NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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NEW YORK MARINE & GENERAL INSURANCE COMPANY,

Index No. **814326/2021E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

WESCO INSURANCE COMPANY, TECHNOLOGY INSURANCE COMPANY, and AMTRUST NORTH AMERICA, INC.,

Defendants.

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The following papers numbered 1 to 3, read on this motion, noticed on 12/30/2021, and duly submitted as no. 1 on the Motion Calendar of 2/8/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Defendants' motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 2/9/2022

Hon. _____
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: April 4, 2022 at 10:00 a.m.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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NEW YORK MARINE & GENERAL INSURANCE COMPANY,

Plaintiff,

- against -

WESCO INSURANCE COMPANY, TECHNOLOGY INSURANCE COMPANY, and AMTRUST NORTH AMERICA, INC.,

Defendants.

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DECISION AND ORDER

Index No. **814326/2021E**

Defendants Wesco Insurance Company ("Wesco"), Technology Insurance Company ("TIC"), and AmTrust North America, Inc. ("AmTrust") (collectively "Defendants") move for an order: (1) transferring this action to New York County pursuant to CPLR § 510(1) and § 510(3) or alternatively, (2) dismissing the complaint as against AmTrust, with prejudice, pursuant to CPLR 3211(a)(1) and § 3211(a)(7). Plaintiff opposes, arguing that: (1) this matter is properly venued in Bronx County, and (2) AmTrust is a proper party in this action.

For the reasons which follow, Defendants' motion to transfer this action is denied, and Defendants' motion to dismiss the complaint against AmTrust is denied.

BACKGROUND:

On October 20, 2021, Plaintiff commenced the instant action against Defendants, alleging causes of action for breaches of fiduciary duty, indemnification and contribution. Plaintiff seeks to recover damages in the amount of $1,737,682.22, plus costs and disbursements, against AmTrust and TIC. Plaintiff also seeks to recover damages in the amount of $6.4 million, plus costs and disbursements, against AmTrust and Wesco.

The complaint alleges that Wesco and TIC were primary liability insurers for certain insureds, for whom Plaintiff was an excess insurer (Compl. ¶ 8). These insureds were defendants in two personal injury actions, the *Henriquez-Rodriguez* action, under Index No. 23380/2014E, and the *Register* action, under Index No. 303391/2014 (the "Underlying Actions"), which were commenced in the Supreme Court of New York, Bronx County, in 2014. The complaint alleges that AmTrust is an affiliate of AmTrust Financial Services, Inc., which owns TIC and Wesco

(Compl., ¶ 9-10). It alleges that AmTrust entered into a General Agency Agreement or other agreement pursuant to which it was to provide certain services to TIC and Wesco (Compl. ¶ 11). It further alleges that AmTrust was the authorized claims administrator for TIC and Wesco (Compl. ¶ 12).

The complaint alleges that Defendants exercised direct and exclusive control over the claims and defense of the Underlying Action, as well as over settlement negotiations in the Underlying Action, the policies underwritten by TIC and Wesco, and the coverages provided to the insureds (Compl. ¶ 13, 17). The complaint alleges that Defendants owe Plaintiff a duty to act in good faith and fair dealing in, *inter alia*, defending the claims and safeguarding the rights and interests of Plaintiff, which include the duty to effectuate timely and equitable settlements (Compl. ¶ 14, 18). The complaint alleges that Defendants breached their fiduciary duties (Compl. ¶ 116, 131, 149), and that the breaches constitute a gross disregard of Plaintiff's interests and a deliberate or reckless failure to place Plaintiff's interest on equal footing with Defendants' interests (Compl. ¶ 117, 127, 150, 164). Plaintiff alleges that it has been damaged as a result (Compl. ¶ 118, 129, 151, 166).

On November 29, 2021, Defendants filed the instant motion. The motion was marked fully submitted on February 8, 2022.

DISCUSSION:

Motion to Change Venue:

Compliance with CPLR 511:

CPLR 511 provides that:

> (a) a demand under subdivision (b) for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served. A motion for change of place of trial on any other ground shall be made within a reasonable time after commencement of the action.
> (b) The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an

> affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

A motion to change venue based on improper venue requires compliance with CPLR 511. (*Pittman v Maher*, 202 AD2d 172, 174 [1st Dept 1994]). Failure to comply with the rule warrants a denial of the motion (*Singh v Becher*, 249 AD2d 154, 154 [1st Dept 1998]).

