SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

PARISH PROPERTY MANAGEMENT, INC., Plaintiff, -against- GLOBAL COVERAGE, INC., THE BLACKMAN AGENCY, INC., MICHAEL PAGAN and HAL BLACKMAN, Defendants, -and- RELIGIOUS PROPERTY TRUST, THE JESUIT COLLABORATIVE, THE NEW YORK PROVINCE OF THE SOCIETY OF JESUS, AND THE JESUIT RESIDENCE, Nominal Defendants.	Index No. 651353/2022 **DECISION AND ORDER** Motion Sequence Numbers 001 and 002

NANCY M. BANNON, J.S.C.:

Motion sequences numbered 001 and 002 are consolidated herein for disposition. In sequence number 001, defendant Global Coverage, Inc. (Global) moves, pre-answer, to dismiss the complaint of plaintiff Parish Property Management, Inc. in its entirety pursuant to CPLR 3211(a)(1) and (a)(7). In sequence number 002, defendant Michael Pagan (Pagan), moves, pre-answer, to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7).

Background

In this declaratory judgment action, plaintiff alleges that Global, the insurance brokerage firm it hired to obtain coverage on its behalf, and defendants Pagan, the Blackman Agency (Agency), and Hal Blackman (Blackman), made material misrepresentations and material omissions of fact to plaintiff, to induce it to enter a primary commercial general liability/property

and casualty (CGL/P&C) insurance policy which defendants obtained by submitting falsified loss histories to the insurer, in breach of their duties to plaintiff, which led the insurer to bring an action for declaratory relief, ultimately rescinding plaintiff's policy and leaving plaintiff with an uninsured liability claim (see verified complaint, e-filed on March 22, 2022 [complaint] [NYSCEF Doc No. 1], ¶¶ 40-62).

Plaintiff asserts four causes of action. First, it asserts a cause of action for fraud, fraudulent misrepresentation, and fraudulent inducement against Pagan (*id*. ¶¶103-118). In its second cause of action, plaintiff asserts a claim of *respondeat superior* liability for fraud, fraudulent misrepresentation, and fraudulent inducement against Pagan's employer, Global (*id.* ¶¶119-26). Third, plaintiff asserts a cause of action for fraud, fraudulent misrepresentation, and fraudulent inducement against Blackman and Agency, as Pagan's disclosed principal (*id.* ¶¶127-34). In its fourth cause of action, plaintiff asserts a claim for common law or implied indemnity against all defendants (*id.* ¶¶135-45).

Plaintiff is a construction management and general contracting company in Pelham, New York, that serves religious communities and institutions (*id.* ¶21). Global is an insurance brokerage firm licensed by the State of New York that maintains its place of business on East 37th Street in Manhattan (id. ¶¶2, 22). At all relevant times, Pagan was an employee of Global and a licensed New York State insurance broker (*id.* ¶23).

At all relevant times, Blackman was a New York State licensed insurance broker who conducted business through Agency (*id.* ¶¶25-26), and Agency was an affiliate of Global which maintained its place of business at Global's East 37th Street address (*id.* ¶27).

Plaintiff's account was initially serviced by Blackman and Agency. In or about 2012, Global, Blackman and Agency entered an agreement under which Global would service

Blackman and Agency accounts and that Global would share equally with Blackman and Agency in the resulting commissions (*id.* ¶28). After its agreement with Blackman, Global assigned Pagan to serve as its senior account executive for Blackman and Agency clients (*id.* ¶¶30-32).[1]

In 2012, Global and Pagan placed plaintiff's primary CGL/P&C insurance coverage with First Mercury Insurance Company (FMIC), effective March 29, 2012, to March 29, 2013 (FMIC Policy) (*id.* ¶33). On July 9, 2013, defendants notified First Mercury regarding two separate personal injury claims made against plaintiff within coverage of the FMIC Policy, made under the surnames "Munoz" and "Juarez" (*id.* ¶34).

Plaintiff alleges that defendants continued to place primary CGL/P&C policies for it in 2013, 2014, and 2015, and that, to obtain coverage for the policy year from March 29, 2015, through March 29, 2016, defendants provided historical loss runs to their new insurer, XL Catlin Insurance Company, including its loss runs for the 2012-2013 FMIC Policy which reflected the Munoz and Juarez claims (*id.* ¶¶37-38).

