

Kerrigan v RM Assoc., Inc.
2008 NY Slip Op 33322(U)
December 9, 2008
Supreme Court, New York County
Docket Number: 100316/2008
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 100316/2008

KERRIGAN, ELIZABETH FRANCES

vs.

RM ASSOCIATES, INC.,

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 100316-08

MOTION DATE 8/21/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

ere read on this motion to/for _____

PAPERS NUMBERED

1-2

3-6

7-11

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 AND ORDER.**

FILED

DEC 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

12/9/08

Dated: _____

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

Index No. 100316/2008

-----X
ELIZABETH FRANCES KERRIGAN, as Executrix
of the Estate of THOMAS CONNELLY,
decedent, and ERIN ERECTORS, INC.,

**DECISION and
ORDER**

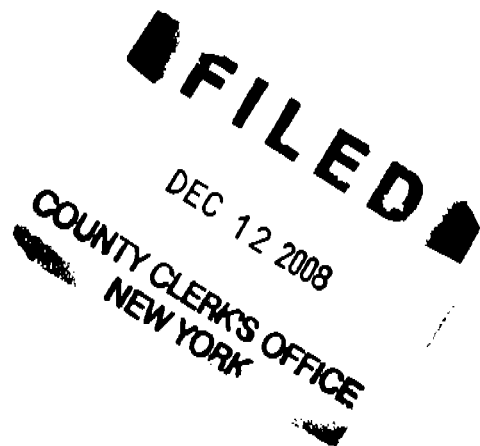
Plaintiffs,

-against-

RM ASSOCIATES, INC., individually and d/b/a
METRO RISK MANAGEMENT, OMNI RISK
MANAGEMENT, INC., TRI-CITY INSURANCE
BROKERS, INC., individually and as a division of
BISYS COMMERCIAL INSURANCE SERVICES,
INC., ACE INA, ACE USA, ACE WESTCHESTER
SPECIALTY GROUP and WESTCHESTER FIRE
INSURANCE COMPANY,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.



In this action involving an excess/umbrella insurance policy, defendant Westchester Fire Insurance Company (Westchester Fire) moves prior to joinder of issue, pursuant to CPLR 3211(a)(1) and (7), to dismiss the first, third and fourth causes of action in the complaint, as well as plaintiffs' claim for attorneys' fees. Plaintiffs cross-move for partial summary judgment on liability on the fourth cause of action, declaring that Westchester Fire owes defense and indemnification to Thomas Connelly (Connelly) and Elizabeth Frances Kerrigan, as Executrix of the Estate of Thomas Connelly (Estate) (collectively, plaintiffs) in the action entitled *Kerrigan v. TDX Construction Corp.*, Sup. Ct. N.Y. Co. Index No. 10904/2004 (Underlying Action).

Defendants RM Associates, Inc., individually and d/b/a Metro Risk Management, Inc., and Omni Risk Management, Inc., (collectively Omni) cross-move, pursuant to CPLR

3211(a)(7), to dismiss the complaint or, alternatively, for summary judgment dismissing all claims against Omni.¹

I. Discussion of Procedural Issues

Westchester Fire and Omni have objected to consideration of plaintiff's cross-motion and its supporting papers. In addition, Omni complains that on its cross-motion, Westchester Fire's answering papers were not timely served and should not be considered.

The court will not consider plaintiffs' cross-motion and its supporting affirmation. Westchester Fire's motion was served by mail on April 7, 2008. It demanded that answering papers and cross-motions be served seven days in advance of the return date. CPLR 2215. Originally the motion was returnable on May 2, 2008, but it was adjourned twice by stipulation in the motion submission part before it was marked submitted there on June 13, 2008. The motion originally was set for oral argument before this court on July 10, 2008, but the oral argument was adjourned first to July 31, 2008 and then to August 21, 2008.