There is no dispute that Defendants complied with the procedural mandates of CPLR 511. Defendants filed a demand to change venue on November 16, 2021, prior to service of the answer. Defendants made this motion on November 29, 2021, within fifteen days of service of the demand.

Motion to Change Venue Pursuant to CPLR § 510(1):

Defendants argue that venue must be transferred to New York County, because Bronx County is not a proper venue. Defendants argue that New York County is a proper venue, because all parties to this action are New York County residents. Defendants argue that Bronx County is not a proper venue, because the events or omissions giving rise to this action are the settlement positions Defendants took with respect to the Underlying Actions and the decisions Defendants made in how the Underlying Actions were handled. Defendants argue that these decisions were not made in Bronx County, but were made in New York County.

In opposition, Plaintiff argues that Bronx County is a proper venue for this action, as a substantial part of the events and omissions giving rise to this action occurred in Bronx County. Plaintiff argues that the Underlying Actions were filed, litigated and tried in Bronx County, settlement discussions and recommendations were made from Bronx County, discovery was made in Bronx County, and the verdicts were reached, and the judgments were entered and satisfied in Bronx County.

In reply, Defendants argue that it is not proper to place venue on the basis of where a loss occurred. As such, Defendants argue that the fact that the verdicts in the Underlying Actions were reached in Bronx County should have no bearing on where venue is placed.

CPLR § 503(a) provides that:

> Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

In 2017, CPLR § 503 was amended to include that the place of trial could be in the county in which a substantial part of the events or omissions giving rise to the claim occurred (CPLR § 503[a], as amended by L. 2017, c. 366, § 1). In determining whether venue is proper under this provision, courts employ a two-part inquiry. "First, the court must 'identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims'. Second, the court must 'determine whether a substantial part of those acts or omissions occurred in the district where suit was filed, that is, whether 'significant events or omissions material to [those] claim[s] ... have occurred in the district in question" (*Harvard Steel Sales, LLC v Bain*, 188 AD3d 79, 82 [4th Dept 2020]).

CPLR § 510 provides, in relevant part, that: "The court, upon motion, may change the place of trial in an action where: 1. the county designated for that purpose is not a proper county; or . . . 3. the convenience of material witnesses and the ends of justice will be promoted by the change."

On a motion to change venue pursuant to CPLR § 510(1), a defendant must demonstrate that the plaintiff's choice of venue is not proper (*IME Watchdog, Inc. v Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 AD3d 464, 465 [1st Dept 2016]) and that its choice of venue is proper (*Drayer-Arnow v Ambrosio & Company, Inc.*, 181 AD3d 651, 652 [2d Dept 2020]; *Joseph v Kaufman*, 188 AD3d 847, 847 [2d Dept 2020]). Once defendant has met its burden, plaintiff must establish in opposition that the venue selected is proper (*Williams v Staten Island University Hospital*, 179 AD3d 869, 870 [2d Dept 2020]).

Here, Plaintiff placed venue in Bronx County, alleging that a substantial part of the events or omissions giving rise to its claims occurred in Bronx County. Essentially, the acts or omissions giving rise to Plaintiff's claims are Defendants' alleged failure to properly defend and settle the Underlying Actions. Although Defendants argue that their settlement positions and decisions in how to defend the Underlying Actions were not made in Bronx County, they have not submitted any evidence in support of this argument, other than counsel's affirmation, who does not purport to have any personal knowledge regarding the matter. The only evidence submitted by Defendants is an affidavit by Glenn Denzler, a Complex Claims Consultant for AmTrust, who merely attests to the parties' principal places of business. His affidavit is bereft of where Defendants made their decisions in how to defend and settle the Underlying Actions. (*cf. S. Donadic, Inc. v Utica Mutual Insurance Company*, Index No. 651270/2018 [movant submitted an affidavit from the claims handler who made the decision to deny coverage, affirming that her office is located in Nassau

County, and that she made the decision in Nassau County]). As such, Defendants have not met their burden to demonstrate that Bronx County is not a proper venue.