Around the beginning of 2016, anticipating renewal of its primary CGL/P&C insurance, plaintiff told defendants that it wished to reduce the cost of its primary coverage and suggested exploring a captive insurance program[2] or raising its deductibles (*id.* ¶40). In response, Pagan

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[1] Religious Property Trust, the Jesuit Collaborative, the New York Province of the Society of Jesus, and the Jesuit Residence are not-for-profit organizations in the State of New York. Plaintiff names them as "Nominal Defendants" in this action because the declaratory relief it seeks, if granted, will inure to their benefit (*id.* ¶¶6-9), as they were named as "additional insureds" in the rescinded policy at the center of this dispute. Furthermore, the Jesuit Residence is a named party to the "*Oviedo*" action discussed below (*id.* ¶9).

[2] "**captive insurance - 1.** Insurance that provides coverage for the group or business that established it. **2.** Insurance that a subsidiary provides to its parent company, usu. so that the parent company can deduct the premiums set aside as loss reserves." INSURANCE, Black's Law Dictionary (11th ed. 2019).

contacted several wholesale brokers, including agent Mike Tracy (Tracy) of All Risks Ltd., who represented, among other carriers, Berkley Insurance Company (Berkley) (*id.* ¶41).

Defendants applied for primary CGL/P&C insurance for the 2016/2017 policy year, providing Tracy, among other things, plaintiff's loss runs for the five preceding policy years, including those for the 2012/2013 FMIC Policy (*id.* ¶¶43-44).

Plaintiff alleges that the loss run report for the 2012/2013 FMIC Policy (FMIC Loss Run), which defendants produced to Tracy in PDF format, had been altered by Pagan, who had placed a text box over the entries made for the Munoz and Juarez claims, and then entered the words "No Losses" in place of those entries (*id.* ¶45, citing complaint, exs D [NYSCEF Doc No. 6] [altered FMIC Loss Run] and E [NYSCEF Doc No. 7] [unaltered FMIC Loss Run]). Plaintiff further alleges that the metadata for the altered FMIC Loss Run indicates that the "author" of the text box was "mpagan" and that the alteration was made at "3/3/2016 4:13:52 PM" (complaint, ex D), less than a month before plaintiff's 2015/2016 policy would lapse.

On March 24, 2016, Blackman sent an e-mail to plaintiff which compared the terms of plaintiff's expiring primary and umbrella excess insurance policies with those projected for the 2016/2017 policy year, based on the primary policy proposed by Berkley (Berkley Policy), which purportedly met plaintiff's coverage requirements at lower annual premiums (complaint ¶51 and ex G thereto [NYSCEF Doc No 9]). That same day, plaintiff responded by e-mail to Blackman, directing defendants to "please proceed with renewal as quoted" (*id.* ¶52). The following day, defendants asked Tracy to bind coverage in accordance with the quoted proposal (*id.* ¶54), to which Tracy responded by e-mail on March 28, 2016, transmitting, among other documents, a copy of the "Binder" of coverage with respect to the Berkley Policy (*id.* ¶55 and ex H thereto [NYSCEF Doc No. 10]).

On April 6, 2016, Blackman sent an e-mail to plaintiff's president, William O'Connor (O'Connor) (*id.* ¶51), which attached a copy of the Berkley Policy, signed on April 6, 2016 by Berkley's "Authorized Representative" (*id.* ¶56-57 and exs I and J thereto [NYSCEF Doc Nos. 11 and 12]). Berkley, through Global, invoiced plaintiff $175,000 for its premium on the Berkley Policy (see complaint, ¶58 and ex J thereto), which plaintiff paid in full (complaint, ¶59).

The complaint further alleges that, in obtaining coverage under the Berkley Policy for the 2016/2017 policy year, defendants represented to plaintiff that they had properly placed, and Berkley had bound itself to provide, primary CGL/P&C coverage for plaintiff and its additional insureds, for occurrences of bodily injury and/or property damage, subject to the Berkley Policy's terms, conditions, exclusions, limits, and deductibles, and that the Berkley Policy would provide plaintiff coverage for contractual indemnity liability to owners and managers of properties where plaintiff worked during the policy period (*id.* ¶62).

