

<b>Exeter Law Group LLP v Wong</b>
2016 NY Slip Op 32425(U)
December 9, 2016
Supreme Court, New York County
Docket Number: 161667/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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THE EXETER LAW GROUP LLP,

Plaintiff-Counterclaim Defendant,

- and -

MITCHELL WONG, ZHEJUN "SUSAN" TAN, and  
LAW OFFICE OF Z. TAN PLLC,

Counterclaim Defendants.

-against-

IMMORTALANA INC. and ROBIN FARIAS-EISNER,  
SALVAREGEN, INC., and KELLY DAY,

Defendants-Counterclaim Plaintiffs.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff-counterclaim defendant The Exeter Law Group LLP ("Exeter") brings suit to collect legal fees allegedly owed to it by Defendants Immortalana, Inc. ("Immortalana"), Robin Farias-Eisner ("Eisner"), Salvaregen, Inc. ("Salvaregen"), and Kelly Day ("Day").

Exeter commenced this action against Immortalana and Eisner by filing a Complaint on November 24, 2014 asserting six causes of action, including breach of contract (first cause of action), an account stated (second cause of action), unjust enrichment (third cause of action), quantum meruit (fourth cause of action), fraud (fifth cause of action), and tortious interference with contractual relations (sixth cause of action).

On January 15, 2015, Immortalana and Eisner moved to dismiss portions of the complaint (Mot. Seq. #1) and, on June 30, 2015, the Court dismissed several of

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**DECISION  
and ORDER**

Mot. Seq. 004

Exeter's causes of action, including its second cause of action for an account stated, and directed Exeter to file an Amended Complaint.

Exeter filed its Amended Complaint on July 20, 2015. The Amended Complaint is brought against Immortalana, Eisner, Salvaragen, and Day. Day and Eisner are alleged to be individual defendants, and Immortalana and Salvaregen, two corporations in which Day and Eisner held shares.

Exeter claims that for approximately three years between 2011 and 2014, Day and Eisner, the "Clients," engaged Exeter on two transactions. Immortalana and Salvaregen are two corporations in which Day and Eisner held shares. Exeter claims, "After uncovering irregularities and conflicts with the transactions, the Exeter Firm withdrew from the engagements." Day and Eisner refused to pay the outstanding balance of Exeter's invoices and Exeter commenced this action to recover the outstanding balance.

Day, Eisner, Immortalana and Salvaregen asserted six counterclaims against Exeter for: (1) legal malpractice; (2) breach of fiduciary duty; (3) fraud; (4) violation of GBL 349; (5) fraudulent inducement; and (6) breach of contract. Additionally, Day, Eisner, Immortalana and Salvaregen asserted "counterclaims" against Mitchell Wong ("Wong") and Zhejun "Susan" Tan ("Ms. Tan" or "Tan"). Day, Eisner, Immortalana and Salvaregen asserted a "counterclaim" against the Law Offices of Z. Tan PLLC (the "Tan Firm"), for malpractice.<sup>1</sup>

Mot. Seq. 4

Exeter, Wong, and Ms. Tan (collectively, "Exeter Parties") move for an order pursuant to CPLR 3211(a)(1), (2), (3), and (7), dismissing the counterclaims and cross claims asserted against them by Day, Eisner, Immortalana and Salvaregen. The counterclaims are for legal malpractice, breach of fiduciary, common law fraud, statutory fraud and breach of contract.<sup>2</sup>

Day, Eisner, Immortalana and Salvaregen allege that Wong, upon information and belief, was "an employee, principal, owner, agent, and/or partner of Exeter" who acted on Exeter's behalf. Tan is also alleged to be "an employee,

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<sup>1</sup> Day, Eisner, Immortalana and Salvaregen improperly label their third party claims against Wong, Ms. Tan, and the Tan Firm as "counterclaims."

<sup>2</sup> The Tan Firm separately moves to dismiss the malpractice claim asserted against it. (See Motion Seq. 5).

principal, owner, agent, and/or partner of Exeter” who acted on Exeter’s behalf.” Tan and/or Tan Firm are alleged to be “an independent contractor providing services to Exeter.”

#### First Counterclaim for Legal Malpractice

The first counterclaim, asserting legal malpractice, alleges, “Exeter, Wong, Tan, and/or Tan Firm provided legal advice, services, and counseling to Counterclaim Plaintiffs [Day, Eisner, Immortalana and Salvaragen] relating to Immortalana and Salvaragen relating to corporate structuring and formation,” “each had an independent duty to counsel Immortalana and Salvaragen along with Day and Farias-Eisner in their capacity as individuals owning interests in each entity and as officers of each entity,” and “participated in, managed, supervised, directed, and controlled the legal representation of the corporate structuring and formation of Immortalana and Salvaragen, including taking steps to create each entity.” It further alleges:

164. Exeter, Wong, Tan and/or Tan Firm, their employees, agents, representatives and/or servants were careless, reckless, and negligent, and committed professional legal malpractice in failing to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal profession in relation to legal services rendered for and on behalf of Counterclaim Plaintiffs [Day, Eisner, Immortalana and Salvaregen], including: their failure to properly advise, counsel, and structure Immortalana and Salvaragen in a manner that fit their corporate purposes and allowed for them to avoid unnecessary taxation and taxable events; their advice on the type of structure and business entities in which to conduct their business and investments given the nature of their business and the investments they intended to and did make; their failure to properly advise Counterclaim Plaintiffs [Day, Eisner, Immortalana and Salvaregen] on how to structure the purchase of assets; their negligent representation in communications with UCLA regarding international patents; and their negligent representation and counseling to Day and Farias-Eisner regarding the structures of Immortalana and Salvaragen in a manner that effected their ownership interests and values in the entities.

165. The acts and/or omissions of Exeter, Wong, Tan, and/or Tan Firm were due to the carelessness and professional negligence of the Counterclaim

Defendants [Exeter, Wong, Ms. Tan, and/or Tan Firm], their employees, agents, representatives, and/or servants.

166. By reason of the above, Counterclaim Plaintiffs [Day, Eisner, Immortalana and Salvaragen] suffered actual ascertainable damages in the attorney's fees paid to new counsel, other professional fees, costs, and other damages for taxable events likely to occur.

In seeking to dismiss the legal malpractice claim, the Exeter Parties argue that Day and Eisner lack standing to bring the legal malpractice claim "because as shareholders they had no standing to bring a direct action for injuries allegedly suffered by their corporations." They further argue that Salvaragen and Immortalana lack standing to bring the claim because neither entity engaged Exeter or Wong, and no privity exists between them.

Day, Eisner, Immortalana and Salvaregen, in turn, argue Day and Eisner "do not bring these claims as shareholders, but rather as individuals who were harmed when they relied on negligent representation by [Exeter and Wong] in structuring and forming their business ventures." Day, Eisner, Immortalana and Salvaregen argue that Salvaragen and Immortalana have standing to bring the legal malpractice claim against the Exeter Parties because the Exeter Parties repeatedly undertook specific tasks on behalf of the corporate entities as reflected in the invoices and such services established an attorney-client relationship. Day, Eisner, Immortalana and Salvaregen also argue:

Furthermore, Exeter's Amended Complaint asserts causes of action for unjust enrichment and quantum meruit against the Corporate Counterclaim Plaintiffs: causes of action which by their very definitions are premised on the provision of services by Exeter. It simply defies belief and logic that Exeter would attempt to recoup payment for the provision of legal services, yet deny that those services established an attorney-client relationship or that Corporate Counterclaim Plaintiffs could hold Counterclaim Defendants liable for malpractice in the provision of those very services.

