Labor Law 240 Risk Mgt., LLC v CRC Ins. Servs., Inc.
2018 NY Slip Op 30859(U)
May 7, 2018
Supreme Court, New York County
Docket Number: 654564/2017
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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LABOR LAW 240 RISK MANAGEMENT, LLC and SHERRY & SONS, INC.,

Plaintiffs,

-against-

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CRC INSURANCE SERVICES, INC., AMTRUST NORTH AMERICA INC., AMTRUST INTERNATIONAL UNDERWRITERS LTD., AMTRUST FINANCIAL SERVICES, INC., INTERNATIONAL SPECIALTY BROKERS, LTD., and ALEX KULLMAN,

Defendants.

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Bransten, J.:

Motion sequence Nos. 001, 002, and 003 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Defendants AmTrust North America, Inc. (AmTrust North Am.), AmTrust International Underwriters Ltd (AmTrust Intl.), and AmTrust Financial Services, Inc. (AmTrust Financial) move for an order, pursuant to CPLR 3211 (a) (7), to dismiss the complaint against them for failure to state a claim (motion seq. No. 001). Defendants CRC Insurance Services, Inc. (CRC) and Alex Kullman move to dismiss the complaint, pursuant to CPLR 3211 (a) (5) and (7), based on the statute of frauds and for failure to state a claim (motion seq. No. 002). Defendant International Specialty Brokers, Ltd. ("ISBL") initially moved to dismiss (motion seq. No. 003), but then settled with plaintiffs and withdrew its motion.

I. Background

In 2013, nonparty Mark Sherry, an insurance broker and founder of plaintiff Sherry & Sons, Inc. ("Sherry & Sons"), developed an insurance program offering New York construction contractors affordable coverage for gravity-related injuries sustained by construction workers, with premiums that were significantly lower than those available in the prevailing markets (the "Program"). *Affirmation of Andrew J. Costigan*, Exhibit 1; *see also,* Amended Complaint, ¶¶ 2, 24, 28. In seeking an insurance carrier to issue the master policy to anchor the Program, Sherry enlisted the help of a long-time friend and business associate, defendant Kullman, who worked for defendant CRC and had a previous business relationship with, and an ownership interest in, defendant ISBL. *Id.*, ¶¶ 29-31.

In 2016, AmTrust North Am. agreed to be the insurance carrier of record for the Program, assuring Sherry that it would participate in the Program for five years. *Id.*, ¶ 29.

On January 1, 2016, AmTrust Intl. and AmTrust North Am. (collectively, "AmTrust") entered into a Managing Producer Agreement ("MPA") with CRC to have CRC act as the manager of the Program. *Id.*, ¶ 36; *see* also, *Costigan Affirmation,* Exhibit 2. Under the MPA, AmTrust appointed CRC, as Producer, on a non-exclusive basis, to market, solicit, underwrite, bind, execute and service the policies under the Program on behalf of AmTrust. *See, Costigan Affirmation,* Exhibit 2 at 1). The MPA included an Amendment No. 1 by which AmTrust approved of CRC's delegation of certain of its responsibilities to plaintiff Labor Law 240 Risk Management ("LL240RM") and defendant ISBL to be performed under

the direction and supervision of CRC. *Amended Complaint*, ¶ 39; *See also*, MPA, Amendment No. 1.

Amendment No. 1 also provided that if LL240RM or ISBL failed to perform the functions as required by the MPA, AmTrust could terminate the MPA with immediate effect "by giving written notice to [CRC] by overnight delivery or certified mail return receipt requested". *MPA*, Amendment No. 1, § 3. Plaintiffs LL240RM and Sherry & Sons provided their underwriting guidelines for the Program, which was included as an addendum to the MPA. *Amended Complaint*, ¶ 37. Section 4 of the MPA Addendum provided that CRC was to receive certain program fees, initial commissions, and profit sharing fees, the latter of which were not payable to CRC until after three years of the Program. *Costigan Affirmation*, Exhibit 2.

On January 6, 2016, CRC and LL240RM entered into a separate agreement, titled Underwriting Management Services Agreement ("UMSA"), which set forth the services that LL240RM was to perform in connection with the Program. In the UMSA, LL240RM was referred to as "Manager," and its relationship with CRC was that of an independent contractor. *UMSA* § 1 at 2. The UMSA included a termination provision providing that the agreement could be terminated under certain specified circumstances, including in the event of termination of the MPA. *Id.*, UMSA § 9 at 6.

