[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOWE PART 56

Justice

Index Number : 603579/2006
XE CAPITAL MANAGEMENT, LLC
VS
XE-R,LLC
Sequence Number : 003
DISMISS

INDEX NO. 603579/06
MOTION DATE 4/30/07
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

s motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/5/07

RICHARD B. LOWE III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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XE CAPITAL MANAGEMENT LLC, and
XE L.I.F.E, LLC,

Index No: 603359/06

Plaintiffs

-against-

DECISION AND ORDER

XE-R, LLC, MARK ROSS & CO., INC., and
MARK E. ROSS

Defendants

----------x

RICHARD B. LOWE III, J:

Plaintiffs XE Capital Management LLC ("XE Capital") and XE L.I.F.E, LLC ("XE LIFE") (collectively "the Plaintiffs") bring the instant action against defendants XE-R, LLC ("XE-R"), Mark Ross & Co, Inc ("MRC"), and Mark E. Ross ("Ross") (collectively, "the Defendants") for declaratory relief, a permanent injunction, and damages. The Defendants assert counterclaims for declaratory relief, a permanent injunction, breach of contract, breach of the duty of good faith and fair dealing, tortious interference with a business relationship, and a declaration of alter ego liability. In the instant motion, the Plaintiffs move to dismiss the Defendant's counterclaims pursuant to CPLR 3211(a)(7). The Defendants oppose the motion, and cross-move for additional discovery pursuant to CPLR 3211(d).

BACKGROUND

In June 2004, XE Capital and Ross's company, R2004, LLC, created XE-R as a joint venture. XE-R provides loans to high-net-worth individuals who wish to purchase life insurance policies. If the individual decides to sell the life insurance policy rather than repay the loan when it becomes due, MRC would broker the policy through XE-R in the secondary market.

Prior to XE-R's formation, MRC had a professional relationship with the then-owners of what is now referred to as the Doe policies. MRC advised them on purchasing a life insurance policy. In October 2004, after XE-R was formed, XE LIFE provided permanent financing to these individuals in order for them to acquire a policy. When the loan matured in July 2006, the then-owners decided to sell the policy; they surrendered it to XE LIFE.

MRC learned about the Doe policies and approached XE LIFE about brokering it. XE LIFE refused. At the time, the relationship between XE LIFE and Ross had deteriorated because of the former's contention that the latter committed a "pattern" of misconduct with respect to XE-R's operations. Ross/MRC/XE-R averred that it had the exclusive right to broker the polices. XE LIFE and XE Capital contended that no such right existed, and selected Sierra Life Solutions, LLC ("Sierra") as the Doe policies' broker.

On October 12, 2006, XE LIFE filed a complaint for declaratory and injunction relief against MRC and Ross under the caption *XE L.I.F.E., Inc v. Mark Ross & Co and Mark E. Ross,* (Index No: 603579/06). It sought an injunction prohibiting MRC from acting as the settlement broker for the Doe policies. MRC filed a parallel action under the caption *XE-R, LLC and Mark*

Ross & Co v. XE Capital Management, LLC and XE L.I.F.E., LLC, (Index No: 603658/06), which sought an injunction prohibiting XE Capital and XE LIFE from preventing it from brokering said policies. In a decision dated October 30, 2006, this Court granted XE LIFE a preliminary injunction, and enjoined MRC from presenting itself as the Doe policies' exclusive broker; MRC's request for injunctive relief was denied.

By stipulation and order dated December 12, 2006, the parties consolidated the aforementioned actions into the instant one. In their complaint, the Plaintiffs request a declaration that they have the right to determine who can broker the Doe policies; injunctive relief prohibiting the Defendants from asserting an exclusive right to broker said policies; and damages for the Doe policies' devaluation allegedly due to the Defendants' conduct.

The Defendants assert six counterclaims against the Plaintiffs. [1] The second through fifth are premised on their aversion that they have the exclusive right to broker the Doe policies. Accordingly they seek a declaration to that effect; an injunction enjoining the Plaintiffs from preventing them from selling said policies; a determination that the Plaintiffs breached the exclusivity agreement; and a determination that the Plaintiffs breached the covenant of good faith and fair dealing. The sixth counterclaim alleges that the Plaintiffs tortiously interfered with the Defendants' business relationship with the Does, the policies' previous owner. Finally, they seek a declaration that XE LIFE and XE Capital are each other's alter egos, thus holding each liable for the other's alleged malfeasance.