On May 16, 2008, plaintiffs' attorney, Anthony DeStefano, served by mail an affirmation in opposition to Westchester Fire's motion, annexing numerous documents (DeStefano Affirmation). Mr. DeStefano's Affirmation stated that he was associated with the firm of Mauro Goldberg & Lilling, LLP, of counsel to Bruce S. Ginsberg, attorneys for plaintiffs. On June 11, 2008, Omni served its cross-motion and supporting papers by mail, demanding answering papers seven days before the return date. On July 11, 2008, Westchester Fire served its reply to the DeStefano Affirmation. On June 12, 2008, without leave of court, Paul H. Maloney, a new

¹ Omni's answering papers state that RM Associates, Inc., and Metro Risk Management, Inc., no longer exist, are two former names of Omni Rick Management, Inc., and that their current attorney represents all three entities.

attorney for plaintiffs, served by mail a second opposing affirmation, dated June 11, 2008 (Maloney Affirmation). The Maloney Affirmation requested partial summary judgment against Westchester Fire on the fourth cause of action and opposed the main motion. Then on July 23, 2008, after submission, plaintiffs served a cross-motion by mail, which stated that the supporting papers were the previously served Maloney Affirmation. In its responsive papers on plaintiffs' cross-motion, Westchester Fire objected to consideration of the Maloney Affirmation. According to letters submitted to the court, Mr. Maloney was retained to represent plaintiffs by Bruce Ginsberg, who subsequently passed away.

The court will consider neither the Maloney Affirmation or plaintiffs' cross-motion. There is no provision in the CPLR that permits service of a second set of opposing papers without leave of court. The rules of court provide that [t]he answering party shall serve copies of all affidavits and briefs as required by CPLR 2214. 22 NYCRR § 202.8, *see also, Rosenman Colin Freund Lewis & Cohen v. Edelman*, 165 A.D.2d 533, 536 (1st Dep't 1991)(moving party may not supplement supporting papers after service of motion). Hence, plaintiffs' second set of answering papers were served in violation of the rules of the court after Westchester Fire had replied to the DeStefano Affirmation, plaintiff's original answer. However, the court notes that there is nothing dispositive contained in the Maloney Affirmation that is not contained in other papers that the court is considering. As plaintiffs' cross-motion is supported by the Maloney Affirmation, it will not be considered for the same reason.

The court will consider Westchester Fire's opposition to Omni's cross-motion. On July 25, 2008, Westchester Fire served its reply to Omni's cross-motion. In Omni's reply on its cross-motion, it objected to consideration of Westchester Fire's answering papers thereon on the

ground that they were untimely served. On August 15, 2008, Mr. Maloney served opposition by mail to Omni's cross-motion. The court will exercise its discretion and consider Westchester Fire's response to Omni's cross-motion because, according to the court's notation on the motion jacket, upon July 31, 2008, the date set for oral argument, the motion was adjourned to August 21, 2008 for submission of "any other papers." Omni is not prejudiced because it submitted a reply to Westchester Fire's opposition to the cross-motion, which the court will consider.

II. Factual Background

A. The Accident, the Underlying Action and the Complaint

On July 2, 2002, Connelly was struck by a manlift being hoisted by a crane while working at a construction site at 1120 St. Nicholas Avenue, New York, NY. Elizebeth Frances Kerrigan (Kerrigan) is Connelly's widow, the Executrix of Connelly's Estate and also the President of plaintiff Erin Erectors, Inc. (Erin). On January 1, 2002, Erin, as Contractor, and Connelly entered into an agreement, pursuant to which Erin agreed to obtain comprehensive general liability insurance and umbrella coverage for any work performed by Erin for Connelly (Erin/Connelly Agreement). In addition, the Erin/Connelly Agreement provided that Erin would indemnify Connelly, to the fullest extent permitted by law, against all claims, including attorneys' fees, arising out of Erin's work. The contract was signed by Kerrigan as Erin's President.

The Underlying Action, a wrongful death action, was commenced by the Estate to recover damages for Connelly's injuries and for Kerrigan's pecuniary losses. Koenig Iron Works, Inc. (Koenig), a contractor or construction manager, was named as a defendant in the Underlying Action and asserted a counterclaim for contractual indemnification against the Estate. TDX

Construction Corporation (TDX), another contractor or construction manager, and the Trustees of Columbia University in the State of New York (Columbia), owner of the site, were also named as defendants in the Underlying Action. They commenced an eighth-party action against Westchester Fire, which alleged that it issued an excess liability and/or commercial umbrella policy to Connelly and Erin, bearing number CUN-689361 (Westchester Policy), with a coverage period of January 13, 2002 through January 13, 2003. Westchester Fire answered the TDX/Columbia 8th party complaint, alleging that the Westchester Policy covered Erin, but not Connelly.

The Estate and Erin then commenced this action. The complaint herein alleges that defendants ACE INA ACE USA, ACE Westchester Specialty Group and Westchester Fire (collectively, the Insurers) are companies principally engaged in providing insurance. The remaining defendants (collectively, the Brokers) are alleged to be engaged in the insurance business.

The complaint alleges that Omni contracted with plaintiffs to provide primary liability coverage (CGL) of \$1,000,000 and excess and/or umbrella coverage (umbrella) of \$10,000,000 for the period January 13, 2002 through January 13, 2003 (Relevant Period), naming Erin as insured and Connelly as additional insured. The complaint further alleges that Tri-City Insurance Brokers, Inc. (Tri-City), individually and as a division of Bisys Commercial Insurance Services, Inc. (Bisys), contracted with Omni to secure that insurance for Erin and Connelly for the Relevant Period. It is alleged that Tri-City and Bisys contracted with the Insurers, including Westchester Fire, to place the CGL and umbrella coverage for Erin and Connelly for the Relevant Period. In addition, the complaint alleges that Omni issued insurance certificates

indicating that the Westchester Policy afforded umbrella coverage to Connelly during the Relevant Period.

The complaint also makes various allegations about the relationship of Omni with Erin and Connelly. It alleges that Erin and Connelly had a relationship with Omni for a period of years prior to the Relevant Period, during which Omni acted as their broker, serviced their construction insurance needs, and obtained CGL and umbrella coverage naming Erin as insured and Connelly as additional insured. It is further alleged that during this time, Erin and Connelly relied upon the specialized knowledge of Omni to obtain such coverage and that Omni represented that it understood such insurance needs.

The action was commenced on January 9, 2008, when the summons and complaint were filed and an index number was purchased. CPLR 304. The complaint contains five causes of action. The first is against all defendants for breach of an alleged contract to procure umbrella insurance for Connelly during the Relevant Period. The second is for negligent misrepresentation or constructive fraud by Omni in issuing an incorrect insurance certificate reflecting such umbrella coverage. The third cause of action alleges that all defendants were negligent in failing to secure such coverage for Connelly. The fourth cause of action seeks a declaration that Westchester Fire is obligated to indemnify plaintiffs against Koenig's counterclaim in the Underlying Action. The fifth cause of action seeks to reform the Westchester Policy to name Connelly as an insured. The motion and cross-motion by Omni do not address the fifth cause of action. Tri-City did not submit any papers.

B. Documentary Evidence

The record contains an undated, unsigned application submitted by Omni's predecessor,

RM Associates, Inc. (RM), inquiring about an umbrella policy covering Erin, Connelly and Erin Interiors during the Relevant Period (Application). DeStefano Affirmation, Exhibit 4.

According to the affidavit of Robert Mastrantonio, Omni's Vice-President, the Application was submitted to Tri-City for a quotation and it was the only application made for umbrella coverage on behalf of Erin and Connelly. On January 8, 2002, Tri-City faxed a price quotation to RM for umbrella coverage for Erin, but not Connelly. Mastrantonio Affidavit, Exh. A.

The first document in the record issued by Westchester Fire is a binder for an umbrella policy for Erin issued on January 16, 2002 by ACE USA (Binder), which states that "this binder is based solely on WESTCHESTER FIRE INSURANCE COMPANY forms and endorsements and does not necessarily include any specifications you may have provided to WESTCHESTER FIRE INSURANCE COMPANY with this submission." In between submission of the Application and issuance of the Binder, various documents were faxed between Tri-City and ACE USA, which are annexed to the DeStefano Affirmation as Exhibits 5 through 9. However, all of them refer to the insured as Erin and not Connelly, with the exception of Exhibit 5, which refers to the CGL policy only. In addition, Exhibits 5 through 7 indicate that the parties had not agreed to a price for the umbrella policy. Exhibit 8 is a fax from Tri-City to ACE USA confirming an oral price quotation. Exhibit 9 is a request from Tri-City to ACE USA to bind coverage. After the Binder was issued, the Westchester Policy was issued on March 15, 2002 and sent by ACE USA to Tri-City under cover letter dated March 16. Omni Cross-Motion, Exh. C and DeStefano Affirmation, Exh. 11.

There also was correspondence between RM, Tri-City and Westchester Fire/ACE USA regarding adding Erin Interiors as an additional insured under the CGL and umbrella policies.