CRC, ISBL, and LL240RM entered into an oral fee-sharing agreement, under which CRC would share with LL240RM and ISBL all program fees that AmTrust paid to CRC under the MPA ("Fee Sharing Agreement"). *Amended Complaint*, ¶ 45. CRC and Sherry &

Sons also entered into a brokerage agreement, whereby Sherry & Sons would be paid 10 percent of the premiums for insurance policies it originated ("Brokerage Agreement"). *Id.*, ¶¶ 45, 63.

Shortly after the MPA and UMSA were executed, on January 15, 2016, Sherry, on behalf of Sherry & Sons, entered into a Non-Compete Agreement with AmTrust. *Id.*, ¶ 48. This agreement prohibited Sherry & Sons, during the term of the MPA and for 24 months after, from representing or contracting with any other insurer, directly or indirectly, for any business that could have been eligible to be written or placed with AmTrust under the MPA, except for eight specific customer accounts previously serviced by Sherry & Sons. *Id.*.

From January 2016 through November 2016, plaintiff LL240RM performed its obligations under the UMSA, and CRC paid for such performance under that agreement and under the Fee Sharing Agreement. *Id.*, ¶ 45. Thus, CRC paid Sherry & Sons, as directed by LL240RM, four percent of the premium commissions which it received in the form of Program fees under the MPA, totaling $229,180. *Id.* During that same period, CRC paid Sherry & Sons $143,918.36 as commissions under the Brokerage Agreement *Id.*, ¶ 64.

On September 29, 2016, AmTrust performed an audit of LL240RM's books and records, but did not produce a report of its findings. *Id.*, ¶ 51. About one month later, AmTrust prohibited Sherry & Sons and LL240RM from participating in the underwriting process for the Program, and all payments ceased. *Id.*, ¶ 53. On November 21, 2016, CRC sent an email to its employees, with a copy to ISBL, notifying them that, effective immediately, Sherry and LL240 RM were no longer involved with the Program. *Id.*, ¶ 54.

From November through December 2016, the underlying master policy remained in place, and AmTrust and CRC continued to write coverage for eligible trade contractors without the involvement of plaintiffs. *Id.* Thereafter, AmTrust failed to renew the master policy at the end of 2016, and, instead, issued individual policies under the Program. *Id.*, ¶¶ 53, 67-68.

II. Procedural History

In June 2017, plaintiffs commenced this action, alleging that defendants unilaterally excluded them from the Program while continuing to commercially exploit the Program, and use plaintiffs' underwriting forms and guidelines, without paying plaintiffs any continuing commissions and/or profit sharing payments. The Amended Complaint asserts 11 causes of action, including: (1) breach of the MPA against AmTrust; (2) breach of the Brokerage Agreement against CRC; (3) breach of the agreement with ISBL; (4 & 5) breach and anticipatory breach of the UMSA and the Fee Sharing Agreement against CRC; (6) tortious interference with the UMSA and Fee Sharing Agreement against AmTrust, Kullman, and ISBL; (7) tortious interference with the MPA against CRC, Kullman, and ISBL; (8) unfair competition against all defendants; (9) breach of the covenant of good faith against AmTrust, CRC, and ISBL; (10) unjust enrichment against all defendants; and (11) in quantum meruit against all defendants.

AmTrust urges that the complaint be dismissed against them on a number of grounds. They urge that plaintiffs' first claim, for breach of the MPA, is insufficient because LL240RM was not an intended third-party beneficiary of the MPA, and it fails to plead a breach. AmTrust argues that plaintiffs' tortious interference claim (sixth cause of action) is insufficient, because it fails to identify any breach of the agreements, and AmTrust could terminate the MPA at will.

Further, AmTrust asserts that it had an economic interest defense to such claim. AmTrust urges that the unfair competition claim fails, because the contracts did not prohibit AmTrust from running the Program without plaintiffs, and Sherry's alleged proprietary interest in the Program does not qualify as a trade secret. They argue that the breach of the covenant of good faith implied in the MPA should be dismissed, because plaintiffs were not parties to the MPA. AmTrust further asserts that the unjust enrichment and quantum meruit claims should be dismissed, as duplicative. Finally, AmTrust maintains that all claims against AmTrust Financial should be dismissed, because it was not a party to the transactions.