On July 15, 2016, plaintiff entered a contract with the Nominal Defendants to provide construction management services for a renovation project at the Loyola School, at 53 East 83rd Street in Manhattan. This contract provided, among other things, that the Nominal Defendants were to be named as additional insureds under the Berkley Policy and plaintiff's umbrella excess policies, and that plaintiff was to hold the Nominal Defendants harmless from any loss arising from plaintiff's work as construction manager (*id.* ¶63).

The Berkley Policy provided coverage to the Nominal Defendants as additional insureds, and to plaintiff for contractual liability under an "insured contract" for liability for bodily injury or property damage caused to third parties by plaintiff, or those acting on its behalf (*id.* ¶65).

In February 2017, defendants began working to renew the Berkley Policy for the period from March 29, 2017 to March 29, 2018. To that end, on February 17, 2017, Pagan sent an e-

mail to Tracy, attaching FMIC loss runs for the policy periods from 2010 to 2013, which included the *unaltered* FMIC Loss Run from 2012/2013 (*id.* ¶¶66-67).

Tracy responded to Pagan by e-mail on February 20, 2017, asking him to explain why the $1.732 million reserved for the Munoz, Juarez, and Russo[3] claims reflected on the newly submitted 2012/2013 FMIC Loss Run did not appear on the 2012/2013 FMIC Loss Run that defendants submitted the year before to solicit the Berkely Policy. Tracy also asked Pagan to send him plaintiff's loss runs for 2013 through 2016, so he could "paint the best possible picture" for the insurers he represented (*id.* ¶¶68-69 and ex M thereto [NYSCEF Doc No. 15]).

Pagan e-mailed Tracy on February 21, 2017, writing only "Need your markets now" (*id.* ¶70 and ex N thereto [NYSCEF Doc No. 16]). Tracy responded that day, copying Blackman, and asked Pagan again to explain the discrepancy between the 2012/2013 FMIC Loss Run defendants submitted that year and the one they submitted in the year before (*id.* ¶¶71-72 and ex O thereto [NYSCEF Doc No. 17]). Pagan did not respond to this e-mail. Blackman responded on February 21, but he did not address the differences between the loss runs (*id.* ¶74). Tracy asked Blackman to ensure Pagan was no longer directly involved placement of plaintiff's CGL/P&C coverage renewal (*id.* ¶75). Blackman, Agency, and Global placed plaintiff's 2017/2018 CGL/P&C coverage through Tracy with Colony Insurance Company, which is not a Berkley affiliate (*id.* ¶77).

On July 18, 2017, Vela wrote to O'Connor, plaintiff's president, requesting that plaintiff consent to rescission of the Berkley Policy, based on the material misrepresentations made (*id.*

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[3] Plaintiff notes in the complaint that a third claim, under the surname Russo, had been made against it within coverage of the FMIC 2012-2013 policy year but explains that, as that claim was reported to FMIC on June 28, 2016, it first appeared in loss runs that Berkley's claims administrator, Vela Insurance Services (Vela), obtained for its renewal review in or after February 2017 but had not been listed in prior FMIC loss runs (complaint ¶67; see also ex L thereto [FMIC Loss Run as of 2/14/2017, listing third claim by Russo]).

¶78 and ex. P thereto [NYSCEF Doc No. 18]). Vela stated therein that, absent such consent, Berkley would commence a declaratory judgment action against plaintiff based on the material misrepresentations made in the altered 2012/2013 FMIC Loss Run (*id.* ¶79 and Ex P thereto).

Plaintiff contends that it asked defendants in 2017 and 2018 to explain why they submitted the altered 2012/2013 FMIC Loss Run to Berkley, but defendants did not respond (*id.* ¶80). Also, defendants would not provide copies of the allegedly falsified loss run, despite plaintiff's requests in 2017 and 2018 (*id.* ¶ 81).

Berkely commenced its action to rescind the Berkley Policy on December 13, 2017, by filing its summons and complaint in the United States District Court for the Southern District of New York, captioned *Berkley Insurance Company v Parish Property Management, Inc.*, Civil Action No. 1:17-cv-09707-AJN (Recission Action) (*id.* ¶82). Plaintiff states that it ultimately resolved the Recission Action under a confidential settlement agreement (*id.* ¶84), and that it expended $113,304.32 in legal fees and costs defending the Recission Action and negotiating its settlement (*id.* ¶85). Plaintiff also maintains that it first saw the altered 2012/2013 FMIC Loss Run in or about March 2018, when Berkley produced a Bates-stamped PDF copy of that document to it during discovery in the Recission Action (*id.* ¶¶86-87).