Accordingly, Defendants' motion to change venue pursuant to CPLR § 510(1) is denied.

Motion to Change Venue Pursuant to CPLR § 510(3):

Defendants argue that even if Bronx County is a proper venue, the convenience of witnesses requires transfer of this action to New York County. Defendants assert that all of the parties have their principal New York offices in New York County. Defendants assert that Plaintiff's claims administrator, ProSight, also has its principal New York office in New York County. Defendants further assert that defense counsel in the Underlying Actions are material witnesses, and that they maintain offices in New York County, not in Bronx County. Finally, Defendants argue that this dispute only affects New York County insurers and has no impact on any Bronx County entities.

In opposition, Plaintiff argues that Defendants have not made the requisite showing to warrant a discretionary change of venue. Plaintiff argues that the convenience of parties is not to be considered on a motion to change venue pursuant to CPLR § 510(3). Plaintiff argues that Defendants have not set forth the residence addresses of the nonparty witnesses, whether any nonparty witness was contacted by Defendants' counsel, whether any nonparty witness is available and willing to testify in Defendants' favor, or any true inconvenience to any nonparty witness. Plaintiff argues that travel between neighboring counties does not constitute the kind of inconvenience warranting a discretionary change of venue.

In reply, Defendants' counsel submits an affirmation stating that he spoke with the attorneys who defended the parties' mutual insureds in the Underlying Actions. He states that he spoke to three of the defense counsel for the *Henriquez-Rodriguez* action, who stated that they are willing to testify in this action, that all three work in downtown Manhattan, and that they will be inconvenienced and burdened if this action were to be located in Bronx County. He also states that he spoke with one of the defense counsel for the *Register* action, who indicated that she works in Westchester County and would prefer that the action be venued in Bronx County. He asserts that he was unable to reach the other defense counsel for the *Register* action, but that her firm maintains offices in New York County and Westchester County. Defendants also argue that when considering the convenience of witnesses, the Court should consider where the majority of the witnesses are located.

"'A motion pursuant to CPLR 510(3) is addressed to the sound discretion of the court,' and defendant's submissions must be 'legally sufficient to support an exercise of that discretion" (*Leopold v Goldstein*, 283 AD2d 319, 320 [1st Dept 2001]; *Pittman v Maher*, 202 AD2d 172, 177 [1st Dept 1994]; *Wecht v Glen Distributors Co.*, 112 AD2d 891, 892 [1st Dept 1985]; *Raghavendra v Stober*, 171 AD3d 814, 816 [2d Dept 2019]).

"In order to obtain relief pursuant to CPLR 510(3), the movant must assert all of the following information: the names and addresses of the witnesses, the substance and materiality of their testimony relative to the issues in the case, that the witnesses have been contacted and are willing to testify on behalf of the movant, and the manner in which they will be inconvenienced by a trial in the county where the action was commenced" (*Gissen v Boy Scout of America*, 26 AD3d 289, 290-291 [1st Dept 2006]; *see also Krochta v On Time Delivery Service, Inc.*, 62 AD3d 579, 580-581 [1st Dept 2009]; *Martinez v Dutchess Landaq, Inc.*, 301 AD2d 424, 425 [1st Dept 2003]; *Coluck Incorporated v SEM Security Systems, Inc.*, 175 AD3d 953, 594-595 [2d Dept 2019]; *Bikel v Bakertown Realty Group, Inc.*, 157 AD3d 924, 925 [2d Dept 2018]).

The convenience of party witnesses is not to be considered on a motion for discretionary change of venue (*Martinez*, 301 AD2d 424 at 425; *Lawrence v Williams*, 158 AD2d 369, 370 [1st Dept 1990]; *Marrero v Mamkin*, 170 AD3d 1159, 1160-1161 [2d Dept 2019]).

Defendants have not demonstrated that a change of venue pursuant to CPLR § 510(3) is warranted. In their moving papers, Defendants did not state whether they contacted any nonparty witnesses or whether any nonparty witnesses are available and willing to testify in their favor. Defendants also failed to state the manner in which the nonparty witnesses will be inconvenienced by a trial in Bronx County, other than to state that they have offices in New York County, but not in Bronx County. Although Defendants attempt to remedy this deficiency in their reply papers, information submitted for the first time in reply cannot be considered by the Court (*Gersten v Lemke*, 68 AD3d 681, 681 [1st Dept 2009]; *Joseph v Kaufman*, 188 AD3d 847, 848 [2d Dept 2020]).