Defendants CRC and Kullman argue that plaintiffs concede they were compensated fully for the services they provided, and, as the contracts demonstrate, they do not have any perpetual right to future participation in the Program. They assert that plaintiffs fail to point to any provision in the UMSA or the purported Fee Sharing Agreement that was breached. They contend that there was no anticipatory breach, because the payment of any profit sharing fees is not due until three years after the first Program year, which would be in 2019. Moreover, they urge that recovery under the Fee Sharing Agreement is barred by the statute

of frauds. They contend that the tortious interference with the MPA claim is insufficient, because they are parties to the MPA, and there are no allegations to support Kullman's individual liability. They maintain that the breach of covenant claim is duplicative of the unsustainable breach of contract claim. Finally, they urge that the unjust enrichment and quantum merit claims are barred by the contracts covering the identical subject matter.

III. Discussion

For the following reasons, the AmTrust Defendants' motion to dismiss is granted, and all claims against them are dismissed. The CRC and Kullman Defendants' motion to dismiss is granted, and all claims against them are dismissed.

On a motion to dismiss, pursuant to CPLR 3211, the court must afford the pleading a liberal construction, accept the facts alleged in the complaint as true, and accord the plaintiffs the benefit of every possible favorable inference. *Leon v Martinez,* 84 NY2d 83, 87–88 (1994). Where a factual question is presented, and the issue cannot be resolved as a matter of law, the motion to dismiss must be denied. *See Condren, Walker & Co., Inc. v Wolf,* 19 AD3d 151, 152 (1st Dept 2005). "[F]actual 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 dismissal is sought based on documentary evidence, the motion will succeed "only if the documentary evidence submitted conclusively

establishes a defense to the asserted claims as a matter of law". *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 458 (2009), *affd* 16 NY3d 173 (2011), citing *Leon v Martinez*, 84 NY2d at 88.

A. Claims against AmTrust Financial

First, the claims against AmTrust Financial are dismissed, in their entirety, as AmTrust Financial did not have any connection with the transactions at issue. The Amended Complaint refers to AmTrust Financial in only two paragraphs– paragraphs 48 and 80. In paragraph 48, plaintiffs allege that nonparty Sherry entered into the Non-Compete Agreement with AmTrust Financial. *Amended Complaint,* ¶ 48. The Non-Compete Agreement annexed to the complaint, however, clearly shows that the agreement, which is on AmTrust North Am. letterhead, is between AmTrust North Am. and Sherry & Sons. See, *Castigan Affirmation*, Exhibit 6.

In the agreement, AmTrust North Am. is defined as "AmTrust North America, Inc. on behalf of AmTrust International Underwriters Limited". *Id.* The fact that the signature block indicates that the person signing on behalf of AmTrust North Am., was "Julian Griffiths, AmTrust Financial Services, Inc., Chief Underwriting Officer–Casualty & Other Lines," and that the letterhead indicates that AmTrust North Am. is "an AmTrust Financial Company," does not make AmTrust Financial a party to the agreement. In any event, that agreement is not mentioned again in the complaint, and is not a basis for plaintiffs' claims for relief.

In paragraph 80, plaintiffs allege that "[t]he acceptance, use and commercial exploitation by Defendants AmTrust International and AmTrust Financial of the delegated services performed by LL240RM under the MPA confirmed AmTrust North America's contractual obligations to LL240RM under the MPA". *Amended Complaint,* ¶80. These allegations are part of the first cause of action which is asserted only against AmTrust North Am. and AmTrust Intl., not AmTrust Financial. The reference to AmTrust Financial appears to be a mistake. Plaintiffs' opposition, implying that AmTrust does not maintain separate corporate formalities or entities, and that they should be entitled to discovery on this issue, is rejected. Plaintiffs have failed to plead any basis for piercing the corporate veil. Thus, all claims against AmTrust Financial are dismissed.

B. Breach of Contract Claims against Am Trust North Am.

The first cause of action against AmTrust North Am. and AmTrust Intl. for breach of the MPA also is dismissed.

To state a claim for breach of contract, LL240RM must allege the existence of a contract, the plaintiffs' performance thereunder, the defendants' breach, and damages resulting from the breach. *See Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d 515, 515 (1st Dept 2016); *Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-446 (1st Dept 2016); *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010).