At the time the complaint herein was filed, a personal injury action had previously been commenced against plaintiff and the Nominal Defendants in Supreme Court, Bronx County, captioned *Oviedo v Religious Property Trust, et al.*, Index No. 300211/2017 (*id.* ¶18). The plaintiff in *Oviedo* alleges that he was injured falling from a ladder during a renovation project at the Loyola School, noted above, which is owned and operated by the Nominal Defendants and at which plaintiff served as construction manager. Mr. Oviedo's alleged injuries and medical costs may expose plaintiff and the Nominal Defendants to millions of dollars in liability (*id.*).

Under the terms of their settlement agreement, Berkley is required to provide coverage for legal defense fees and costs with respect to the Berkley Policy, to plaintiff as the named insured, and to the Nominal Defendants, as additional insureds under the Berkley Policy, but will not provide coverage for any liability award or settlement in the *Oviedo* action (*id.* ¶19).

Global e-filed its motion to dismiss the complaint in sequence 001 on May 31, 2022 (see notice of motion [NYSCEF Doc No. 31]). Nominal Defendants e-filed their answer in this action on June 6, 2022 (NYSCEF Doc No. 41). Pagan e-filed his motion to dismiss the complaint in motion sequence 002 on June 10, 2022 (see Notice of Motion [NYSCEF Doc No. 42]). Blackman and Agency filed their answer on June 13, 2022 (NYSCEF Doc No. 49).

Discussion

"On a CPLR 3211 motion to dismiss, [] we must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference. Indeed, the question of 'whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss'" (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011] [alteration omitted], quoting *EBC I, Inc. v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]).

"On a CPLR 3211(a)(1) motion to dismiss based upon documentary evidence, 'a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 621 [1st Dept 2018], quoting *Leon v Martinez,* 84 NY2d 83, 88 [1994]). To prevail, "the moving party must show that the documentary evidence conclusively refutes plaintiff's [] allegations" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.,* 5 NY3d 582, 590-591 [2005] [citation omitted]).

"On a motion to dismiss a cause of action pursuant to CPLR § 3211(a)(5) as barred by the applicable statute of limitations, a defendant must establish, prima facie, that the time within which to sue has expired" (*Flintlock Constr. Servs, LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020] [internal quotation marks and citation omitted]). "Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*id.*).

"A motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action must be denied if the factual allegations contained within the four corners of the pleading manifest any cause of action cognizable at law" (*M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020], citing *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151–152 [2002]). "While factual allegations set forth in a complaint should be accorded every favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration" (*id.*, citing *Matter of Sud v. Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Motion Sequence Number 001

Global moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (a)(7), on several grounds.[4] First, Global asserts that Plaintiff cannot maintain a declaratory judgment action against an insurance broker. It reasons that a "DJ" action does not seek damages but only a declaration of the rights and responsibilities of the parties and, as Global was not party to plaintiff's insurance contract with Berkley, there is no basis for the Court to render a declaration.

[4] Both movants purport to seek dismissal of the entire complaint. Of the four causes of action in the complaint, however, only the second, respondeat superior liability for Pagan's fraudulent conduct, and the fourth, for common law/implied indemnity, are asserted against Global. Only the first and fourth are asserted against Pagan.

The "DJ" sought here, however, does not involve plaintiff's insurance contract with Berkley, but rather defendants' duties to plaintiff. Global's undertaking as plaintiff's insurance broker was a substantial obligation and defendants' alleged breach of this duty is actionable. "An agent or a broker who in any respect violates his or her duties to the insured is personally liable to the insured for the damages caused by the agent's or the broker's default, that is, for the amount that could have been recovered from the insurer had the proper insurance been obtained" (3 Couch on Ins § 46:71 [3d ed. 2022], citing, *inter alia*, *Brown v Escher*, 140 Misc 292 [App Term, 1st Dept 1931]); see also *Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 1277 [2d Dept 2021] ["insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform their client of their inability to do so" [internal quotation marks and citation omitted]).