In any case, Defendants did not submit any affidavits from any of the nonparty witnesses proposed to testify on Defendants' behalf. Defendants submitted only its counsel's affirmation, in their reply papers, stating that he spoke with some of the nonparty witnesses who are available to testify on Defendants' behalf. The affirmation, however, is hearsay, and insufficient to support Defendants' motion (*Pittman v Maher*, 202 AD2d 172, 176 [1st Dept 1994] ["In response to affidavits from each of the non-party witnesses proposed to testify on plaintiff's behalf, defendants

submitted only the affidavit of an attorney contradicting their statements concerning the convenience of testifying in the Bronx. Defendants submitted no affidavit as to the convenience of a medical technician who will ostensibly testify on their behalf. Instead they relied on the argument of counsel, supported only by a hearsay assertion regarding what the technician told the lawyer, which is insufficient for this purpose"]; *see also Walsh v Mystic Tank Lines Corp.*, 51 AD3d 908, 908-909 [2d Dept 2008]).

Moreover, Defendants have not demonstrated that the nonparty witnesses will be inconvenienced by having to travel from New York County to Bronx County for trial, as general statements that witnesses would be inconvenienced by traveling to an adjacent county for trial are insufficient to warrant a change of venue, given the relatively short distance between the two counties (*Moumouni v Tappen Park Associates, Inc.*, 118 AD3d 427, 428 [1st Dept 2014]; *Geraldino v Coca-Cola Bottling of N.Y.*, 300 AD2d 56, 56 [1st Dept 2002]; *Prado v Walsh-Atkinson Co.*, 212 AD2d 489, 489 [1st Dept 1995]; *Pittman*, 202 AD2d 172 at 177 ["A presumption that a witness will be inconvenienced merely because the courthouse is located in a different county is unwarranted"]; *Ambroise v United Parcel Serv. of Am., Inc.*, 143 AD3d 927, 928 [2d Dept 2016] ["The mere fact that the witnesses would be required to travel a significant distance does not establish, without more, that requiring their testimony would impose an undue burden on them"]).

Accordingly, Defendants' motion to change venue pursuant to CPLR § 510(3) is denied.

Motion to Dismiss the Complaint Against AmTrust:

Defendants move pursuant to CPLR § 3211(a)(1) and § 3211(a)(7) to dismiss this action against AmTrust, arguing that AmTrust is not a proper party to this action. Defendants argue that AmTrust was the claims administrator for TIC and Wesco in the Underlying Actions. Defendants assert that AmTrust is not a party to the TIC or Wesco policies and has no rights or obligations under them. Defendants argue that an entity that is not a party to an insurance policy may not be sued in connection with an alleged failure to meet the terms of the policy. Defendants argue that, as a matter of law, neither a claims administrator for an insurance policy nor an affiliate of the entity issuing the policy may be sued in connection with an alleged breach of the policy.

In support of its motion, Defendants submitted the affidavit of Mr. Denzler and copies of the relevant TIC and Wesco insurance policies. Mr. Denzler states that AmTrust is not a party to TIC's commercial general policy that was issued to the parties' mutual insureds. He states that

AmTrust thus has no rights or obligations under the policy (Affidavit of Glenn Denzler, ¶ 3). Mr. Denzler also states that AmTrust is not a party to Wesco's insurance policy that was issued to the parties' mutual insureds. He states that AmTrust thus has no rights or obligations under the policy (Affidavit of Glenn Denzler, ¶ 5). He asserts that AmTrust acted as the claims administrator for TIC and Wesco for the Underlying Actions (Affidavit of Glenn Denzler, ¶ 7). He further asserts that AmTrust is not an insurance company and that it is not the corporate parent of either TIC or Wesco (Affidavit of Glenn Denzler, ¶ 8).