Acknowledging it is not a party to the MPA, plaintiff LL240RM contends it may nevertheless pursue a breach of contract claim against AmTrust as a third-party beneficiary of the MPA, because CRC delegated to LL240RM the performance of certain of CRC's obligations under the MPA.

"The third-party beneficiary concept arises from the notion that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay or perform". *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 43 (1985) (internal quotation marks and citations omitted). To assert a claim as a third-party beneficiary, the plaintiff must establish: (1) a valid and binding contract between other parties; (2) that the contract was intended for the plaintiff's benefit; and (3) the benefit was immediate, not incidental, indicating that the parties to the contract assumed a duty to compensate plaintiff if the benefit is lost. *State of Cal. Pub. Employees' Retirement Sys. v. Shearman & Sterling*, 95 NY2d 427, 434-435 (2000).

Under the standards in the Restatement (Second) of Contracts for determining claims of third-party rights, the plaintiff must be an intended, not incidental, beneficiary, such that performance of the promise satisfies the obligation of the promisee to pay money to the third-party beneficiary, or the circumstances show that "the promisee intends to give the beneficiary the benefit of the promised performance". *LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 (1st Dept 2001); see also, *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d at 44 (internal quotation marks and citation omitted); *see Condren, Walker & Co., Inc. v Wolf*, 19 AD3d at 152. It must show that "no one other than the third

party can recover if the promisor breaches the contract," or that the contractual language "clearly evidences an intent to permit enforcement by the third party". *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d at 45. The "parties' intent to benefit the third party must be apparent from the face of the contract", and their manifestation of intent must be sufficient to make the beneficiary's reliance probable and reasonable. *LaSalle Natl. Bank v Ernst & Young*, 285 AD2d at 108; see also, *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d at 44. "Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent". *LaSalle Natl. Bank v Ernst & Young*, 285 AD2d at 108-109.

Here, LL240RM is not a promisee of AmTrust, and the MPA does not require any performance to be rendered to LL240RM. Under the MPA, AmTrust's payments run to CRC, not LL240RM, which was paid pursuant to a separate agreement with CRC, the UMSA (Underwriting Management Services Agreement). AmTrust did not retain CRC, as its managing producer for the Program, for LL240RM's benefit. LL240RM fails to point to any language indicating that AmTrust and CRC, as the parties to the contract, intended that the MPA was for the benefit of LL240RM, and that they assumed a duty to compensate LL240RM if the benefit was lost. *State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d at 434-435. CRC clearly had the right to recover from AmTrust if AmTrust breached the MPA, however, there is no language in that agreement indicating the parties intended to give LL240RM an individually enforceable right thereunder. *See Grunewald v Metropolitan Museum of Art*, 125 AD3d 438, 439 (1st Dept 2015) (members of

public are incidental beneficiaries of MMA's lease with the City, as neither lease language nor circumstances indicate the parties' intent to give public individually enforceable rights thereunder); *Gonzalez v Fidelity & Deposit Co. of Maryland*, 119 AD3d 432, 433 (1st Dept 2014) (pleadings failed to allege facts sufficient to show plaintiffs were intended beneficiaries of wage and benefits provisions of general contract); *Oursler v Women's Interart Ctr.*, 170 AD2d 407, 408 (1st Dept 1991) (documentation for National Endowment of Arts grant awarded to defendant "'to support production of a videotape by [plaintiffs],'" fails to show clear intent by NEA or defendant to permit enforcement of contract by plaintiffs).

Amendment No. 1 to the MPA evidences only that LL240RM was a delegee of CRC, consented to by AmTrust, which was to perform certain specified underwriting services for the Program under CRC, the manager or producer. CRC remained bound by all terms and conditions of the MPA, and was "fully responsible" for LL240RM's actions thereunder. *MPA,* Amendment No. 1 at 2. The MPA itself makes clear that CRC's right to delegate certain obligations was subject to significant restrictions, including, that AmTrust had to give written consent to any delegation, and that CRC remained responsible for any obligations that it delegated. *Id.*, MPA, Art II.C.13, Art III at 2.

