf of LIG were not performed and/or were performed negligently, incompetently, improperly, inadequately, incompletely, improperly and/or without due care or diligence." In addition to the audit, performed pursuant to the Engagement Letter, the complaint alleges that "Friedman also served as a financial consultant and accountant to LIG," provided "tax-related services," and that "LIG again engaged Friedman to perform the independent audit of LIGUSB's financial statements for the year end December 31, 2013." The complaint also alleges that Friedman charged additional fees for "its cooperation with the NYDFS" and that it "sought to charge LIG significant additional fees . . . to re-do the work it failed to adequately perform the first time."

To the extent LIG seeks to recover the fees it paid under the Engagement Letter, its unjust enrichment claim is precluded by the written agreement. *See id.* To the extent LIG seeks to recover fees for additional work it engaged Friedman to perform, which Friedman allegedly failed to perform or performed negligently, LIG seeks to use the unjust enrichment claim to "simply duplicate[], or replace[], a conventional contract or tort claim." *Corsello*, 18 NY3d at 790. Such is not the function of a claim for unjust enrichment. *See id.* For the foregoing reasons, Friedman's motion to dismiss the sixth cause of action is granted.

B. ARC's Motion to Dismiss (Motion Sequence Numbers 002)

i. Personal Jurisdiction

ARC argues that the court lacks personal jurisdiction over it, as it is a New Jersey limited liability company without a presence in New York. In the complaint, LIG alleges that the court has jurisdiction pursuant to CPLR § 301 and § 302 (a) (1), and in opposition to ARC's motion, LIG argues that the court has long-arm jurisdiction over ARC, pursuant to CPLR § 302 (a) (1) and § 302 (a) (3) (ii). In the alternative, LIG argues that it has made a sufficient start of demonstrating jurisdiction to warrant denial of the motion pending jurisdictional discovery.

The plaintiff is not required to plead the basis of jurisdiction in the complaint. *Fischbarg v Doucet*, 9 NY3d 375, 381 n 5 (2007). However, if the defendant moves to dismiss pursuant to CPLR § 3211 (a) (8), the plaintiff, "[a]s the party seeking to assert personal jurisdiction . . . bears the ultimate burden of proof on this issue." *Doe v McCormack,* 100 AD3d 684, 684 (2d Dept 2012) (citation and internal quotation marks omitted); *see also Fischbarg*, 9 NY3d at 381 n 5. In opposing the motion, the plaintiff "need only demonstrate that facts 'may exist'" (*Peterson v Spartan Indus.*, 33 NY2d 463, 466 [1974]), or "ma[ke] a 'sufficient start' in demonstrating" a basis for personal jurisdiction over the defendant, "to warrant further discovery on the issue of personal jurisdiction." *HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665, 666 (1st Dept 2011) (citation omitted).

A court has general jurisdiction over a corporation, pursuant to CPLR § 301, if it is incorporated in New York or has its principal place of business here. *See D&R Global*

Selections, S.L. v Bodega Olegario Falcon Pineiro, 128 AD3d 486, 487 (1st Dept 2015), citing *Daimler AG v Bauman,* 134 S Ct 746 (2014), *lv granted* 26 NY3d 914 (2015).

CPLR § 302 (a), provides that: "[a]s 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, . . . who, . . . 1. transacts any business within the state or contracts anywhere to supply goods or services in the state." The statute "is a 'single act statute,' whereby physical presence is not required and one New York transaction is sufficient for personal jurisdiction." *D&R Global Selections, S.L. v Bodega Olegario Falcón Piñeiro*, 90 AD3d 403, 404 (1st Dept 2011). However, "it is only applicable where the defendant's New York activities were purposeful and substantially related to the claim." *Id.* "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (citation and internal quotation marks omitted); *see also Paterno v Laser Spine Inst.*, 24 NY3d 370, 377 (2014) ("where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302 [a] [1]").

Pursuant to CPLR § 302 (a) (3) (ii), jurisdiction exists if five elements are satisfied:

> [f]irst, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the

> State; and fifth, that defendant derived substantial revenue from interstate or international commerce.

LaMarca v Pak-Mor Mfg. Co., 95 NY2d 210, 214 (2000).