The policy attached as Exhibit A to Mr. Denzler's affidavit indicates that TIC issued the policy to Janus Management, Inc. Etal for the policy period from October 20, 2012 through October 20, 2013. The policy attached as Exhibit B to Mr. Denzler's affidavit indicates that Wesco issued the policy to GM Realty 1, LLC and GM Realty HDFC for the policy period from December 23, 2013 through December 10, 2014.

In opposition, Plaintiff argues that the documents Defendants proffer on their motion do not utterly refute the allegations or conclusively establish a defense as a matter of law. Plaintiff also argues that its causes of action based on breaches of fiduciary duties do not depend on the existence of a contract between the parties. Plaintiff further argues that since there was an agreement between AmTrust and TIC and between AmTrust and Wesco, pursuant to which AmTrust agreed to provide TIC and Wesco with certain services in connection with the policies issued to the insureds and which conferred upon AmTrust the right to carry out claim duties on behalf other insureds, AmTrust is a proper party.

In reply, Defendants argue that Plaintiff has not explained how the complaint would show that AmTrust owes Plaintiff a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. Defendants argue that, even accepting Plaintiff's allegations as true, the relationship between AmTrust and Plaintiff, if any, was nothing more than an ordinary relationship between sophisticated businesses.

Motion to Dismiss Pursuant to CPLR 3211(a)(1):

CPLR 3211(a) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence".

A document qualifies as "documentary evidence" for purposes of CPLR 3211(a)(1) if it is: (1) unambiguous, (2) of undisputed authenticity, and (3) its contents are essentially undeniable.

(*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]; *Mehrhof v Monroe-Woodbury Cent. Sch. Dist.*, 168 AD3d 713, 715 [2d Dept 2019]). Documents such as judicial records, mortgages, deeds, contracts, and other papers, the contents of which are essentially undeniable, have been found to qualify as documentary evidence (*Mehrhof*, 168 AD3d 713 at 715; *Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019]). Courts have found that insurance policies qualify as documentary evidence (*Ralex Services, Inc. v Southwest Marine & General Ins. Co.*, 155 AD3d 800, 802 [2d Dept 2017]; *Randazzo v Gerber Life Ins. Co.*, 3 AD3d 485, 485-486 [2d Dept 2004]).

Generally, "letters, emails and affidavits fail to meet the requirements for documentary evidence" (*Magee-Boyle*, 173 AD3d 1157 at 1159). However, affidavits may be used to authenticate documentary evidence (*Muhlhahn v Goldman*, 93 AD3d 418, 418 [1st Dept 2012]).

"A court may not dismiss a complaint based on documentary evidence unless 'the factual allegations are definitively contradicted by the evidence or a defense is conclusively established'" (*VXI Lux Holdco S.A.R.L.*, 171 AD3d 189 at 193; *Mehrhof*, 168 AD3d 713 at 715). "In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contracted by documentary evidence" (*Dixon v 105 West 75th Street, LLC*, 148 AD3d 623, 626-627 [1st Dept 2017]).

Defendants have not established their entitlement to dismissal of the complaint against AmTrust pursuant to CPLR 3211(a)(1). The only documentary evidence that may be considered are the insurance policies at issue. A review of the insurance policies establishes that AmTrust is not a party to those insurance policies. However, this does not conclusively establish that AmTrust had no part in the defense and settlement of the Underlying Actions. In fact, the policies do not explain AmTrust's relationship with TIC and Wesco. To explain AmTrust's relationship with TIC and Wesco, Defendants rely on the affidavit of Mr. Denzler. However, as explained above, affidavits are generally not considered documentary evidence for consideration on a motion brought pursuant to CPLR 3211(a)(1).

Accordingly, Defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) is denied.

Motion to Dismiss Pursuant to CPLR 3211(a)(7):

CPLR § 3211(a)(7) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action."

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'.

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976] [". . . affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious claims. Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one'"]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533 [1st Dept 2012]). The facts alleged in such affidavits must also be assumed to be true (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017]). However, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Id.; Cruciata v O'Donnell*, 149 AD3d 1034 [2d Dept 2017]).

A complaint must contain all essential facts to provide notice of the claim asserted (*DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]). Accordingly, vague and conclusory allegations will not suffice (*id.* at 239; *Fowler v American*, 306 AD2d 113, 113 [1st Dept 2003]) and a complaint suffering such affliction ought to be dismissed for failure to state a cause of action (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1994]; *O'Riordan v Suffolk Chapter*, 95 AD2d 800, 800 [2d Dept 1983]).

"When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff has stated a cause of action to whether it has one'. . . . [I]f the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]). However, "unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal

should not eventuate" (*Baumann v Hanover Community Bank*, 100 AD3d 814, 816 [2d Dept 2012]; *Paino v Kaieyes Realty, LLC*, 115 AD3d 656, 657 [2d Dept 2014]).

Generally, affidavits submitted on a motion to dismiss pursuant to CPLR 3211(a)(7) are "intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). Even if an affidavit submitted by a defendant to attack the sufficiency of a pleading is considered, it "will seldom if ever warrant the relief [the defendant] seeks unless [such evidence] conclusively establishes that plaintiff has no cause of action" (*Basis Yield Alpha Fund (Master)*, 115 AD3d 128 at 134; *see also Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010]).

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner, LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity" (*Board of Managers of Brightwater Towers Condominium v FirstService Residential New York, Inc.*, 193 AD3d 672, 673 [2d Dept 2021]; *Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017]).

"A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. An arm's-length business relationship does not give rise to a fiduciary obligation, as the core of a fiduciary relationship is a higher level of trust than normally present in the marketplace between those involved in arm's-length business transactions" (*Board of Managers of Brightwater Towers Condominium*, 193 AD3d 672 at 673). "A 'defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations'" (*Id.* at 674). "While courts generally look to the parties' contractual agreement to discover the nature of their relationship, the existence of a fiduciary relationship is not dependent solely upon an agreement or contractual relation. Rather, the actual relationship between the parties determines the existence of a fiduciary duty" (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]).

Defendants have not demonstrated their entitlement to dismissal of the complaint against AmTrust pursuant to CPLR 3211(a)(7). In light of the fact that Defendants submitted documents to be considered on this motion, the correct inquiry is whether Plaintiff has a cause of action for breach of fiduciary duty against AmTrust, not whether Plaintiff has stated one.

Defendants submitted copies of the insurance policies at issue, and thus demonstrated that AmTrust is not a primary insurer. However, Defendants have not conclusively demonstrated that AmTrust cannot otherwise be held liable for breach of the fiduciary duty to Plaintiff. In his affidavit, Mr. Denzler states that AmTrust acted as the claims administrator for TIC and Wesco in the Underlying Actions. However, there is no explanation of what that entails. Significantly, Mr. Denzler does not deny that AmTrust participated in the defense or settlement of the Underlying Actions. Furthermore, he does not state that AmTrust acted only at the direction of TIC and/or Wesco and that it did not have any independent authority to act. The Court also notes that Defendants have not submitted a copy of the agreements between AmTrust and TIC or between AmTrust and Wesco outlining the services to be rendered by AmTrust in relation to the Underlying Actions (*cf. S.P. v Dongbu Ins. Co.*, 174 AD3d 911 [2d Dept 2019] ["The complaint alleged that York's role was that of claims administrator for the insurer with regard to the policy. The evidence submitted by the defendants conclusively established that York did not have independent authority to issue the disclaimer and only did so at the direction of the insurer; that York is not an insurance company and did not participate in any way in the underwriting, issuance, or binding of the policy; and that York has no contractual privity with KDF or the plaintiff"]). Moreover, the email chain Defendants submitted with their motion demonstrates that AmTrust was involved in the defense and settlement of the Underlying Actions. As such, there is an issue of fact as to whether AmTrust owes a fiduciary duty to Plaintiff. Moreover, taking Plaintiff's allegations as true, Plaintiff has sufficiently alleged causes of action in breaches of fiduciary duties.

Accordingly, Defendants' motion to dismiss the complaint against AmTrust pursuant to CPLR 3211(a)(7) is denied.

It is hereby

ORDERED that this matter is scheduled for a Preliminary Conference on **Monday, April 4, 2022 at 10:00 a.m.** It is further

ORDERED that Plaintiff serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 2/9/2022

Hon. _____
FIDEL E. GOMEZ, A.J.S.C.