The Addendum to the MPA, which attaches underwriting guidelines that identify the three "key parties" to the Program as LL240RM, CRC, and ISBL, does not demonstrate that LL240RM was an intended beneficiary to the MPA. The only party to the MPA identified in the attached guidelines as a "key party" to the Program is CRC, and LL240RM fails to

explain how this translates to LL240RM being an intended beneficiary of the MPA. Where a contract fails to expressly state the parties' intention to benefit a third party, the third party who contracts with the promisee does not have the right to enforce the promisee's contract with another. *Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 656 1976).

AmTrust and CRC entered into the MPA for their mutual benefit, not to benefit an entity that CRC retained to help it perform its obligations as manager and producer under the MPA. LL240RM is, at best, an incidental beneficiary. While LL240RM asserts that it should be permitted discovery on this issue, it fails to describe what discovery would bear on this question. The MPA's terms establish that, at best, LL240RM is an incidental, not an intended, beneficiary of the MPA, and discovery will not breathe life into plaintiffs' claim.

Even if LL240RM was an intended beneficiary, or there was an issue as to its status, plaintiffs fail to allege a breach of the MPA. While the Amended Complaint refers to Amendment No.1, it only asserts that it was breached by AmTrust's actions in excluding LL240RM from the Program. The MPA, including Amendment No.1, however, does not guarantee that LL240RM would always be part of the Program, does not contain a time period, and the delegation of some of CRC's duties to LL240RM was for an indefinite period of time, making the MPA terminable at will. *Greenwich Vil. Beverages v Food Merchandisers*, 8 AD2d 719 (1st Dept 1959); *see also LoPresti v Massachusetts Mut. Life Ins. Co.*, 30 AD3d 474, 476 (2d Dept 2006).

Moreover, the termination provision in the MPA, while providing for termination upon written notice, only requires written notice to the Producer, which is clearly defined as

CRC. *MPA* at 10. Thus, there is no basis to assert a breach. Therefore, the first cause of action as against AmTrust North Am. for breach of the MPA is dismissed.

C. *Breach of Brokerage Agreement as against CRC*

The second cause of action by Sherry & Sons against CRC for breach of the Brokerage Agreement is dismissed for failure to state a claim.

In the Amended Complaint, Sherry & Sons states it was paid a 10 percent commission under the agreement from January 2016 through November 2016 in the amount of $143,918.36, and concedes it was fully compensated during that period (amended complaint, ¶¶ 64, 87-88). It then vaguely alleges that CRC has breached by failing to continue to pay commissions. As with the alleged breach of the MPA, Sherry & Sons apparently claims that CRC was required to continue to pay it commissions indefinitely. It, however, fails to point to any policies it originated after November 2016, or between January and November 2016 that remained in effect such that CRC was required to pay it additional commissions. CRC was not the insurer, and any decision to issue or renew policies would have been made by AmTrust, the insurer, not CRC.

Moreover, there is no term of the Brokerage Agreement providing that CRC had an obligation to renew insurance policies to ensure that Sherry & Sons would receive commissions.

D. Breach of the UMSA and Fee Sharing Agreement against CRC

The fourth cause of action, for breach of the UMSA and the Fee Sharing Agreement, also is dismissed.

LL240RM alleges that, pursuant to Section 12 of the UMSA and the Fee Sharing Agreement, CRC agreed to pay it a four percent commission on premiums for Program-related underwriting services, and that commencing in October 2016, CRC began excluding LL240RM from the Program, and ceased paying any commissions, violating the terms of those agreements. Amended Complaint, ¶¶ 100-103.

As a preliminary matter, the UMSA does not declare that LL240RM was the exclusive underwriter for the Program, and, it is noted that CRC also was not the exclusive manager under the MPA. *Compare, MPA with UMSA* . Second, LL240RM does not allege that it rendered any services after November 2016. It concedes that, during the time when it actually performed the tasks specified in the UMSA, CRC properly compensated it for its work. Aamended Complaint, ¶ 45. LL240RM also concedes that, as of December 2016, it was no longer participating in the underwriting process for the Program (*id.*, ¶ 53). It fails to point to any provision in the UMSA requiring payment to it when services are not rendered. Finally, the UMSA does not indicate that CRC must use LL240RM's services for any period of time. Moreover, while it contains a termination provision, that provision does not require provision of any written notice. *UMSA* § 9 at 6. Even if it did, CRC may terminate the UMSA where the MPA was terminated. *Id.*

As to the Fee Sharing Agreement, because LL240RM fails to allege any breach of the UMSA, there is no breach of this alleged agreement. The alleged Fee Sharing Agreement simply defines the compensation resulting from section 12 of the UMSA, which is silent as to the specific compensation to be paid to LL240RM. In addition, the claim for profit sharing under this Fee Sharing Agreement is barred by the statute of frauds. Under General Obligations Law § 5-701 (a) (1), an oral agreement is void unless there is some writing subscribed by the party to be charged, if such agreement by its terms could not be performed within one year from its making.