Here, it is undisputed that ARC is a New Jersey limited liability company, with its principal place of business in New Jersey. Therefore, the court lacks general jurisdiction over it. *D&R Global Selections, S.L.*, 128 AD3d at 487.

LIG contends that the court may exercise long-arm jurisdiction over ARC, pursuant to CPLR § 302 (a) (1), because ARC engaged in a business transaction with Friedman, a New York firm, and ARC knew that the work was in connection with an audit of LIG, a New York insurance company, to be performed for submission to the NYDFS. LIG also contends that the requirements of CPLR § 302 (a) (1) are satisfied because ARC supplied the Audit Support Memo to Friedman in New York. ARC counters that "[a]ll work done by ARC . . . was performed in the State of New Jersey," that payments were received in New Jersey, and that "[a]ll communications with Friedman . . . were made by email or telephone from [the sole member of ARC, Frank J. Rau's ("Rau")] office in New Jersey."

Given that ARC, a New Jersey company, performed all work at issue in this action in New Jersey and communicated with Friedman by email and telephone from New Jersey, it cannot be said that LIG has shown "that facts 'may exist'" or that it has made a "'sufficient start'" of showing that ARC engaged in "volitional acts" to "avail[] itself of the privilege of conducting activities within [New York]." *Peterson*, 33 NY2d at 466;

HBK Master Fund, 85 AD3d at 666 (citation omitted); *D&R Global Selections, S.L*, 90 AD3d at 404 (citation and internal quotation marks omitted).

Rau's telephone calls and emails to Friedman did not "project[] him[] into" New York. *Compare Parke-Bernet Galleries, Inc. v Franklyn*, 26 N.Y.2d 13, 15, 17–18 (1970) (finding defendant in California who "receiv[ed] and transmit[ed] bids" at an auction in New York via telephone "in a very real sense, projected himself into the auction room in order to compete with the other prospective purchasers who were there."), *with Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 782, 788 (2d Cir. 1999) (finding defendant Puerto Rican firm's contacts with New York, which included telephone calls, did not subject it to jurisdiction pursuant to CPLR § 302 (a) (1)). Moreover, LIG cites no case law in support of its argument that ARC is subject to jurisdiction under CPLR § 302 (a) (1) merely because Rau knew that ARC's work was going to be used by Friedman in the audit of LIG and Friedman's opinion would be submitted to NYDFS.

While LIG highlights ARC's other contacts with New York—providing an actuarial opinion for another New York insurer; soliciting business in Rochester, New York; and ARC's sole member's affiliation with a firm located in Shelter Island, New York—such contacts were unrelated to this action and, as such, have no bearing on whether ARC is subject to long-arm jurisdiction pursuant to CPLR § 302 (a) (1). *See Paterno*, 24 NY3d at 379.

LIG also asserts that jurisdiction exists under CPLR § 302 (a) (3) (ii), which requires a showing "that defendant derived substantial revenue from interstate or

international commerce." *LaMarca*, 95 NY2d at 214. "The substantial interstate commerce revenue component . . . narrows the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but 'whose business operations are of a local character.'" *Ingraham v Carroll*, 90 NY2d 592, 599 (1997) (citation omitted).

> What constitutes 'substantial revenue' under CPLR 302 (subd. [a], par. 3, cls. [i] and [ii]) is not defined in the statute. The phrase should be construed to require comparison between a defendant's gross sales revenue from interstate or international business with total gross sales revenue, and between a defendant's net profit from interstate or international business with total net profit.

Allen v Auto Specialties Mfg. Co., 45 AD2d 331, 333 (3d Dept 1974).[2]

In his affirmation, Rau states that "[in] the past year, ARC's revenue derived from clients based in New York was about $12,000." In opposition, LIG points to ARC's