"To determine whether an attorney-client relationship exists, a court must consider the parties' actions." (*Pellegrino v Oppenheimer & Co., Inc.*, 49 A.D. 3d 94, 99 [1st Dept 2008] [citations omitted]). "[A]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task." (*Id.*). While the existence of an attorney-client relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship

based on his or her own beliefs or actions. (*Id.*). See *Jane St. Co. v Rosenberg & Estis, P.C.*, 192 A.D. 2d 451, 451 [1st Dept 1993] (holding “[t]here is nothing in the record to indicate that defendant law firm either affirmatively led plaintiff to believe it was acting on plaintiff’s behalf or knowingly allowed plaintiff to proceed under this misconception.”).

In order to defeat a motion to dismiss, a party must plead facts showing the privity of an attorney-client relationship, or a relationship so close as to approach privity. (*Cal. Pub. Employees Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434 [2000] [affirming dismissal of legal malpractice claim for failure to plead actual privity or “a relationship so close as to approach that of privity”]). To show “a relationship so close as to approach that of privity,” or “near privity,” “[t]he evidence must demonstrate “(1) an awareness by the maker of the statement that it 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.” *Cal. Pub. Employees*, 95 N.Y.2d at 434. “To show ‘near privity,’ a plaintiff must allege that the attorney was aware that its services were used for a specific purpose, that the plaintiff relied upon those services, and that the attorney demonstrated an understanding of the plaintiff’s reliance.” *Candela Entertainment, Inc. v. Davis & Gilbert, LLP*, 39 Misc 3d 1232(A) [Sup Ct 2013].

Here, to the extent that Day and Eisner bring claims as individuals who were harmed when they relied on alleged negligent representation by Exeter and Wong in structuring and forming their business ventures, they have stated a claim for legal malpractice. With respect to Immortalana and Salvaregen’s claims for legal malpractice, the lack of a retainer agreement between them and Exeter is not dispositive on the issue of whether there was an attorney-client relationship. Furthermore, Exeter’s Amended Complaint asserts causes of action for unjust enrichment and quantum meruit, seeking to recover for legal services they provided. Accordingly, accepting all facts as alleged in the pleading to be true and according the nonmoving party to the benefit of every possible inference, the first counterclaim for legal malpractice stands.<sup>3</sup>

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<sup>3</sup> Movants do not seek to dismiss the legal malpractice claim on the grounds that it fails to state a claim for legal malpractice.

## Second Counterclaim for Breach of Fiduciary Duty

A client can state a claim for breach of fiduciary duty against an attorney by alleging “the existence of a fiduciary relationship, misconduct by the defendant, and damages that were caused by the defendant’s misconduct.” (*Harbor Consultants Ltd. v Roth*, 907 N.Y.S.2d 100, 100 [N.Y. Sup. Ct. 2010]). “As a fiduciary, an attorney is charged with a high degree of undivided loyalty to his [or her] client.” (*Harbor Consultants*, 907 N.Y.S.2d at 100).

The second counterclaim alleges that Exeter and Wong, as the attorney of Day, Eisner, Immortalana and Salvaragen, “owed them a duty of undivided and undiluted loyalty” and “were required to keep certain information privileged and confidential.” It alleges that Exeter and Wong breached their fiduciary duty to them “by disclosing confidential and privileged information with A. Richard Golub (“Golub”), a known associate of Immortalana’s principals . . . for the sole purpose of coercing one of Immortalana’s owners, Kelly Day, to provide payment to Exeter.” More specifically, it alleges in April 2014, at Wong’s “instigat[ing], “Wong and Golub contacted Day by telephone” at which point “Golub began screaming and reprimanding Day for not paying Exeter and Wong” and “shouted at Day in an aggressive tone that Day’s ‘partners’ were ‘screwing her’ and that the company they had formed was a sham.” It alleges that “[t]he information Golub referred to in the telephone call with Day was information Wong and Exeter obtained while representing Counterclaim Plaintiffs” which Wong and Exeter disclosed to Golub “in order to coerce payment for monies they believe are owed to them.”<sup>4</sup>

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<sup>4</sup> The second counterclaim alleges, “Exeter and Wong further breached their fiduciary duty to Counterclaim Plaintiffs by disclosing confidential and privileged information, provided to Exeter and Wong during the scope of their representation of the Counterclaim Plaintiffs, in public records of this matter.” Specifically, it alleges, “Exeter and Wong filed the Complaint in this action and included confidential and privileged information in the filings,” “filed those documents knowing that they would be publically available via the internet,” “filed those documents in breach of their obligation to protect confidential and privileged information of the Counterclaim Plaintiffs,” “[t]he information referred to in the publically filed documents was obtained by Exeter and Wong while representing Counterclaim Plaintiffs,” and disclosed “in violation of their fiduciary duty in order to coerce payment for monies they believe are owed to them.”

Exeter and Wong seek to dismiss the second counterclaim under CPLR 3211(a)(1) on the grounds that the engagement letter signed by the Day and Eisner in 2012 explicitly authorizes Exeter to confer with Mr. Golub. Here, the 2012 engagement, which is signed by Eisner and Day, letter provides, “Additionally, I will be consulting with Aaron Richard Golub, Esq., from the law office of Aaron Richard Golub, Esquire, P.C., whom You [Day and Eisner] already know.” While the 2012 engagement letter may permit Wong to consult with Mr. Golub on certain matters, it does not flatly contradict Eisner and Day’s allegations that Mr. Golub may have disclosed confidential communications that Day and Eisner did not authorize. Furthermore, the alleged coercive nature of the communication may rise to the level of a breach of a fiduciary duty.

Alternatively, Exeter and Wong seek to dismiss the second counterclaim under CPLR 3211(a)(7) on the grounds that New York Rules of Professional Conduct (“NYRPC”) 1.6(b)(4) and 1.6(b)(5)(ii) authorized Exeter and Wong to reveal client confidences in consulting with other lawyers. NYRPC 1.6(b) provides, in relevant part, that a lawyer “may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: (4) *to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm; \*\*\* [or] (5)(i)(ii) to establish or collect a fee . . .*” (*emphasis added*). NYRPC 1.6, Comment 14, states “[p]aragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6).” Comment 14 to NYRPC 1.6 further states that “[b]efore making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure.” Here, while Exeter and Wong may have a defense based on NYRPC 1.6, it does not provide a basis to dismiss the Complaint based on a failure to state a claim at this juncture.

Lastly, Exeter and Wong argues that the second counterclaim fails to state a claim because “[t]here is no private right of action for a violation of the Code of Professional Responsibility” under controlling First Department law.” “The violation of a disciplinary rule does not, without more, generate a cause of action.” (*Schwartz v. Olshan Grundman Frome & Rosenzweig*, 302 A.D.2d 193, 199 [1st Dep’t 2003]). However, a claim for breach of fiduciary duty can be stated where the defendant lawyer is alleged to have used confidential information to disadvantage a former client even though it was also a violation of disciplinary rules. (*Sharbat v Law Offs. of Michael B. Wolk, P.C.*, 2011 WL 197825 (N.Y. Sup. Ct. Jan. 12, 2011).



Accordingly, Movants have failed to establish a basis for dismissal of the second counterclaim for breach of fiduciary, and the claim stands.

### Third Counterclaim for Fraud and Fifth Counterclaim for Fraudulent Inducement

The third counterclaim alleges that Exeter and Wong defrauded Eisner and Day by listing attorneys (Marvin Todd and Magdale Labbe Henke) and a consultant (Fred Cohen) on Exeter's website whom, Eisner and Day allege, were not associated with Exeter and by misrepresenting the size of Exeter and the scope of services that Exeter could provide. Exeter and Wong allege, "If not for the false representations by Exeter and Wong, Counterclaim Plaintiffs [Day, Eisner, Immortalana and Salvaregen] would not have retained Exeter's services and would not have believed the rates charged were fair."

The fifth counterclaim alleges that Exeter and Wong fraudulently induced Eisner and Day to engage Exeter. It alleges, "Exeter and Wong, prior to and while providing services to Farias-Eisner and Immortalana, made false representations of material facts relating to the scope, size, and services provided by them by representing various attorneys on the Website who were not in fact affiliated with, employed by, or associated with Exeter and Wong." It further alleges "Exeter and Wong knew those representations to be untrue at the time they were made" "made those false representations with the intention of inducing reliance and forbearance from further inquiry by Counterclaim Plaintiffs [Day, Eisner, Immortalana and Salvaregen]," and Day, Eisner, Immortalana and Salvaregen "justifiably relied upon Exeter's and Wong's false representations in determining whether to use Exeter's and Wong's services and in determining whether Exeter's and Wong's experience, capabilities, services and staffing justified the rate of fees charged for such services."

Exeter and Wong seek to dismiss the third and fifth counterclaims on the grounds any claims of actual reliance on alleged misrepresentations that certain individuals were affiliated with Exeter is refuted by the engagement letters which specify those who will be working on their claims. Exeter and Wong also argue that any reliance without investigation was not reasonable as a matter of law in view of disclaimers on Exeter's website that it was a "virtual law firm" and not a "traditionally structured law firm." In addition, Exeter and Wong argue that the

damages sought are not cognizable because Defendants cannot seek lost profits or the benefits of a hypothetical alternative agreement.

In a claim for fraudulent misrepresentation, a plaintiff must allege: 1) a misrepresentation or a material omission of fact; 2) which was false and known to be false by defendant; 3) made for the purpose of inducing the other party to rely upon it; 4) justifiable reliance of the other party on the misrepresentation or material omission; and, 5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 [2011]). CPLR § 3016 requires particularity in the pleading of a fraud cause of action. (CPLR § 3016[b]).

Here, Day and Eisner signed an engagement letter in 2011 and 2012 which specified the services that were being rendered and the attorneys and individuals who would be working on the subject matters.

The 2011 engagement letter provides, in relevant part:

#### CONTACT AT THE FIRM

I [Mitchell Wong] will be Your primary contact at Exeter. At this time, it is anticipated that I alone will work with You on this matter. I may also consult Your existing lawyers, if any. Other attorneys and paralegals may also perform work in connection with Your representation and Exeter reserves the right to appropriately staff the representation.

The 2012 engagement letter provides, in relevant part:

#### CONTACT AT THE FIRM

I [Mitchell Wong] will be Your primary contact at Exeter. As we discussed, I will identify and engage outside counsel.

The attorney whom I expect to engage for this purpose is Lorena Siciliano, Esq., of Hoffman Sabban & Watenmaker, APC, 10880 Wilshire Blvd. Suite 2200, Los Angeles, CA 90024. Based on our research, the firm of Hoffman Sabban & Watenmaker, APC, is a Los Angeles law firm that specializes in the area of California trusts and estates law. According to our research, Ms. Siciliano sub-specializes in the taxation of trusts and estates. Biographical material

on Ms. Siciliano and her firm are attached behind Tab B. Prior to this engagement, neither Ms. Siciliano nor her firm has had any contact with anyone at my Firm. However, I wish to disclose that my family may require the services of her firm for an unrelated matter in the near future.

Additionally, I will be consulting with Aaron Richard Golub, Esq., from the law office of Aaron Richard Golub, Esquire, P.C., whom You already know. Other attorneys and paralegals may also perform work in connection with Your representation and Exeter reserves the right to appropriately staff the representation, subject to the special confidentiality instructions for this engagement.

Here, the subject engagement letters flatly contradict any claims of actual reliance on the alleged misrepresentations. Accordingly, the third and fifth counterclaims are dismissed.

#### Fourth Counterclaim – Violations of GBL 349

The fourth counterclaim alleges that Exeter's website violated GBL 349. The fourth counterclaim alleges, "Exeter and Wong engaged in a material deceptive or misleading practice aimed at consumers by making false representations on Exeter's website." It alleges that Exeter made certain misrepresentations on its website concerning its size and the scope of services. Specifically, it alleges that Exeter represented that certain lawyers (i.e. Tan, Marvin David, Fred Cohen and Magdale Labbe Henke) had certain affiliations with Exeter when they did not. It is also alleges that Exeter represented that it "provided 'a full spectrum of services' including corporate law, employment, labor & global immigration, finance law, information technology, intellectual property, litigation and dispute resolution, PRC (China) Law, real estate, and taxation," which was also false. Defendants allege that Exeter's "representations were made with the intent to portray Exeter as a larger law firm in order to justify charging clients at fee rates that would not otherwise be reasonable," "were deceptive to consumers, including the Counterclaim Plaintiffs," "were misleading to consumers, including the Counterclaim Plaintiffs," "were material to consumers, including Counterclaim Plaintiffs, in determining whether to retain Exeter's services," "were made to induce consumers, including Counterclaim Plaintiffs, to retain Exeter's services and pay Exeter's fees at its inflated rates," and "were made with Wong's knowledge and approval, and at Wong's direction." Defendants allege that they

“considered the size and scope of the firm and relied upon the representations on the Website,” “justifiably and reasonably relied upon the false representations in using Exeter’s services and were justified in believing Exeter’s rates were reasonable,” and “[i]f not for the false representations by Exeter and Wong, Counterclaim Plaintiffs would not have retained Exeter’s services and would not have believed the rates charged were fair.” The fourth counterclaim alleges, “Counterclaim Plaintiffs were damaged as a result of Exeter’s and Wong’s deceptive practices in that Exeter and Wong were able to claim higher hourly rates than were justified by the size, scope, and experience of Exeter.”

Exeter and Wong contend that the GBL 349 claim should be dismissed pursuant to CPLR 3211(a)(7) because GBL 349 applies only to “consumer transactions” and not to contracts for individual performance, such as engagements for attorney services.

Section 349 of the GBL is a consumer protection statute that prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York State. GBL § 349(a). The statute is intended to “empower consumers; to even the playing field in their disputes with better funded and superiorly situated fraudulent businesses.” *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 148 (2d Dept. 1995).

To state a claim under GBL § 349, a plaintiff must allege that (1) the deceptive act or practice was consumer-oriented; (2) the deceptive act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result. *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 205-6 (2004) (“[A] plaintiff must allege both a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff”). The threshold requirement of consumer-oriented conduct is met by proof that “the acts or practices have a broader impact on the consumer at large” in that they are “directed to consumers” or “potentially affect similarly situated consumers.” *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25-27 (1995). “Private contract disputes, unique to the parties,” do not fall within the ambit of the statute. *Id.* at 25. Nor do “single shot transaction[s] involving complex arrangements, knowledgeable and experienced parties and large sums of money.” *Genesco Entm’t, a Div. of Lymutt Indus., Inc. v. Koch*, 593 F. Supp. 743, 752 (S.D.N.Y. 1984) (rental of Shea Stadium was a “single shot

transaction,” not a typical consumer transaction, and therefore not covered by section 349).

Here, the GBL 349 claim arises out of the provision of legal services specific to Day and Eisner, “[p]rivate contract disputes, unique to the parties” and does not fall within the ambit of the statute. Furthermore, as discussed above, Day and Eisner were not injured as a result of the website. Indeed, the engagement letters specifically narrowed the representation by the firm to Mr. Wong.

#### Sixth Counterclaim for Breach of Contract

Upon review of the four corners of the pleading, the sixth counterclaim states a claim for breach of contract.

Wherefore, it is hereby

ORDERED that the Exeter Parties’ motion to dismiss is only granted to the extent that the third, fifth, and fourth counterclaims are dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: DECEMBER 9 2016

**DEC 09 2016**

  
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EILEEN A. RAKOWER, J.S.C.