According to plaintiffs' allegations and Addendum 1 of the MPA, CRC as the Producer was entitled to profit sharing, if any, three years after the expiration of the first Program year. *MPA,* Addendum 1, § 4(c). Since the Program began in January 2016, profit sharing fees, at the earliest, would not be earned until January 2019. Thus, LL240RM's purported portion of the profit sharing fees could not be earned, and the Fee Sharing Agreement with respect thereto, could not be performed, within one year. Accordingly, the Fee Sharing Agreement needed to be in writing, signed by the party to be charged, to be enforceable.

E. Anticipatory Breach of the UMSA and Fee Sharing Agreement

Similarly, the fifth cause of action, for anticipatory breach of the UMSA and the Fee Sharing Agreement, is dismissed as insufficient.

Again, LL240RM fails to allege that it performed any tasks under the UMSA or the Fee Sharing Agreement after November 2016 and concedes it was paid for all services

performed before that, and the agreements fail to contain provisions requiring it be paid if it was no longer providing services under the Program. Additionally, the profit sharing fees have not, and may never, become payable under the MPA. Finally, the statute of frauds bars recovery for anticipatory breach of the oral Fee Sharing Agreement with regard to profit sharing fees. See, *Camhi v. Tedesco Realty, LLC*, 105 A.D.3d 795, 796 (2nd Dept 2013).

F. Tortious Interference Claims

The sixth cause of action against AmTrust and Kullman for tortious interference with the UMSA and the Fee Sharing Agreement fails to state a claim and, therefore, is dismissed.

To assert a claim for tortious interference with an existing contract, the plaintiff must allege: (1) the "existence of its valid contract with a third party;" (2) "defendant's knowledge of that contract;" (3) "defendant's intentional and improper procuring of a breach" of the contract; and (4) resulting damages. *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 NY3d 422, 426 (2007); *see also Law Offs. of Ira H. Leibowitz v. Landmark Ventures, Inc.*, 131 AD3d 583, 585 (2d Dept 2015); *AREP Fifty-Seventh, LLC v. PMGP Assoc., L.P.*, 115 AD3d 402, 402 (1st Dept 2014).

First, as to defendant Kullman, as an employee of CRC, a party to both of those agreements, he is not a stranger to the contracts. *Ashby v. ALM Media, LLC,* 110 A.D.3d 459, 459 (1st Dept 2013). In addition, the Amended Complaint is devoid of non-conclusory allegations of fact that would support the inference that Kullman induced CRC to breach its agreements with LL240RM in any capacity other than that of an officer and/or employee of

CRC, and that he was acting with malice, in order to impair the plaintiff's business, or for his personal profit. *Robbins v. Panitz*, 61 NY2d 967, 969 (1984) (corporate officer not personally liable for inducing corporation to breach unless activity involved a separate tortious act); *Travelsavers Enters., Inc. v. Analog Analytics, Inc.*, 149 AD3d 1003, 1007 (2d Dept 2017) (dismissed where no independent torts allegedly committed by officer); *Baer v Complete Off. Supply Warehouse Corp.*, 89 AD3d 877, 878-879 (2d Dept 2011) (dismissed where plaintiff failed to adequately allege independent torts by corporate officer); *Petkanas v Kooyman*, 303 AD2d 303, 305 (1st Dept 2003) (must allege corporate officer's acts which resulted in tortious interference were beyond scope of employment).

Deriving some financial benefit as a shareholder of one of the parties to the contract is insufficient in and of itself "to establish that his predominant motive was to obtain an individual pecuniary benefit, rather than advance the interests of the corporation". *Kats v East 13th St. Tifereth Place, LLC*, 73 AD3d 706, 708 (2d Dept 2010). Thus, plaintiffs' assertion that Kullman has a financial interest in ISBL, without any allegations of fact that his predominant motive was to obtain a personal pecuniary benefit, fails to provide a basis for individual liability for Kullman. Therefore, LL240RM has not stated a claim holding Kullman personally liable on the theory that he induced CRC to breach the agreements for personal gain.