DeStefano Affirmation, Exhibit 12 through 14. In the change requests issued by Omni, Connelly is listed as an insured under the Westchester Policy. In the Affirmation of Paul Maloney, dated August 15, 2008, responding to Omni's cross-motion (Maloney Affirmation), annexed as Exhibit B, is a January 16, 2002 request from Tri-City to ACE USA requesting the addition of Erin Interiors as a named insured under the Westchester Policy. According to the fax transmission report, this document was submitted on the same day as the Binder, but slightly earlier in the day.

Also included in Exhibit B to the Maloney Affirmation is an invoice dated January 16, 2002, from Tri-City to RM. It indicates that RM earned a \$3,000.00 commission on the placement of the Westchester Policy.

On February 21, 2002, Admiral Insurance Company (Admiral) issued a CGL policy for the Relevant Period (Admiral Policy) naming Erin, Connelly and Erin Interiors, Inc. (Erin Interiors) as insureds. Answering Affidavit of Michael Glascott, sworn to on July 25, 2008, Exh. A. It does not name any additional insureds.

III. Discussion

A. Motion to Dismiss - General Standard

On a motion to dismiss, the facts alleged in the complaint are accepted as true and the plaintiff is entitled to the benefit of every favorable inference. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 A.D.3d 273, 275 (1st Dep't 2005). Affidavits and other evidence may be freely used to preserve inartfully pleaded claims. *R.H. Sanbar Projects, Inc. v. Gruzen Partnership*, 148 A.D.2d 316 (1st Dep't 1989).

B. Westchester Fire's Motion

The grounds for Westchester Fire's motion are that the documentary evidence, i.e., the Westchester Policy, proves that plaintiffs have not stated a claim for breach of contract, that the negligence claim is merely a different nomenclature for the inadequate breach of contract claim, that plaintiffs are not entitled to indemnification because Thomas Connelly is not covered by the umbrella policy, and that plaintiffs are not entitled to attorneys fees as a matter of law.

Westchester believes that paragraph J in the Conditions section of the Westchester Policy, a bate-stamped copy of which is annexed as Exhibit C to Omni's cross-motion, establishes that it had no contract to insure Connelly. Paragraph J appears at Bates 044 and it provides as follows:

This policy (including the Declarations and any schedules and endorsements attached hereto) contains all the agreements between you and us concerning the insurance afforded hereby. The first "Named Insured" shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms and conditions can be amended or waived only by endorsement issued by us and made a part of this policy.

The court agrees with Westchester Fire that the Westchester Policy is the only contract binding upon it, that it did not insure Connelly and, therefore, Westchester Fire is entitled to dismissal of plaintiff's claim for breach of contract. The four corners of an insurance contract govern who is covered and the extent of coverage. *Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 A.D.3d 386 (1st Dep't 2006). Although the complaint alleges that a certificate of insurance was issued naming Connelly as an insured under the Westchester Policy, it is well settled that a certificate of insurance is insufficient to confer coverage where there is none. *Id.*

There is no document from Westchester Fire agreeing to insure Connelly. The complaint itself alleges that Westchester Fire contracted with Trinity, not plaintiffs, to procure umbrella insurance for Connelly. Further, there is no document in the record that demonstrates that Trinity

submitted an application for umbrella coverage for Connelly to Westchester prior to the issuance of the Westchester Policy. Moreover, the Westchester Policy by its own terms supercedes any prior agreements, as was stated in the Binder that Westchester Fire issued. Section II I of the Westchester Policy is entitled "Named Insured and Insured." It defines the "Named Insured" as the individual so named in Item 1 of the Declarations, which in this case was Erin. *Id.* at Bates 001 and 038. Section III(1)(a) provides that in the case of a corporation, the "Named Insured" includes any subsidiary company or any company controlled or actively managed by the Named Insured. *Id.* at Bates 038.

Omni and plaintiffs argue that Connelly is an insured under the Westchester Policy pursuant to Section III(2)(b), which provides as follows:

- (2) The term "Insured" as used herein means the "Named Insured" and:
(b) at your option and subject to the terms of this policy, any person...(other than the "Named Insured") included as an additional insured in the "Underlying Insurance," but only with respect to "Your Work," "Your Product" or property owned or used by you....

Id.

The underlying insurance, the Admiral CGL policy, lists Erin, Connelly and Erin Interiors as named insureds on the first page of the declarations. Answering Affidavit of Michael Glascott, sworn to on July 25, 2008, Exh. A, p. 1. The Admiral policy, Section II(1)(a), provides that for an individual, an insured is someone designated as an insured in the declarations. There is an additional insured endorsement in the Admiral policy, but it does not name any additional insureds. *Id.* at CG 20 10 10 01.

Omni and plaintiffs urge that Connelly is an additional insured under the Admiral CGL policy and, therefore, Connelly is an insured under the Westchester Policy. Alternatively, they

argue that there is an ambiguity in the Westchester Policy. Westchester Fire argues that Connelly is an insured, but not an additional insured, under the Admiral CGL policy and that under the unambiguous terms of the Westchester Policy, Section III(2)(b), only an additional insured under the Admiral policy is covered.

The position of Omni and plaintiffs rests on precedent which states that an additional insured is entitled to the same coverage as a named insured. *Pecker Iron Works of N.Y., Inc. v. Traveler's Ins. Co.*, 99 N.Y.2d 391, 393 (2003)(term "additional insured" well understood in insurance industry to mean entity enjoying same protection as "named insured"). However, other case law draws distinctions between additional insureds and named insureds in construing whether particular insurance contract provisions apply. *General Sec. Prop. & Cas. Co. v. American Fleet Mgt., Inc.*, 10 Misc. 3d 1075A(Sup. Ct. N.Y. Co. 2005), *affirmed*, 37 A.D.3d 345 (1st Dep't 2007)(additional insured not required to pay deductible where policy required it to be paid by named insured); *Wausau Underwriters Ins. Co. v. QBE Ins. Corp.*, 496 F. Supp. 2d 357, 361 (S.D.N.Y. 2007)(under New York law additional insured not required to notify insurer separately where policy required notice by named insured only).

It is well settled that the terms of an unambiguous insurance contract may be construed by the court as a matter of law without resort to extrinsic evidence. *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169 (1973). Here, the Westchester Policy unambiguously provides that only an additional insured under the underlying CGL policy is an insured under the Westchester Policy, Section III(2)(b). The terms additional insured and named insured are not synonymous in the Admiral CGL policy. An insured is a party named in the declarations and an additional insured is a party named in an additional insured endorsement. As Connelly is not

named as an additional insured in the Admiral policy, he is not an insured under the Westchester Policy pursuant to Section III(2)(b) therein.

Plaintiffs make the further argument that Connelly is a named insured under the Westchester Policy, Section III(2)(a), which provides that:

- (2) The term "Insured" as used herein means the "Named Insured" and:
(a) any person ... that has obligated you by written contract to provide the insurance that is afforded by this policy, but only with respect to liability arising out of "Your Work", "Your Product" and to property owned or used by you....

Plaintiffs assert that this clause grants Connelly status as an insured pursuant to the terms of the Erin/Connelly Agreement. DeStefano Affirmation, Exh. 2.

Connelly is not an insured under Section III(2)(a) of the Westchester Policy because according to the allegations of the complaint, the liability did not arise from Erin's work for Connelly. The Erin/Connelly Agreement required Erin to obtain umbrella insurance for all work performed by Erin for Connelly. However, the complaint in the Underlying Action alleges that Connelly was performing work for Erin at the time of the accident, not the other way around. *Id.*, Exh. 1, ¶¶ 68-69. While there are claims by some parties in the Underlying Action that Connelly was employed by Erin, in that event Erin still would not be working for Connelly.

However, it is premature at this time to dismiss the fourth cause of action and plaintiffs' claim for attorneys fees as against Westchester Fire because were plaintiffs to succeed on their claim for reformation, they will be entitled to coverage and defense costs.

Finally, Westchester Fire is entitled to dismissal of the third cause of action for negligence because plaintiffs have not alleged an independent non-contractual duty owed to them by Westchester Fire. "It is a well-established principle that a simple breach of contract is not to

be considered a tort unless a legal duty independent of the contract itself has been violated.”

Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 N.Y.2d 382, 389 (1987).

C. Omni's Cross-Motion

The grounds for Omni's cross-motion are that plaintiffs' claims are barred by the statute of limitations, that the breach of contract claim against Omni must fail for lack of consideration; and that the complaint is academic because Connelly is covered by the terms of the umbrella policy issued by Westchester Fire.

1. Statute of Limitations

a. Statute of Limitations for Breach of Contract

A claim that an insurance broker breached a contract to obtain appropriate insurance is governed by the six year statute of limitations contained in CPLR 213(2). *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20, 30 (2001). The statute of limitations on a breach of contract action begins to run from the time of the breach even if no damage occurs until later. *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993)(client's secret negotiations to sell property in violation of exclusive brokerage contract commenced running of statute). On a claim that an insurance broker failed to get the coverage requested by the insured, the statute begins to run when the deficient policy at issue is procured and issued. *St. George Hotel Assocs. v. Shurkin*, 12 A.D.3d 359 (2d Dep't 2004).

Plaintiffs' first claim for breach of contract is not barred by the statute of limitations. Omni claims that the statute of limitations began to run when Omni submitted the undated Application to Tri-City, which occurred no later than January 8, 2002, when Tri-City responded with a price quotation for the coverage. However, the law is that the statute of limitations begins

to run when the policy is procured, not when the application is made. *Id.* Moreover, the documentary proof demonstrates that Omni's Application requested umbrella coverage for Connelly and, hence, the breach could not have occurred at the time of the Application. The umbrella policy was issued and procured in March 2002 and, therefore, this action was timely filed in January 2008.

b. Statute of Limitations for Negligence

Plaintiffs' claim against Omni for negligence is time-barred. A claim that an insurance broker was negligent in failing to obtain appropriate insurance is governed by the three year statute of limitations contained in CPLR 214(4). *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20, 30 (2001). The statute begins to run on the date of the loss. *Id.* at 31. Here, the accident occurred on July 2, 2002 and, therefore, the negligence claim is time-barred because the complaint was not filed until 2008. Accordingly, the third cause of action against Omni is dismissed.

c. Constructive Fraud

The statute of limitations for constructive fraud is the six year statute of limitations contained in CPLR 213(1). *Monaco v. New York Univ. Medical Ctr.*, 213 A.D.2d 167, 168 (1st Dep't 1995), *appeal dismissed in part and den. in part*, 86 N.Y.2d 882 (1995). The two-year discovery provision which extends the statute of limitations beyond the six year period to two years from the date of a fraudulent act does not apply to constructive fraud. *Id.* Omni is incorrect that the three year statute of limitations for negligence applies to this claim.

Omni argues that the statute of limitations began to run at the latest on the date of the accident, July 2, 2002. As a six year statute of limitations applies and the complaint was filed in

January 2008, the action for constructive fraud cannot be dismissed as time-barred based on this record.

d. Negligent Misrepresentation

A claim for negligent misrepresentation is also governed by the six year statute of limitations. CPLR 213(1); *Santiago v. 1370 Broadway*, 96 N.Y.2d 765 (2001); *Fandy Corp. v. Lung-Fong Chen*, 262 A.D.2d 352 (2d Dep't 1999). The statute begins to run on the date of the misrepresentation. *Fandy Corp. v. Lung-Fong Chen, supra*. Accordingly, the negligent misrepresentation claim cannot be dismissed at this juncture based upon the supposition that the latest misrepresentation must have occurred on July 2, 2002.

2. Negligent Misrepresentation/Constructive Fraud

Plaintiffs' second cause of action alleges that Omni made negligent misrepresentations by issuing insurance certificates listing Connelly as an insured under the Westchester Policy. A negligent statement may be the basis for recovery of damages where "(1) the author is bound by some relation of duty, arising out of contract or otherwise, to act with care if he acts at all, (2) where there is a carelessness in imparting words, (3) upon which others are expected to rely, and (4) upon which they did act or failed to act, (5) to their damage." *Rotanelli v. Madden*, 172 A.D.2d 815 (2d Dep't 1991). A broker who agrees to place insurance for a customer must exercise reasonable diligence to do so and, if unable to make such a placement, must timely notify the customer to afford it the opportunity to procure the insurance elsewhere. *Baseball Office of the Comm'r v. Marsh & McLennan*, 295 A.D.2d 73, 79-80 (1st Dep't 2002). An insured has a right to rely on its broker with respect to insurance matters, and the broker cannot argue, as an insurer might, that the insured had an obligation to read the policy. *Id.* at 82.

Plaintiffs have stated a claim for negligent misrepresentation against Omni for issuing the insurance certificates that mistakenly reflected that Connelly had umbrella coverage under the Westchester Policy. The record reflects that the Application submitted by Omni to Tri-City requested umbrella coverage for Connelly, but that the Westchester Policy did not provide it. There is evidence from which it could be inferred that Omni believed that Connelly was covered. When Omni made requests to add Erin Interiors to the Westchester Policy, it listed Connelly as an insured on the change request form. Omni, as an insurance broker, had a duty to act with due care toward its client in placing the coverage, in issuing a certificate to its client reflecting the coverage obtained and a duty to review the coverage for its insured. While Omni denies that Connelly was its client, on a motion to dismiss, the court must accept the allegations of the complaint as true and accord the plaintiff the benefit of every favorable inference.

However, plaintiffs have not stated a claim for constructive fraud. The elements of a claim for fraud are a representation of a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury. *Monaco v. New York Univ. Medical Ctr.*, *supra*, 213 A.D.2d at 169. To recover for constructive fraud, plaintiff need not prove actual knowledge of falsity, but only that a fiduciary or confidential relationship existed. *Id.* at 168; *Callahan v. Callahan*, 127 A.D.2d 298, 301 (3d Dep't 1987).

Giving plaintiffs the benefit of every favorable inference, there are insufficient allegations to maintain an action for constructive fraud. The complaint alleges that, during the Relevant Period, Omni serviced plaintiffs' insurance needs, that plaintiffs' relied on Omni's specialized knowledge to obtain insurance coverage, that Omni historically obtained named insured coverage

for Erin and additional insured coverage for Connelly; that Omni acted as plaintiffs' insurance broker, that Omni had secured coverage for plaintiffs, and that Omni "represented, assured and acknowledged" that it understood plaintiffs' insurance needs. Complaint, ¶¶ 18 through 22. The complaint further alleges that Omni issued false certificates of insurance upon which it intended Connelly to rely. The complaint fails to allege a fiduciary or confidential relationship between Omni and plaintiffs and, therefore, plaintiffs have not stated a claim for constructive fraud.

3. Breach of Contract

Omni alleges that plaintiffs' breach of contract claim is deficient because the complaint does not allege that there was consideration for Omni's agreement to procure the Westchester Policy. However, the record contains some evidence from which it can be inferred that Omni earned a commission, which is enough to preserve the claim. *R.H. Sanbar Projects, Inc. v. Gruzen Partnership, supra*. Accordingly, it is

ORDERED that the motion of Westchester Fire Insurance Company to dismiss the first, third and fourth causes of action in the complaint for, respectively, breach of contract, negligence and declaratory judgment, and to dismiss plaintiffs' demand for attorneys' fees, is granted solely to the extent that the first and third causes of action are dismissed as against Westchester Fire Insurance Company and in all other respects the motion is denied; and it is further

ORDERED that the cross-motion of R.M. Associates, Inc., individually and d/b/a as Metro Risk Management and Omni Risk Management, Inc., to dismiss the complaint is granted solely to the extent that the third cause of action for negligence is dismissed based on the statute of limitations and the portion of the fourth cause of action for constructive fraud is dismissed (but not the portion of the fourth cause of action for negligent misrepresentation), and in all other

respects the motion is denied; and it is further

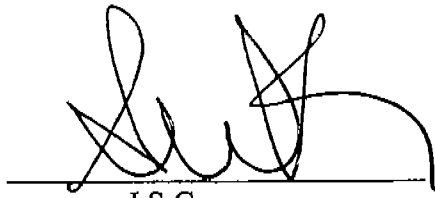
ORDERED that plaintiffs' cross-motion is denied; and it is further

ORDERED that the parties are directed to appear for a pre-trial disclosure conference on January 15, 2009 at 11:00 a.m., in Part 54, Room 1227, of the courthouse located at 111 Centre Street, New York, N.Y.; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the first and third causes of action as against Westchester Fire Insurance Company and the third cause of action and the portion of the fourth cause of action sounding in constructive fraud as against R.M. Associates, Inc., individually and d/b/a as Metro Risk Management and Omni Risk Management, Inc., and to sever the remainder of the action, which shall continue.

Dated: December 9, 2008

ENTER:



J.S.C.

FILED
DEC 12 2008
COUNTY CLERK'S OFFICE
NEW YORK