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[2] Rather than relying on percentages, a court may also assess the substantiality of interstate or international revenue by referring to the amount of sales alone. *See Allen v Canadian Gen. Elec. Co.*, 65 AD2d 39, 41–43 (3d Dept 1978) (finding $8.79 million in sales to New York "prima facie 'substantial' and demonstrate[d] a sufficient contact with this State to support jurisdiction," despite the fact that this amount was only 1% of defendant's entire sales), *affd* 50 NY2d 935 (1980); *see also* Vincent C. Alexander Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 302 at 211, (2010 ed) (citing *Candian General Elec.*, 65 AD2d 39) ("determining whether the revenue from interstate or international commerce is 'substantial', as in the case of subset (i), can be based on either a comparison of percentages or on raw dollar amounts"); Mitchell A. Lowenthal and Boaz S. Morag, *§ 2:25. Specific jurisdiction—Tortious Acts committed outside New York*, in 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS 74, 78 (Robert L. Haig ed., 4th ed. 2015) (footnote omitted) ("The inquiry is case specific, but can be measured on a relative or absolute basis.").

Here, the only sales figure in the record is ARC's claim that it received approximately $12,000 in revenue from New York clients within the year. This figure differs greatly from the $8.79 million discussed in *Candian Gen. Elec.*, and, accordingly, the Court's remaining discussion on the topic will refer to the "comparison theory," (*Canadian Gen. Elec.*, 65 AD2d at 41), set forth by the *Allen* court. 45 AD2d at 333.

website, which states that ARC provides actuarial services "throughout the United States" and lists large, out-of-state clients, including: Temple University Health Systems, Winn Dixie Corporation, Anheuser Busch, and Costco Wholesale Corporation. Szendel affirmation, exhibits A; *see also id.*, exhibit E (websites of ARC's clients, demonstrating that they are based outside of New Jersey). I have not been provided with information about ARC's other interstate or international revenues and profits or its intrastate revenues and profits. *See Allen*, 45 AD2d at 333. Therefore, at this point, LIG has not made a sufficient showing that ARC derives substantial revenue from interstate commerce pursuant to CPLR § 302 (a) (3) (ii). However, "that knowledge is peculiarly under the control of [ARC], and the failure of the plaintiff[s] to come forward with substantial proof at this time should not mean that [ARC] must prevail on the motion." *Tonelli v Chase Manhattan Bank, N.A.*, 49 AD2d 731, 731 (1st Dept 1975).

In sum, LIG has not submitted sufficient, competent information on this motion for me to rule on that ground for dismissal at this time. Accordingly, I will address ARC's alternative grounds for dismissal of the action.

ii. Malpractice (First Cause of Action)

ARC contends that the malpractice claim must be dismissed as against it, because an actuary is not a professional under New York law. LIG counters that, even if an actuary is not a professional, the complaint sufficiently pleads a common law negligence claim against ARC and the court should treat the first cause of action as such. In reply, ARC argues that if any cause of action, other than malpractice, can be gleaned from the pleadings, it is a claim for negligent misrepresentation based on the Audit Support

Memo. ARC contends that, even so, the complaint fails to state a claim for negligent misrepresentation, because the parties did not have a "privity-like relationship;" and LIG fails to allege that any statements in the Audit Support Memo were false or that LIG reasonably relied on such statements.

Under New York law, "an actuary is not a 'professional' for purposes of a malpractice cause of action." *Health Acquisition Corp. v Program Risk Mgt., Inc.*, 105 AD3d 1001, 1004 (2d Dept 2013). Nonetheless, if the complaint states a claim for negligence, a motion to dismiss should be denied. *See* CPLR 3026 ("[p]leadings shall be liberally construed"); *Health Acquisition Corp.*, 105 AD3d at 1004-1005 (finding complaint should not have been dismissed against actuary, despite inability to state claim for malpractice, as "the complaint sufficiently allege[d] a cause of action against [the actuary] on a theory of common-law negligence"); *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990) ("[t]he test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained").

"[T]he traditional common-law elements of negligence [are]: duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Lauer v City of New York*, 95 NY2d 95, 100 (2000). Whether a duty exists "is a legal issue for the courts." *Eiseman v State of New York*, 70 NY2d 175, 187 (1987).

To state a claim for negligent misrepresentation, a plaintiff must establish "the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff." *Mandarin Trading Ltd.*, 16 NY3d at 180 (citation and internal quotation marks omitted).

> [B]efore liability for negligent misrepresentation may attach in favor of a third party, there must be: (1) an awareness by the maker of the statement that the statement is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.

North Star Contr. Corp. v MTA Capital Constr. Co., 120 AD3d 1066, 1069-1070 (1st Dept 2014).

Here, the complaint fails to allege facts giving rise to a duty running from ARC to LIG. LIG alleges that Friedman hired ARC to assist it with its audit of LIGUSB, and that "ARC knew . . . that LIGUSB would rely upon the audited Statutory Financial Statements . . . and that such audited Statutory Financial Statements were being prepared for filing with the NYDFS." In essence, LIG alleges that Friedman hired ARC and that it was foreseeable that ARC's negligent performance of its work would cause injury to LIG. However, "[f]oreseeability of injury does not determine the existence of duty" (*Eiseman*, 70 NY2d at 187), nor will a contractual relationship, by itself, "give rise to tort liability in favor of a third party." *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 (2002); *cf Lawrence Dev. Corp. v Jobin Waterproofing*, 186 AD2d 634, 636 (2d Dept 1992) (finding that the underlying relationship between the third-party plaintiff and the general contractor "[was] neither contractual nor the functional equivalent of privity,"

and that, as such, the third-party plaintiff "[could not] sustain a cause of action against [the general contractor] to recover damages for pecuniary loss arising from [the general contractor]'s alleged negligent conduct").

Nor is there sufficient linking conduct to support a claim for negligent misrepresentation, as ARC prepared the Audit Support Memo for Friedman (not LIG), LIG does not allege any contact between ARC and LIG, and does not allege that LIG ever received or relied on the Audit Support Memo. *See Securities Inv. Protection Corp. v BDO Seidman*, 95 NY2d 702, 712 (2001) (finding that "there was no 'linking conduct' that put SIPC and BDO in a relationship approaching privity," where "BDO's audits were not prepared for the specific benefit of SIPC, were not sent to SIPC, were not read by SIPC"); *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 94 (1st Dept 2003) (defining "'linking conduct,'" in the context of accountant malpractice brought against third-party, as "any word or action on the part of [the accountant] directed to plaintiffs, so as to link the accountant to the nonclient" [citation and internal quotation marks omitted]).

Accordingly, ARC's motion to dismiss the first cause of action is granted for failure to state a claim.

iii. Unjust Enrichment (Sixth Cause of Action)

ARC contends that the unjust enrichment claim fails because there is no connection or relationship between ARC and LIG that could have caused reliance. LIG counters that the complaint sufficiently alleges that ARC knew that it was hired in connection with Friedman's audit of LIG, "that its compensation came indirectly from

LIG," and that it "knew, or had reason to expect[,] that Friedman would rely on its conclusions in issuing and audit opinion, and that LIG would be relying on that opinion."

To state a claim for unjust enrichment,

> a plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered. . . . Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated.

Mandarin Trading Ltd., 16 NY3d at 182 (internal quotation marks and citations omitted).

Here, LIG alleges that Friedman hired ARC, that ARC provided its Audit Support Memo to Friedman, and that Friedman paid ARC for its services, allegedly "out of the fees that LIG paid to Friedman." There are no allegations of any direct contacts between LIG and ARC, or that LIG ever received or relied on the Audit Support Memo. As "[t]here are no indicia of an enrichment that was unjust where the pleadings fail to indicate a relationship between the parties that could have caused reliance or inducement," dismissal of the unjust enrichment claim is proper. *Id.* at 182; *see id.* at 182-183 ("[w]ithout sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal"). Therefore, ARC's motion to dismiss the sixth cause of action is also granted for failure to state a claim.

In accordance with the foregoing, it is

ORDERED that the motion to dismiss of defendant Friedman LLP (motion sequence 001) is granted to the extent of dismissing the second, third, fourth, fifth and sixth causes of action as against it, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendant Actuarial Risk Consultants, LLC (motion sequence number 002) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against this defendant; and it is further

ORDERED that the action is severed and continued against Friedman LLP; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Actuarial Risk Consultants, LLC shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendant Friedman LLP is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDRED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on April 13, 2016, at 2:15 PM.

This constitutes the decision and order of the Court.

Dated: March 10, 2016

ENTER:

HON. SALIANN SCARPULLA
J.S.C.