As to AmTrust, as determined above, there was no breach of the UMSA or the Fee Sharing Agreement. Moreover, AmTrust had an economic interest in those agreements, as it was the insurer under the Program and it approved CRC's delegees, including LL240RM, on

whom CRC relied to fulfill its underwriting obligations in the Program. Thus, it was privileged to interfere with those agreements. *See, Foster v Churchill*, 87 NY2d 744, 750 (1996); *Morgan v Worldwide Entertainment Holdings, Inc.*, 141 AD3d 461, 463 (1st Dept 2016). The Amended Complaint fails to allege either malice or fraudulent or illegal means to defeat this economic justification defense. *Morgan v Worldwide Entertainment Holdings, Inc.*, 141 AD3d at 463. Accordingly, there can be no claim for tortious interference with those agreements, and the sixth cause of action is dismissed.

The seventh claim for tortious interference with the MPA against CRC and Kullman similarly is insufficient.

CRC was a party to the MPA, and, therefore, cannot be liable for tortiously interfering with it. Kullman, again, as an employee of CRC, was not a stranger to the contract, there are no allegations that he acted with malice or personally profited, and there are no non-conclusory factual allegations that his predominant motive was to obtain an individual pecuniary benefit.

G. Unfair Competition Claim

The eighth cause of action for unfair competition is also dismissed.

The gravamen of this claim is that AmTrust, CRC, and Kullman have continued to run the Program without plaintiffs, thereby "misappropriat[ing] the labor, skills and resources of Plaintiffs for their own benefit and to the detriment of the Plaintiffs". *Amended Complaint*,

¶128. None of the contracts governing these parties' relationship, however, contain any provisions prohibiting the parties from continuing to run the Program without plaintiffs.

To state a claim for unfair competition, the plaintiff must allege harm from acts or practices relating to: (1) deceptive marketing; (2) trademark infringement; or (3) appropriation of "intangible trade values including trade secrets and the right of publicity". *Marsh USA, Inc. v. Alliant Ins. Sers., Inc.*, 49 Misc 3d 1210 (A), 2015 NY Slip Op 51555 (U), * 5 (Sup Ct, NY County 2015), quoting Restatement (Third) of Unfair Competition § 1. "[T]he primary concern in unfair competition is the protection of a business from another's misappropriation of the business' organization or its expenditure of labor, skill, and money". *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 (1st Dept 2015) (internal quotation marks and citation omitted).

The Amended Complaint does not allege any trademark infringement or any trade secrets. Plaintiffs claim they have alleged deceptive marketing, because their complaint details how they developed the Program, only to have defendants cut them out of it and hold it out as their own. *Plaintiffs' memorandum in opposition* (motion seq. No. 001) at 14-15. The Amended Complaint, however, does not allege any such reverse palming off. Amended Complaint, ¶¶ 125-133. Morever, there are no allegations that there was any customer confusion based on defendants' marketing --- the customers were insureds and were not deceived because AmTrust was still the insurer under the Program.

Plaintiffs admit they do not allege that the Program qualifies as a trade secret. *Plaintiffs' opposition 001* at 15, but, instead, assert that their claim may be sustained because it is based on proprietary information. First, plaintiffs fail to plead, or present any factual allegations, as to what about the Program involves their proprietary information, what they did to protect such proprietary information, and how defendants used that information. In addition, in asserting an unfair competition claim, the plaintiff must allege the bad faith misappropriation of a commercial advantage which belonged exclusively to the plaintiff (*Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 439 [1st Dept 2017]; *LoPresti v Massachusetts Mut. Life Ins. Co.*, 30 AD3d at 476), a confidential relationship between the parties or a valid agreement to refrain from competing unfairly (*see V. Ponte & Sons v American Fibers Intl.*, 222 AD2d 271, 272 [1st Dept 1995]), and special damages (*see Waste Distillation Tech. v. Blasland & Bouck Engrs.*, 136 AD2d 633, 634 [1st Dept 1988] [plaintiff must plead special damages in form of actual losses identified and causally related to defendant's tortious act]).

Plaintiffs do not allege the existence of a confidential relationship or a valid agreement to not compete. While Sherry & Sons executed the non-compete agreement with AmTrust with regard to the MPA, it never sought a reciprocal confidentiality or non-compete agreement from AmTrust, or a separate one with CRC, regarding plaintiffs' alleged proprietary information. Plaintiffs also fail to allege special damages. The allegations that defendants continued to sell the insurance under the Program do not constitute acts of bad faith misappropriation of plaintiffs' skills, labor and expenditures. *See Krinos Foods, Inc. v.*

Vintage Food Corp., 30 AD3d 332, 333-334 (1st Dept 2006). Their allegations are plainly insufficient. *See APF Mgt. Co., LLC v. Munn*, 151 AD3d 668, 671 (2d Dept 2017); *Abe's Rooms, Inc. v. Space Hunters, Inc.*, 38 AD3d 690, 692-693 (2d Dept 2007). Therefore, the eighth cause of action is dismissed.

H. Breach of Duty of Good Faith Claim

The ninth cause of action, for breach of the duty of good faith and fair dealing, fails to state a claim.

To the extent that plaintiff Sherry & Sons brings this claim, it is insufficient because it was not a party to the MPA, the UMSA or the Fee Sharing Agreement. With respect to the Brokerage Agreement, to which Sherry & Sons was a party, as discussed above, the Amended Complaint fails to allege a breach, and this claim duplicates the unsustainable breach of contract claim. *See Skillgames, LLC v. Brody*, 1 AD3d at 252 (claim for breach of implied covenant cannot substitute for unsustainable breach of contract claim). Moreover, both causes of action arise from the same facts and seek the same damages. Thus, the implied covenant claim is duplicative. *Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 489 (1st Dept 2018); *see Deadco Petroleum v Trafigura AG*, 151 AD3d 547, 548 (1st Dept 2017); *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dept 2010).

LL240RM's claim for breach of the covenant of good faith with regard to the MPA is dismissed, because, as determined above, it failed to adequately allege that it is a third-party beneficiary of the MPA. Moreover, as with Sherry & Sons' claim, this claim duplicates the insufficient breach of contract claim. *Deadco Petroleum v Trafigura AG*, 151 AD3d at 548.

LL240RM's claim against CRC is dismissed for the same reasons. LL240RM alleges that CRC deprived it from receiving the value of the Program which plaintiffs created, developed and implemented. Amended Complaint, ¶ 137. The UMSA, however, did not contemplate that LL240RM was going to receive the "value of the Program;" rather, it was to be compensated for the underwriting services it provided under the agreement. As determined above, plaintiffs admit that LL240RM was paid for the services it provided from January through November 2016 under the UMSA, and that it did not render any further services.

CRC had the right to terminate the UMSA subject to AmTrust's agreement or in the event of termination of the MPA, which occurred. Plaintiffs cannot use this claim as a substitute for its unsustainable breach of contract claim against CRC.

I. Quasi-Contract Claims

The tenth and eleventh causes of action, which allege unjust enrichment and seek recovery in quantum meruit, respectively, are subject to dismissal in light of the existence of an enforceable contract governing the same subject matter. *See Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987); *APF Mgt.Co., LLC v Munn*, 151 AD3d at 671.

Both claims sound in quasi contract. *Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250 (1st Dept 2009); *Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 488-489 (1st Dept 2009). Recovery in quasi contract may not be obtained where there is a valid enforceable contract between the parties regarding the same subject matter. *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009); *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005), unless there is a bona fide dispute as to the existence of the contract. *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 AD3d 6, 20 (2d Dept 2008).

Here, there is no such bona fide dispute, and the subject matter of both of these claims as to all defendants is identical to that asserted under the breach of contract claims. Therefore, the tenth and eleventh causes of action are dismissed.

Accordingly, it is

ORDERED that the motion of defendants AmTrust North America, Inc., AmTrust International Underwriters Ltd, and AmTrust Financial Services, Inc. (motion seq. No. 001) to dismiss the Amended Complaint against them is granted and the complaint is dismissed in its entirety against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendants CRC Insurance Services, Inc. and Alex Kullman (motion seq. No. 002) to dismiss the Amended Complaint against them is granted and the complaint is dismissed in its entirety against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendant International Specialty Brokers, Ltd. (motion seq. No. 003) to dismiss the complaint against it was withdrawn.

Dated: May 7, 2018

ENTER:

EILEEN BRANSTEN, J.S.C.