"The scope of the broker's duty is defined by the nature of the client's request [and a] claim of liability for a violation of his duty may sound in either contract or tort" (*Alpha/Omega Concrete Corp.*, 197 AD3d at 1277 [internal quotation marks and citations omitted]). "It is [also] well settled that an insurance broker may be held liable to its principal for common law indemnification where it breached its duty to that principal by negligently or intentionally misrepresenting facts in connection with obtaining insurance coverage" (*Seneca Ins. Co., Inc. v Certified Moving & Stor. Co., LLC*, 138 AD3d 504, 505 [1st Dept 2016], citing *Utica First Ins. Co. v Floyd Holding*, 5 AD3d 762 [2d Dept 2004]).

Global argues that declaratory relief is not available in New York where recovery is sought against an insurance broker for failing to procure insurance. This argument is contrary to the First Department's decisions in *Booth Mem. Hosp. & Med. Ctr. v Merson & Co.* (162 AD2d 100, 100 [1st Dept 1990]) and *Cabrini Med. Ctr. v KM Ins. Brokers* (142 AD2d 529, 530 [1st

Dept 1988]. These decisions also undermine Global's arguments regarding the lack of actual damages, justiciability, and prematurity regarding plaintiff's claims for declaratory relief (see *Booth Mem. Hosp,* 162 AD2d at 100 [defendant broker's procurement of "worthless" insurance sufficient basis for actionable claim and plaintiff's cause of action "for declaratory judgment relief presents justiciable controversy" because "potential liability may extend into the coverage contracted for"]) and *Cabrini Med. Ctr.,* 142 AD2d at 530 [declaratory judgment action permitted where defendant broker failed to obtain insurance coverage plaintiffs paid for, since "potential liability might well reach into the coverage contracted for," and so "dismissal for prematurity was unwarranted"] [citation omitted]).

Global also argues that, as plaintiff's causes of action sound in fraud, it should not be allowed to maintain an action for declaratory relief, as adequate remedies at law were available. Assuming without deciding that plaintiff has adequate remedies at law available, that would not require the Court to dismiss plaintiff's application for declaratory relief, "as a genuine, justiciable controversy exists" (*Seneca Ins. Co. v Lincolnshire Mgt.,* 269 AD2d 274,275 [1st Dept 2000] [citations omitted], cited in 43 NY Jur 2d, Declaratory Judgments § 9 and 24C Carmody-Wait 2d § 147:18).

Next, Global argues that, as plaintiff's causes of action all sound in fraud, they are all time-barred under CPLR 3211(a)(5). Global asserts that, as Pagan is alleged to have tortiously altered the Loss Runs on "3/3/2016 4:13:52 PM," plaintiff's causes of action accrued that day and so its commencement of this action on March 22, 2022, was twenty days past the expiration of the six-year limitations period for fraud.

A cause of action alleging that a party was fraudulently induced to enter a contract, however, generally accrues at the time of the contract's execution (*K-Bay Plaza, LLC v Kmart*

Corp., 132 AD3d 584, 590 [1st Dept 2015] [retail lease], citing *Rogal v Wechsler*, 135 AD2d 384, 385 [1st Dept 1987] [cause of action for fraudulent inducement of settlement agreement "accrues and the Statute of Limitations commences to run at the time of the execution of the contract"]). Using this measure, plaintiff's filing of its complaint on March 22, 2022 was timely, as it occurred more than two weeks before April 6, 2022, the sixth anniversary of the execution of the Berkley Policy.

Global goes on to argue that it cannot be held liable for Pagan's allegedly fraudulent conduct under the theory of respondeat superior liability. Global asserts plaintiff cannot show that, "but for" Global's acts or omissions, plaintiff would have obtained coverage for the losses for the subject claims. Global contends that as Berkley asserted three grounds for seeking rescission of its Policy, and coverage would have been denied on one of the other two grounds in any event, plaintiff cannot show Pagan's fraud was the proximate cause for its loss. Global, however, fails to identify the bases, other than the falsified FMIC 2012-2013 Loss Run, on which Berkley's claims administrator, Vela, had premised its July 18, 2017, letter to plaintiff, requesting rescission in exchange for refund of paid premiums (ex P to complaint [NYSCEF Doc No 18]).