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[1] The Defendants also asserted a counterclaim that sought a declaration that the instant dispute was arbitrable. That counterclaim is rendered moot by this Court's February 8, 2007 decision, which held that the Defendants waived any right to arbitration because they sought judicial intervention to resolve their claims.

In the instant motion, the Plaintiffs move to dismiss the Defendants' counterclaims under CPLR 3211(a)(7), averring that the latter failed to state claims where relief could be granted. The Defendants oppose the motion, and seek additional discovery pursuant to CPLR 3211(d).

DISCUSSION

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. . ." (*CPLR 3211(a)(7)*) In a motion to dismiss, the court takes the facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, LP v State Street Bank and Trust Co,* 5 NY 3d 582 [2005]). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." (*Ackerman v 204 East 40th Owners Corp.,* 189 AD 2d 665 [1st Dept 1993].)

Fourth Counterclaim: Breach of Contract

The Defendants' contention that they have the exclusive right to broker the Doe policies is partially premised on their aversion that the XE-R joint-venture agreement gives them said right. [2] In their fourth counterclaim, they allege that the Plaintiffs breached the agreement by preventing them from brokering the Doe policies. In order to sufficiently plead a cause of action for breach of contract, the Defendants must specify the terms of the contract, the consideration,

[2] The Defendants also assert additional grounds for their exclusivity rights. Those allegations will be discussed, *infra.*

their performance, and the basis of the Plaintiff's alleged breach. (*See, 219 Broadway v Alexander's Inc.*, 46 NY2d 506 [1979].)

> Here, the Defendants plead
>
> In August 2004, R2004 and XE Capital formed XE-R for the purpose of. . .brokering the settlement of policies in the secondary market.

(*Answer at page 13, ¶ 71*)

> In the fall of 2004, Defendants began discussing a non-recourse financing transaction through which the Does would refinance certain policies which had previously been purchased through [MRC]

(*Id ¶ 72*)

> Section 2.2(a) of the Agreement states that the purposes of XE-R include. . ."to originate loans collateralized by life insurance policies" and "to broker life settlements of policies and receive compensation related to such brokerage.

(*Id ¶ 73*)

> Pursuant to Section 3.6(b)(I) of the Agreement, XE Capital. . .covenants that "The Company [XE-R] will be the exclusive means by which XE Capital and its Affiliates transact in Loans as contemplated by Section 2.2(a); provided that XE Capital may transact in any Loans not originated by [XE-R] with the consent of the managing member, which consent shall not be unreasonably withheld."

(*Id ¶ 73*)

> In October 2004, after the formation of XE-R and after the parties entered into the August 2004 agreement, [Ross and MRC] brought the Does and the Doe transaction to the new joint venture. . .The parties agreed to an arrangement whereby XE-R provided interim financing for the Doe policies. . .

(*Id at pages 13-14, ¶ 76*)

> The interim financing was collateralized by life insurance policies and thus meets the definition of a "loan" as set forth in Section 2.2(a)

(*Id at page14, ¶ 77*)

> XE LIFE is an affiliate of XE Capital and thus XE-R is the exclusive means by which XE LIFE may transact in such loans. *See* Agreement § 3.6(b)(I)

(*Id* ¶ *78*)

> As the Agreement controls the Doe interim financing. . .and the purpose of XE-R is "to broker life settlements. . ." XE-R or its designee is the designated broker of any settlement of the Doe Policies.

(*Id* ¶ *80*)

> In November 2004, the Defendants suggested to Plaintiffs that the permanent financing of the Doe policies, which would replace the interim financing, come directly through XE LIFE to the Does solely for the purposes of administrative ease.

(*Id* ¶ *82)*

> . . .It was never the intention of the parties that the permanent financing would somehow take the Doe transaction out of the control of the XE-R joint-venture or Agreement. . .

(*Id* ¶ *83*)

> The permanent financing. . .meets the definition of "Loan" as set forth in Section 2.2(a) of the Agreement. The Managing Member never gave consent to transact in any Doe Loan outside the Agreement.

(*Id* ¶ *84*)

> Both the interim and permanent financings of the Doe Policies were XE-R transactions controlled by the Agreement.

(*Id at page 16,* ¶ *87*)

On July 11, 2006. . .Plaintiffs declared that they would not use Defendants as brokers of the settlement of the Doe policies until "there is a resolution of the larger issues between us."

(*Id at page 21,* ¶ *111*)

> Although the Doe transaction was conducted pursuant to the joint venture and is governed by the Agreement, in stating that they would not use Defendants as brokers of the settlement of the Doe policies. . .Plaintiffs egregiously undermined the purpose of the joint venture.

(*Id at page 22, ¶ 112*)

Here, the Defendants identify the existence of the XE-R Agreement, of which the Plaintiffs do not dispute. Furthermore, they specify those provisions that they allege the Plaintiffs breached; namely, that XE-R and its affiliates are to be the exclusive broker of settlement policies that XE Capital or its affiliates transacts. Finally, the Defendants plead that the Doe policies were within the Agreement's ambit, and the Plaintiffs breached the exclusivity provisions by refusing to use XE-R and its affiliates as the Doe policies' brokers. The Defendants have thus adequately plead a breach of contract.

However, the analysis does not conclude there. If the pleading contains "bare legal conclusions as well as factual claims contradicted by documentary evidence", the motion to dismiss should be granted. (*Stuart Lipsky , PC v Price,* 215 AD 2d 102 [1st Dept 1995].) Here, the Plaintiffs aver that the underlying record conclusively refutes that the Doe policies are governed by the Agreement, rendering the Defendants' pleading inadequate to state a claim for breach of contract.

The Plaintiffs argue that "Defendants cannot dispute that XE-R was not yet formed when the sale of the Doe policies took place" and that the Defendants cannot " dispute that XE-R was not a party to the ultimate financing of those policies. . ." (*Memo of Law at page* 7) To be sure, the Defendants acknowledge that the Does purchased their initial policy before XE-R was formed and that XE LIFE provided the permanent financing directly, without XE-R's involvement. (*Memo in Opp'n, at pages 6-7*)

As to the Plaintiffs' first contention: on a CPLR 3211(a)(7) motion to dismiss, the court must accept the facts plead as true and afford the Defendants every possible favorable inference.

(*See, NM IQ LLC v OmniSky Corp,* 31 AD 3d 315 [1st Dept 2006].) Here, the Defendants plead their interpretation that the Doe policies are covered by the agreement, despite the fact that the Doe policies were sold/purchased pre-XE-R formation. Since there is no documentary evidence that "flatly contradicts" [3] the Defendants' allegation, it is not appropriate, at this juncture, for a court to determine conclusively the meaning of said contract with respect to whether a policy sold pre-joint venture falls within the agreement's realm. [4]

As to the Plaintiffs' second point: the issue is whether XE-R still possessed the exclusive right to broker this policy pursuant to Section 3.6(b)(I) when XE-R did not originate this loan. The Defendants plead that the permanent financing came from XE LIFE directly, rather than through XE-R, for "administrative ease", and that it was not their intention to have the Doe policies removed from the brokerage provision. (*See, Answer at page 14, ¶ 82 & 83*). It specifically pleads that it never gave consent, as required by the agreement. (*See, Id ¶ 84*)

The Plaintiffs proffer documentary evidence that they aver conclusively refutes the Defendants' pleading that XE LIFE's sole financing did not eliminate the exclusive brokerage rights. [5] Here, they proffer an email from Lisa Brogan to Terrence Leighton, which states that XE-R authorized and directed XE LIFE to act as the sole lender for the Doe transaction.

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[3] *See, Lipsky, supra.*

[4] The Plaintiffs cite to this Court's October 30, 2006 decision regarding the imposition of a preliminary injunction as further support for their contention that the Defendants fail to adequately plead a breach of contract. In doing so, they are applying the inappropriate standard in the instant motion. In order for a court to issue a ruling on a preliminary injunction, CPLR 6301 *et seq* requires that it review *the merits as is presented to it at the time* in order to make a *preliminary* finding on who would likely ultimately prevail. Here, by moving pursuant to CPLR 3211(a)(7), the Plaintiffs have asked this Court to review the Defendants' pleading and determine whether a claim is stated. It is not appropriate, at this junction, to make a legal determination as to the underlying merits. (*See, ILG Capital LLC v Archipelago LLC,* 36 AD 3d 401 [1st Dept 2007].)

[5] See Note 4, *supra.*

Furthermore, the documents pertaining to the permanent financing clearly list XE-LIFE, and not XE-R, as the lender. XE-R is nowhere referenced therein.

In order for the records to conclusively refute the Defendants' pleadings, they must clearly demonstrate that the Defendants relinquished their brokerage rights. The Plaintiffs argue that the emails and agreements demonstrate that the Defendants did this by their conduct, despite the latter's assertions that they did not do so verbally or intentionally. To be sure, the email and financing agreement resoundingly demonstrate that XE-R was not involved in the Doe policies' permanent financing. These documents do indeed *strongly suggest* that the financing outside the agreement withdrew the Doe policies from the brokerage provision. But this does not flatly refute the Defendants' pleading that it never consented to or intended that it would be excluded. Giving the Plaintiffs' pleadings every favorable inference, and not finding that the documents refute them, the motion to dismiss the fourth counterclaim is denied.

Second Counterclaim: Declaratory Judgment

In their second counterclaim, the Defendants seek a "declaration that they have the exclusive right to broker the settlement of the Doe Policies." (*Answer at page 27, ¶ 140*) To the extent that this counterclaim is premised on the Defendants' cognizable claim for breach of the XE-R contract, the Plaintiff's motion to dismiss it is denied.

However, the declaratory relief the Defendants seek is not solely premised on that contract. Additionally, they assert three other grounds for their alleged exclusive right to broker the Doe policies: an agreement with the Does; their reimbursement of the Does expenses with respect to XE LIFE's financing; and their offer to indemnify XE LIFE for any losses the latter

incurred with respect to the Doe policies' permanent financing. In order for the Defendants to survive a motion to dismiss the declaratory relief pertaining to these three alleged agreements, it must sufficiently plead their existence. Each will be addressed in turn.

A. The Doe Agreement

Here, the Defendants plead that

> The Does have sought the advice of [MRC] for over a decade. Defendants entered into an agreement with the Does whereby the Defendants provided professional expertise and guidance not only in connection with the acquisition of certain life insurance policies, but in the financing or refinancing of those policies. . .

(*Answer page 12, ¶ 70*)

> The Does. . .understood that the Doe transaction was controlled by XE-R and that Defendants were to broker any settlement.

(*Answer at page 19, ¶ 98*)

> The Does and their professional advisors expressed their unequivocal requirement to have the Defendants. . .broker any future settlement of the policies. . .

(*Id ¶ 99*)

> Defendants specifically undertook the duty to act as exclusive broker for the settlement of the Doe Policies, and Defendants' promise to the Does was conveyed and confirmed by Plaintiffs. . .

(*Id ¶ 100*)

> The Does would not have entered into the transaction with the Plaintiffs without Defendants' agreement to act as exclusive brokers for any settlement of the policies.

(*Id ¶ 101*)

> As the insureds under the policies, the Does provided various documents in connection with the transaction, including authorizations. . .required by The Health Insurance and Portability and Accountability Act of 1996 ("HIPAA"). . .

(*Id, ¶ 102*)

> Since the parties and the Does all understood that the Defendants would be the exclusive brokers in any settlement of the Doe policies, the Does named only the Defendants as being authorized to receive disclosures pursuant to HIPAA.

(*Id at page 20, ¶ 103*)

> [After the Does tendered the policies rather than repay the matured loan], Plaintiffs' counsel asked XE-R to make XE LIFE its "designee" under the HIPAA authorizations, which would allow XE LIFE to receive disclosures. . . necessary for the settlement of the policies.

(*Id ¶ 106*)

> XE-R never designed XE-LIFE as its agent. . .

(*Id at page 21, ¶ 107*)

> XE Capital, through XE LIFE, wrote to the Does demanding the execution of new HIPAA documents before monies held in escrow that were due and owing to the Does would be released. . .the Does executed the HIPAA forms in order to obtain the money due them. In particular, on or about June 28, 2006, the Does executed new HIPAA forms naming XE LIFE and its affiliates and representatives as authorized to receive disclosures.

(*Id ¶ 108*)

> The original HIPAA forms authorizing "XE-R or its designates" to receive disclosures under HIPAA were never revoked

(*Id ¶ 109*)

> Plaintiffs obtained the new HIPAA authorizations from the Does by withholding from the Does information that otherwise would have been material and necessary to their decision-making - particularly that Plaintiffs intended to usurp Defendants' settlement rights. Had the Does known these facts, they would not have provided the authorizations.

(*Id ¶ 110*)

The Defendants' pleading with respect to their alleged exclusive right based on an agreement with the Does can be separated into two arguments: their initial agreement with the Does gave them said right, as did the HIPAA forms' execution. Neither pleading can overcome the Plaintiffs' motion to dismiss.

I. The Agreement Itself

To be sure, the Defendants sufficiently plead the existence of *an* agreement with the Does. They plead that they entered into one approximately 10 years ago and identify the agreement's stated purpose of providing the Does with advice on life insurance policies. They do not, however, sufficiently plead that this specific agreement gave them the exclusive right to broker the settlement of policies permanently funded by XE LIFE.

First, their allegation that the Does understood and desired that the Defendants act as settlement broker is insufficient to plead the existence of a contract. Indeed, wishes and aspirations do not rise to the level of legal obligations.

Second, the Defendants' allegation that the Plaintiffs confirmed that the former would broker the possible policies' settlement equally fails to plead a contract on which declaratory relief could be granted. Here, the Defendants offer a conclusion that the Plaintiffs made a promise, without additional support for its pleading. The Defendants fail to proffer any writing to support their aversion of an additional contractual obligation separate and apart from the XE-R Agreement. [6]

ii. The HIPAA Forms

The allegations concerning the HIPAA's forms' execution fail to sufficiently plead the Defendants' exclusive brokerage rights. The Defendants plead that whomever the Does designate to receive the HIPAA disclosures is done for the purpose of giving the designee the right to settle the policies' potential resale. Even affording the Defendants "every possible

[6] See, *supra*.

favorable inference" does not save this allegation from dismissal. Indeed, if XE-R were given *a* right to broker the policies because of the HIPAA designation, XE LIFE was also given *a* right when the Does subsequently designated it to receive the disclosures. The Defendants plead that the designation given to XE-R was never revoked; two entities therefore have the right to receive the disclosures and the broker the policies. By their own pleadings, the Defendants cannot have an "exclusive" right if another entity has also the same right.

B. Expense Reimbursement

As yet another basis for their aversion that they possess the exclusive right to broker the Doe policies, the Defendants plead

> Defendants. . .agreed to reimburse the Does for certain substantial expenses incurred in connection with the acquisition of the permanent financing. Section 14.11(b) of the loan agreement dated January 4, 2005 entered into between XE LIFE and the Does [provides that] "by separate agreement with XE-R, LLC, that company is to pay or reimburse [the Does], for the payment of reasonable costs and expenses. . . in connection with the transactions contemplated by this Agreement through January 9, 2005.". . .

(*Answer at page 18, ¶ 94*)

> XR-R paid close to $100,000 in expenses as contemplated by Section 14.11(b) of the loan agreement. The payment of the Does' expenses by Defendants is further evidence of XE-R's interest in the Doe transaction. . .and is additional confirmation of Defendants' exclusive brokerage rights.

(*Id, ¶ 95*)

Here, the Defendants identify an agreement's existence under which XE-R took on the obligation to pay the Doe's expenses. But this agreement, and the Defendants' pleading, only provides that XE-R would cover the Doe's expenses pertaining to the transaction. This agreement does not provide that XE-R received exclusive brokerage rights *because* of the reimbursement. Rather, the Defendants conclude that they did without supporting their

contention with language quoted from a binding agreement. Their "bare legal conclusion"is insufficient to survive the Plaintiffs' motion to dismiss the declaratory relief premised herein. (*See, Stuart Lipsky, supra*).

C. The XE-LIFE Indemnification

The final basis for the Defendants' request for a declaratory judgment is an alleged indemnification XE-R provided XE-LIFE. Here, the Defendants plead

> . . . at the request of XE-LIFE, XE-R made the following undertaking with respect to the settlement of certain life insurance policies hereinafter referred to as the "Smith policies": "To induce you to enter into the Doe transactions, we hereby agree to treat any proceeds in excess of the applicable debt on the settlement of the [Smith] policies as a backstop against any losses that may be incurred by XE-LIFE on the settlement of the Doe policies." The indemnification is an inducement for XE LIFE to make the loan to the Doe partnership.

(*Answer at page 17, ¶ 90*)

> The above-described indemnification evidences XE-R's vested interest in brokering the settlement of the Doe Policies and obtaining a sale price that would, at a minimum, cover XE-LIFE's loans. XE-R received no benefit [and] no consideration for indemnity, other than the exclusive settlement brokerage rights herein noted. XE-R would not have indemnified XE-LIFE for this exposure if it could not control the exposure by brokering the settlement.

(*Id, ¶ 92*)

> XE-LIFE, which accepted this protection, accepted the indemnification until faced with the proof. . .that said indemnification was unequivocal evidence of the parties' respective rights and obligations pursuant to the Agreement. . .at which point. . . XE-LIFE claimed. . .to have "never accepted" and to have "returned" the indemnification.

(*Id, at pages 17-18, ¶ 93*)

Here, the Defendants fail again to adequately plead the existence of a contract separate and apart from the XE-R Agreement that gives them an exclusive right to settle or broker the Doe policies. The Defendants plead that they indemnified XE-LIFE from the risks associated with the Doe policies' permanent financing. But the plain language of this alleged indemnification only provides that the XE-R provided the indemnification in order to induce XE-LIFE to make the loan. It *does not* provide that, as a result of the indemnification, XE-LIFE gave XE-R said right. Rather, the Defendants plead conclusively that this indemnification evidences the right's existence and that XE-R would never have given it if not for the acquisition of said right. Pleading expectations does not satisfy the pleading requirements for a binding contract.

Accordingly, the Plaintiffs' motion to dismiss the second counterclaim for declaratory relief is denied, and granted, in part. To the extent that the Defendants seek a declaratory judgment that they have the exclusive right premised on the XE-R Agreement, the Plaintiffs' motion to dismiss is denied. To the extent that the Defendants seek a judicial declaration that they have an exclusive right premised on their agreement with the Does; the reimbursement of the Doe's expenses; and the indemnification of XE-LIFE's losses, the Plaintiff's motion to dismiss is granted.

Third Counterclaim: Injunctive Relief

As their third counterclaim

The Defendants seek an order enjoining Plaintiffs and their agents from denying Defendants exclusive brokerage rights in connection with the settlement

> of the Doe policies, and from marketing or advertising brokerage services, or from brokering or authorizing a broker other than Defendants in connection with the settlement of the Doe policies. [7]

(*Answer at page 29, ¶ 149*)

A principal may revoke an agency, even one grounded in contract, subject only to liability to respond in damages for breach of contract. (*See, Kerr S.S. Co v Kerr Nav. Corporation,* 113 Misc 56 [NY County Sup. Ct. 1920]; *Smith v Conway,* 198 Misc 886 [NY County Sup. Ct. 1950], *aff'd,* 278 AD 566 [1st Dept 1951].) Therefore, it is "contrary to public policy for a principal to have an agent forced upon [her/him] against [her/his] will." (*Tyson v Cayton,* 1990 WL 144306 [SDNY], *applying New York law.*) This is premised on the idea that "the result would be to compel two antagonistic parties to work together." (*Id.*)

Here, the relationship between the parties is undoubtedly contract-based. The XE-R Agreement provides that XE-R would broker loans originated by XE Capital and its affiliates. But because this relationship is rooted in contract law, it does not mean that its nature fails to be one of principal and agent. Indeed, when one entity is charged with brokering another's property, an agency relationship is formed. Here, the Defendants admit that the Doe policies are XE LIFE's property. (*See, Memo in Opp'n, at page 21*) If their assertion is correct and the brokering of this policy falls within the agreement's four corners, XE-R is to broker XE LIFE's property, and thereby act as its agent.

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[7] As discussed, *supra,* the Defendants can only assert this claim based on the XE-R Agreement, and no other purported agreement.

Accordingly, the Defendants' counterclaim for injunctive relief must be dismissed. The relationship between the parties is strained at best, with the rift's origination pre-dating the instant action. If the fact-finder determines that the Plaintiffs breached the contract, injunctive relief would direct two parties "in an antagonistic relationship" to work together. The better remedy, if the Defendants prevail, are the damages sought under their breach of contract counterclaim: the commissions they would have received had they settled the Doe policies. [8]

Fifth Counterclaim: Breach of the Duty of Good Faith and Fair Dealing

Under New York, all contracts imply a duty of good faith and fair dealing in executing performance contained therein. (*See, Smith v General Acc. Ins. Co.,* 91 NY 2d 648 [1998].) The covenant is premised upon the inference that neither party's conduct will interfere with the other party's right to enjoy "the fruits of the contract." (*See, 511 West 232nd Owners Corp v Jennifer Realty,* 98 NY 2d 144 [2002].) A party who pleads a breach of the duty and a breach of contract cannot assert the same facts to support both claims. (*See, Cerberus Int'l Ltd v Bantec, Inc,* 16 AD 3d 126 [1st Dept 2005].) If a party does, the breach of good faith and fair dealing must be dismissed. (*See, Engelhard Corp v Research Corp,* 268 AD 2d 358 [1st Dept 2000].)

Here, the Defendants plead the same facts as those found in the breach of contract claim to support their contention that the Plaintiffs breached the duty of good faith and fair dealing. (*See, Answer at page29, ¶ 150; at page 30, ¶ 153*) They do, however, specifically plead that the duty was breached because the Plaintiffs "divert[ed] XE-R's business to broker the settlement of

[8] In a footnote, the Defendants argue that if this Court finds that this relationship is governed by agency law, the agency is in fact irrevocable. (*See, Memo in Opp'n, at page 20, Footnote 9*). This is premised on their assertion that it is an "agency coupled with an interest." However, the Defendants do not proffer any arguments to support their contention that this legal principle is controlling. Accordingly, this Court will not address their argument.

the Doe policies" to Sierra. (*See, Id at page 22, ¶ 115; at page 30, ¶ 156*). Despite this additional pleading, the facts still return to the breach of contract claim: the Plaintiffs allegedly breached *both* the contract *and* the duty by preventing the Defendants from brokering the Doe policies and assigning that "right" to Sierra. Furthermore, the Defendants seek the same damages in both claims: an amount equal to the commissions they would have earned on the Doe policies' settlement. (*See, Id at page 29, ¶ 152; at page 30, ¶ 158*) Since both claims are premised on the same facts and seek the same damages, the fifth cause of action for the breach of good faith and fair dealing is dismissed.

Sixth Counterclaim: Tortious Interference with Business Relations

In their sixth counterclaim, the Defendants aver that the Plaintiffs interfered with their on-going business relationship with the Does. In addition to their pleading that they had a decade-old relationship with the Does, the Defendants allege that

> In ordering the "new" HIPAA authorizations from the Does in a deceitful and fraudulent manner, the Does were duped into aiding and abetting Plaintiffs in their scheme, which. . .was conjured to result in a breach of Defendants' obligation pursuant to the exclusive brokerage agreement between the Does and Defendants. . .

(*Answer at page 31, ¶ 160*)

> In denying Defendants their exclusive rights. . .Plaintiffs have tortiously interfered with Defendants' ongoing business relationship with the Does. . .

(*Id, ¶ 161*)

> . . .Plaintiffs' conduct is intended to prevent Defendants from acting so as to satisfy their obligations to the Does, and undermines what has been the continuing business relationship between Defendants and the Does. . .

(*Id, ¶ 163*)

> As a direct and proximate cause of Plaintiffs' tortious interference, Defendants have been damages in an amount to be determined at trial.

(*Id,* ¶ *165*)

In order to plead a claim for tortious interference with a business relationship, the movant must plead "the existence of a valid contract between the [defendants] and a third party, [plaintiffs'] knowledge of the contract, [plaintiffs'] intentional procurement of the third party's breach without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co v Smith Barney,* 88 NY 2d 413 [1996].) The Defendants do not meet this pleading standard.

Here, the Defendants plead the existence of a business relationship between them and the Does. But the stated purpose of that relationship was to give advice on the procurement and financing of life insurance policies; the Defendants do not plead that they had a contract with the Does to broker the policies that are the subject of the instant action. While the Defendants plead that the Plaintiffs allegedly committed malfeasance by instructing the Does to amend the HIPAA forms, this cannot serve as the premise for a contract breach. The HIPAA forms cannot constitute a contract between the Defendants and the Does. As the Defendants plead, they still remain authorized under the forms to receive the disclosures.

Finally, the Defendants fail to plead damages aside from those allegedly resulting from the contract breach. The counterclaims are void of any allegation that the larger relationship with the Does were tarnished. Indeed, the Defendants have not plead that as a result of the Plaintiffs' actions, the Does ceased seeking their professional advice. Accordingly, the motion to dismiss this counterclaim is granted.

Seventh Counterclaim: Declaration of Alter Ego Liability

In their final counterclaim, the Defendants seek a judicial declaration that XE Capital and XE LIFE are each other's alter egos. Therefore, they must be held liable for the other's alleged wrongdoing.

A party who seeks to pierce the corporate veil "must plead and prove (1) complete domination and control of the subsidiary, not only generally, but with respect to the transaction at issue; (2) that this control was used to commit a fraud or other wrong, in contravention of the [Defendants'] rights; and (3) that the control and misuse caused [Defendants'] loss." (*Eastern States Elec. Contractors v William L.*, 153 AD 2d 522 [1st Dept 1989].) The Defendants fail to meet their pleading-burden.

Here, the Defendants plead that

> Counsel for XE Capital and XE LIFE have represented to this Court: "We represent XE LIFE, which is a subsidiary of XE Capital. That's one half of the joint venture. . . we represent one half of the joint venture. . ."
> (*Answer at page 25, ¶ 126*)

> In Section 3.6(b)(I) of the Agreement, XE Capital represents. . .that XE-R "will be the exclusive means by which XE Capital and its Affiliates transact in Loans. . .," thereby promising that it controls the behavior of its Affiliates. . .such as XE LIFE.
> (*Id at page 26, ¶ 128*)

> Upon information and belief, XE LIFE was formed for the purpose of being XE Capital's instrument in anticipation of making loans collateralized by life insurance policies in connection with the joint venture between the parties. . .
> (*Id, ¶ 129*)

> Upon information and belief, XE LIFE exercises its rights only at the direction of XE Capital, is dominated and controlled by XE Capital, and was used by XE Capital. . . to deprive Defendants of their brokerage rights.
> (*Id, ¶ 130*)

In addition, the Defendants assert several other allegations, upon information and belief, that XE Capital and XE LIFE share office space, telephone numbers, management, and assets. (*See, Id at page 32, ¶ 165-173*)

Here, while XE Capital and XE LIFE may share counsel in the instant action, that does establish that the two entities are each other's alter egos. Nor does the fact that together they comprise one-half of XE-R's ownership prove such. Indeed, it is not out of the realm of possibilities in Corporate America for a parent and subsidiary to partner in a joint venture without the veil between them becoming porous. Moreover, while XE Capital promised that it and its affiliates would be the exclusive means to transact loans, that does not in and of itself prove XE Capital has or had complete dominion over XE LIFE. Finally, the Defendants remaining allegations pertaining to their alter-ego counterclaim are premised on several assertions upon information and belief. Without additional, alleged facts to support the allegation claimed herein, this counterclaim cannot remain. Accordingly, the motion to dismiss it is granted.

The Defendants' Counterclaim: Additional Discovery Pursuant to CPLR 3211(d)

The Defendants cross-move pursuant to CPLR 3211(d). They contend that the Plaintiffs have additional facts in their possession that, if proffered, would warrant the instant motion's denial.

"Should it appear from *affidavits* submitted in opposition to a motion made under [CPLR 3211(a)] that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion. . ." (*CPLR 3211(d), emphasis added*)

Here, the Defendants have not produced affidavits attesting that additional facts *may* exist that would justify denying the motion, in its entirety, at this time. Accordingly, their cross-motion is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion to dismiss the Defendants' second counterclaim is denied and granted in part. To the extent that the Defendants seek a declaratory judgment that they have the exclusive right premised on the XE-R Agreement, the Plaintiffs' motion to dismiss is denied. To the extent that the Defendants seek a judicial declaration that they have an exclusive right premised on their agreement with the Does; the reimbursement of the Doe's expenses; and the indemnification of XE-LIFE's losses, the Plaintiff's motion to dismiss is granted; and it is further

ORDERED that the motion to dismiss the Defendants' fourth counterclaim is denied; and it is further

ORDERED that the motion to dismiss the Defendants' third, fifth, sixth, and seventh counterclaims is granted; and it is further

ORDERED that the Defendant's cross motion pursuant to CPLR 3211(d) is denied.

This shall constitute this Court's decision and order.

Date: June 5, 2007

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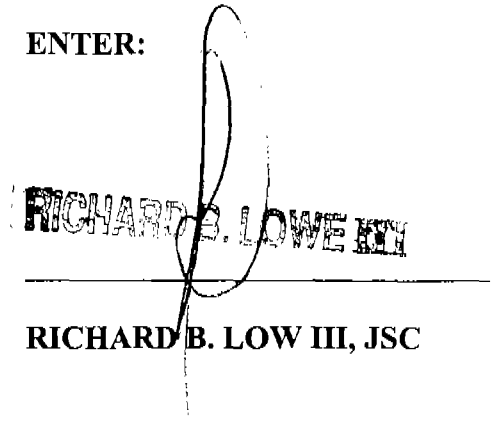

RICHARD B. LOW III, JSC