Notwithstanding Global's assertion to the contrary, Vela's letter noted just one ground for denying coverage and seeking rescission, that is, the submission of "falsified loss runs" for the 2012-2013 policy year, relating to three unreported claims. In addition to the Munoz and Juarez claims, with combined reserves set at more than $1,435,000, the true FMIC 2012-2013 Loss Run also reflected a third claim by Erica Russo, who had brought an action against plaintiff for bodily injury with reserves in excess of $223,000 (ex P to complaint, *supra*, at 3). For its part, plaintiff maintains that, but for defendants' tortious misrepresentations and omissions, plaintiff

would not have entered into the voidable Berkley policy and instead would have sought out CGL/P&C coverage for that policy year, from Berkely or another carrier, that would have covered the *Oviedo* claim.

Global also contends that plaintiff fails to state a cause of action for fraud because it has failed to plead fraud with sufficient particularity and has failed to demonstrate justifiable reliance. "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR 3013). "Where a cause of action is based upon misrepresentation [or] fraud, … the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]). "[B]earing in mind that the sufficiency of a pleading statement primarily depends upon compliance with CPLR § 3013's basic requirements, these special provisions in Rule 3016(b) constitute no more than a directive that the 'transactions and occurrences' constituting the 'wrong' shall be pleaded in sufficient 'detail' to give adequate notice thereof" (*Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964]).

Plaintiff's causes of action for fraud against defendants are based on its claim that Pagan falsely represented to plaintiff that it had obtained valid insurance for its business for the 2016/2017 policy year. Specifically, in obtaining the Berkley Policy for the 2016/2017 policy year, defendants represented to plaintiff that they had properly placed, and Berkley had bound itself to provide, primary CGL/P&C coverage for plaintiff and its additional insureds, for occurrences of bodily injury and/or property damage, subject to the Berkley Policy's terms, conditions, exclusions, limits, and deductibles, and that the Berkley Policy would provide plaintiff coverage for contractual indemnity liability to owners and managers of properties where plaintiff worked during the policy period (complaint ¶62). These allegations of fraud "are

sufficient to withstand [Global's] motion to dismiss" (*Levi v Utica First Ins. Co.*, 2003 NY Slip Op 30097 [U], *8 [Sup Ct NY County, Sept 9, 2003]).

As to justifiable reliance, plaintiff alleges that, in late 2015 or early 2016, it contacted defendants to discuss either renewing its current 2015/2016 CGL/P&C, then placed with XL Caitlin Insurance Company, or finding a different carrier for the new policy year beginning March 29, 2016 (complaint ¶40). Plaintiff further alleges that it advised Blackman and Pagan that it was looking to reduce premiums and so would consider higher deductibles, and that it would also like to explore a captive insurance program (*id.*).

Upon accepting this assignment from the plaintiff, Blackman and Pagan undertook to obtain the type of insurance coverage sought, within the scope of the terms discussed, or to report back on their inability to do so (see *Alpha/Omega Concrete Corp.*, *supra*). Rather than performing this task conscientiously and using plaintiff's true loss records, Pagan instead allegedly falsified plaintiff's loss runs and passed them on to Tracy, apparently so he could obtain more favorable terms by trick. Global fails to offer any valid basis to hold that plaintiff's reliance in these circumstances would be unjustified.

Global also argues that plaintiff cannot seek indemnification from an insurance broker for fraud. This is not true. Common law "[i]ndemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer" (*Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003] [internal quotation marks and citations omitted]).

"It is well settled that an insurance broker may be held liable to its principal for common law indemnification where it breached its duty to that principal by negligently or intentionally

misrepresenting facts in connection with obtaining insurance coverage" (*Seneca Ins. Co. v Certified Moving & Stor. Co., LLC*, 138 AD3d at 505, citing *Utica First Ins. Co. v Floyd Holding*, 5 AD3d 762).

Finally, Global asserts that plaintiff cannot recover the legal fees it incurred in the Recission Action. Global argues that it cannot be held liable for plaintiff's defense costs because of the American Rule, which requires litigants to cover their own legal fees, absent an agreement, statute, or court rule to the contrary. Global is mistaken. "Under the 'American Rule,' to which this State adheres, the prevailing litigant ordinarily cannot collect its reasonable attorneys' fees from its unsuccessful opponents" (*Hunt v Sharp*, 85 NY2d 883, 885 [1995] [citations omitted]). This rule, however, does not apply "where recovery is sought from a third-party wrongdoer" who was not, "either legally or as a practical matter, the same as the claimant's opponent in the main action" (*id*., citing, *inter alia*, *Shindler v Lamb,* 25 Misc2d 810, 812 (Sup Ct NY County 1959), *affd* 10 AD2d 826 [1st Dept 1960], *affd* 9 NY2d 621 [1961]). *Shindler* states "a well-recognized exception" to the American Rule: "If, through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person in bringing or defending an action to protect his interests, he is entitled to recover the reasonable value of attorneys' fees and other expenses thereby suffered or incurred" (*id.* [citations omitted]). Accordingly, this facet of Global's motion must also be denied.

Motion Sequence 002

Pagan joins Global in arguing that the complaint is time-barred because plaintiff's claims accrued when allegedly falsified loss runs were submitted to Berkley on March 3, 2016, and so plaintiff's time to bring its complaint lapsed on March 2, 2022. As noted above, this view is

incorrect. The six-year period runs on the date of the execution of the insurance contract in this case, and so the complaint was timely filed.

Pagan also argues that the complaint is time barred under the two-year "discovery" exception in CPLR Section 213(8) because plaintiff necessarily "discovered" the alleged fraud on July 18, 2017, when Berkley's claim administrator sought to rescind the Berkley Policy, and so plaintiff's window to bring its complaint closed in July 2019. This is a misinterpretation of the statute.

Section 213(8) provides, in pertinent part, that:

> "the time within which the action must be commenced shall be *the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud*, or could with reasonable diligence have discovered it"

(emphasis added).

As the late Prof. David Seigel explained, "The result is that in each of these discovery cases there are actually two measurements: (1) the stated period running from the wrong itself, and (2) the 2-year period running from the wrong's discovery. *The plaintiff can use whichever is longer*" (Seigel, NY Prac § 43 [6th ed. 2022] [emphasis added]). In consequence, the complaint is not time-barred, as plaintiff is entitled to the 6-year period running from the execution of the Berkley Policy issued in reliance on the FMIC Loss Runs Pagan allegedly falsified.

Pagan also claims that the complaint must be dismissed because documentary evidence flatly contradicts plaintiff's allegations and so provides a complete defense to plaintiff's claims. Specifically, Pagan asserts plaintiff cannot maintain its claims against him because an insured has a duty to review its entire application and to correct any errors and that an insurance broker cannot be held responsible for inaccurate information in an insurance application that was reviewed and approved by the insured, citing, *inter alia*, *Curanovic v New York Cent. Mut. Fire*

Ins. Co. (307 AD2d 435, 437 [3d Dept 2003]) and *Motor Parkway Enterprises, Inc. v Loyd Keith Friedlander Partners, Ltd.* (89 AD3d 1069, 1070 [2d Dept 2011]). These are correct statements of these rules, but they are inapposite in this case.

Pagan asserts that plaintiff's review should have encompassed all application materials, including the FMIC Loss Runs, but offers no documentary evidence to establish that they formed part of the application, or that plaintiff ever saw the falsified version of FMIC Loss Runs before or during the application process. The Berkley Policy application, which Global and Pagan both submit as an exhibit in support of their respective motions (see NYSCEF Doc Nos. 37 and 47), does not include copies of either the altered or unaltered versions of the FMIC Loss Runs. Furthermore, in its pleading, plaintiff indicates that it first learned that its loss history had been falsified when its president received Vera's July 18, 2017, letter, seeking rescission of the Berkley Policy (complaint, ¶78 and ex P thereto), and that it did not obtain a copy of the altered FMIC Loss Runs until Berkley produced the document in discovery in the Recission Action, in or around March 2018 (*id.* ¶¶86-87). Pagan offers no evidence to the contrary and so fails to contradict plaintiff's allegations on this point.

The Court has considered the movants' remaining arguments and finds them unavailing.

Conclusion

Accordingly, it is hereby

ORDERED that the motion of defendant Global Coverage, Inc. to dismiss the complaint (motion sequence 001) is denied, and it is further

ORDERED that the motion of defendant Michael Pagan to dismiss the complaint (motion sequence 002) is denied, and it is further

ORDERED that the moving defendants shall file an answer within 20 days of entry of this order, and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference on August 17, 2023, at 12:00 p.m.

This constitutes the Decision and Order of the court.

Dated: May 25, 2023

E N T E R:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON