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

PRESENT: O. PETER SHERWOOD PART 61
*Justice*

LIBERTY MUTUAL FIRE INSURANCE COMPANY, *et al.*,

Plaintiffs,

-against-

DEMCO NEW YORK CORP., *et al.*,

Defendants.

INDEX NO. 117722/09

MOTION DATE April 23, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to dismiss the amended complaint

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-3 |
| Answering Affidavits — Exhibits | 4-5 |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☑ No

Upon the foregoing papers, the motion of defendants Harrington Ocko & Monk, LLP, Glenn A. Monk, Adam G. Greenberg and Edward C. Haynes for an order pursuant to CPLR § 3211 (a) (7) dismissing the amended complaint as against them is decided in accordance with the accompanying decision and order.

Dated: 9/30/10

O. P. Sherwood

O. PETER SHERWOOD, *J.S.C.*

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

----------X

LIBERTY MUTUAL FIRE INSURANCE COMPANY, as subrogee of Price Chopper Operating Co., Inc. d/b/a Price Chopper Market Center, Konover Construction Corp. and Golub Corporation, and KBE BUILDING CORPORATION, formerly known as KONOVER CONSTRUCTION CORP., Individually,

Plaintiffs,

- against -

DEMCO NEW YORK CORP., KELLY & MEENAGH, THOMAS F. KELLY, JOHN P. MEENAGH, JR., HARRINGTON OCKO & MONK, LLP, GLENN A. MONK, ADAM G. GREENBERG, EDWARD C. HAYNES, and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

DECISION AND ORDER

Index No. 117722/2009

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MARYLAND CASUALTY COMPANY and DEMCO NEW YORK CORP.,

Third-Party Plaintiffs,

-against-

NATIONAL CASUALTY COMPANY,

Third-Party Defendant.

Third-Party Index No. 590275/2010

----------X

O. PETER SHERWOOD, J.:

This is an action, *inter alia,* for a declaratory judgment with respect to insurance coverage in a personal injury action arising out of a construction accident. Defendants Harrington Ocko & Monk, LLP ("HO&M"), Glenn A. Monk ("Monk"), Adam G. Greenberg ("Greenberg") and Edward C. Haynes ("Haynes") (collectively the "Harrington defendants") move for an order pursuant to CPLR § 3211 (a) (7) dismissing the amended complaint insofar as asserted against them for failure to state a cause of action (Motion Sequence No. 001). The motion is opposed by plaintiffs Liberty

Mutual Fire Insurance Company ("Liberty Mutual") and KBE Building Corporation, formerly known as Konover Construction Corp. ("KBE") (collectively "plaintiffs").[1]

Defendants Kelly & Meenagh LLP ("K&M"), Thomas F. Kelly ("Kelly") and John P. Meenagh, Jr. ("Meenagh") (collectively the "K&M Defendants") separately move for an order pursuant to CPLR § 3211 (a) (1) and (7) and CPLR § 1001 dismissing the amended complaint insofar as asserted against them on the grounds that documentary evidence conclusively establishes a defense, failure to state a cause of action and failure to include National Casualty Company and/or its parent company Scottsdale Insurance Group as a party defendant (Motion Sequence No. 002).[2] The K&M Defendants' motion is separately opposed by plaintiffs and defendants/third-party plaintiffs Demco New York Corp. ("Demco") and Maryland Casualty Company ("Maryland") s/h/a Zurich American Insurance Company, respectively.[3]

Plaintiffs move for an order pursuant to CPLR § 3211 (a) (7) and Part 130 of the Uniform Rules of the Chief Administrator of the Courts (22 NYCRR § 130.1 *et seq.*) dismissing Maryland's counterclaims against them and imposing sanctions upon Maryland's counsel for failure to voluntarily discontinue such "frivolous" counterclaims (Motion Sequence No. 003).

Motion Sequence Nos. 001, 002 and 003 are consolidated for purposes of disposition.

***Background***

**The Underlying Action**

On June 25, 2002, Walter Rought ("Rought"), while working as an employee of Demco at a construction site located at the Price Chopper Market Center, 39 Plank Road, Newburgh, New York (the "Project"), sustained bodily injuries when a rope he was pulling through an electrical

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[1]All references herein to "KBE" are to the company formerly known as Konover Construction Corp.

[2]On or about March 31, 2010, after the K&M Defendants filed their motion to dismiss, defendant Maryland Casualty Company s/h/a Zurich American Insurance Company and defendant Demco New York Corp. commenced a third-party action against National Casualty Company. Thus, the K&M Defendants' argument with respect to CPLR § 1001 is essentially moot and will not be addressed in this decision.

[3]All references herein to "Maryland" are to the insurance company s/h/a Zurich American Insurance Company.

conduit broke causing him to fall ("the Accident") (Affirmation of Lisa L. Shrewsberry, Esq. In Support of the Harrington Defendants' Motion [Shrewsberry Affirm.], ¶ 3, Ex. "A", Amended Complaint ¶ 21). Golub Corporation ("Golub") was the owner of the site where the Project was being performed, KBE was the general contractor, and Demco was a subcontractor (*id.* ¶¶ 4-5). On or about January 14, 2002, KBE and Demco entered into a subcontract agreement whereby Demco, as subcontractor, agreed to name Golub and KBE as additional insureds under its liability policies and to indemnify, defend and hold harmless KBE and Golub "against all claims . . . arising out of or resulting from the performance of the Subcontractor's work attributable to bodily injury" (Amended Complaint ¶¶ 24-25).

In or about 2005, Rought commenced an action in the Supreme Court, Sullivan County, titled *Walter Rought v Price Chopper Operating Co., Inc. d/b/a Price Chopper Marker Center, Konover Construction Corp. and Golub Corporation,* Index No. 1142/05, to recover damages for the injuries sustained in the Accident (the Rought Action") (Amended Complaint ¶ 20). KBE commenced a first third-party action against Demco. Price Chopper Operating Co., Inc. d/b/a Price Chopper Marker Center ("Price Chopper"), KBE and Golub commenced a second third-party action against Demco and Maryland (Amended Complaint ¶¶ 35-36) (collectively the "Demco Actions"). The Demco Actions asserted causes of action for contractual indemnification for the claims alleged against third-party plaintiffs in the Rought Action and sought coverage from Maryland as additional insureds under the policy issued to Demco (*id.* ¶ 37).

At KBE's request, Liberty Mutual issued a commercial general liability policy number TB2-111-254613-002, effective June 1, 2002 to June 1, 2003, to KBE as the first named insured (the "Liberty Mutual Policy"). Price Chopper and Golub are additional insureds under the Liberty Mutual Policy for claims asserted in the Rought Action (*id.* ¶¶ 26-27).

In accordance with its subcontract with KBE, Demco procured from Maryland a commercial general liability policy number CON5857763, effective December 1, 2001 to December 1, 2002, which provided insurance to Demco as first named insured, with a single occurrence limit of $1 million and aggregate of $2 million (the "Maryland Policy") (Amended Complaint ¶ 29; Affidavit of John P. Meenagh in Support of the K&M Defendants' Motion [Meenagh Aff.], p. 3, fn.1). Price Chopper, KBE and Golub are additional insureds under the Maryland Policy (*id.* ¶¶ 3, 30).

Upon learning of the Rought Action, KBE notified Liberty Mutual of same. Liberty Mutual accepted and undertook the defense of Price Chopper, KBE and Golub in the Rought Action (*id.* ¶¶ 28, 33). KBE and Golub also sought coverage from Maryland as Demco's insurer, but Maryland initially disclaimed coverage of Price Chopper, KBE and Golub for the claims asserted in the Rought Action (*id.* ¶ 32). Because of this disclaimer, Liberty Mutual retained K&M to defend the Rought Action (Amended Complaint ¶¶ 33-34; Meenagh Aff. ¶ 9).

Third-party defendant National Casualty Company ("National Casualty") issued a policy to Demco, as first named insured, under policy number UM00029036, effective December 1, 2001 to December 1, 2002, providing umbrella liability coverage for Demco, and Price Chopper, KBE and Golub as additional insureds, on the claims asserted in the Rought Action, with a single occurrence limit of $10,000,000.00 (Amended Complaint ¶¶ 52-53; Shrewsberry Affirm. ¶ 11; Meeghan Aff. Ex. "K").

On or about November 14, 2006, Liberty Mutual's claims adjuster, Melissa Egan, advised Meenagh by facsimile communication that Maryland had accepted the tender for indemnity and defense of Price Chopper, KBE and Golub (Meenagh Aff. ¶ 11, Ex. "B").

Thereafter, by letter dated November 17, 2006, Haynes, as counsel for Demco and Maryland in the Rought Action, advised K&M that Demco and Maryland had "fully accepted the tender of [KBE] and Price Chopper to Demco, subject to the transfer of [K&M's] file to [HO&M]" and requested an executed Consent to Change Attorneys stipulation (Amended Complaint ¶ 39; Meenagh Aff. ¶ 12, Ex. "C"). A Consent to Change Attorneys, providing for the substitution of HO&M as attorneys of record for Price Chopper and Golub in place and stead of K&M in the Rought Action, was filed with the Sullivan County Supreme Court Clerk on or about January 11, 2007 (Amended Complaint ¶ 43; Shrewsberry Affirm. ¶ 9; Meenagh Aff.¶ 13). The Consent to Change Attorneys Forms were executed by Meenagh on behalf of K&M as attorneys for KBE and by Haynes on behalf of HO&M. Such forms were also executed by Robert G. Dunn, General Counsel and Vice-President of KBE, and by William J. Kenneally, Senior Vice President and Secretary for Price Chopper and Golub (Meenagh Aff. ¶ 13).

On or about January 17, 2007, HO&M, by Haynes, served and filed a Notice of Appearance indicating their appearance as attorneys for Price Chopper, KBE and Golub in the Rought Action

(Meenagh Aff. ¶ 14, Ex. "E").

By letter dated February 8, 2007, Meenagh advised KBE's President and General Counsel, Robert Dunn, that KBE's defense had been assumed by Maryland and that HO&M, by Haynes, was now representing KBE. Meenagh further advised that he was preparing stipulations to discontinue the Demco Actions and that once K&M had transferred its file to HO&M, K&M's involvement in the case would cease (Meenagh Aff. ¶ 16, Ex. "G"). On or about February 9, 2007, K&M, purportedly as attorneys for KBE, executed a "Stipulation Discontinuing Third-Party Action Index # 1142A-05 Only" (the first third-party action) (Amended Complaint ¶ 47; Meenagh Aff. ¶15, Ex. "F"). That same date, K&M, purportedly as attorneys for Price Chopper, KBE and Golub, executed a "Stipulation Discontinuing Second Third-Party Action Under Index # 1142B-05 Only" (Amended Complaint ¶ 46; Meenagh Aff. ¶ 15, Ex. "F"). Such stipulations indicated that the respective discontinuances were "with prejudice" (*id.*). The stipulations contained in the record do not bear the signature of HO&M on behalf of Demco in the first third-party action or of HO&M on behalf of Demco or of Maryland's counsel in the second third-party action.

By letter dated February 9, 2007, Meenagh advised Melissa Egan of Liberty Mutual that K&M had received the fully executed Consent to Change Attorney Forms from HO&M and had executed stipulations discontinuing the Demco Actions and forwarded them to Haynes at HO&M. In closing, Meenagh indicated that K&M's involvement in the Rought Action was at an end (Meenagh Aff. ¶ 17, Ex. "H").

National Casualty has taken the position that: (1) its coverage is excess to Liberty Mutual's policy; and (2) KBE's contractual indemnification claims against Demco are moot since the first and second third-party actions were discontinued with prejudice (Amended Complaint ¶ 54; Meeagh Aff. ¶ 20, Ex. "K").

Apparently National Casualty's position gave rise to questions concerning possible legal malpractice in K&M's handling of the Rought Action, specifically in executing the stipulations discontinuing the Demco Actions (Amended Complaint ¶ 56). Liberty Mutual and KBE put their concerns in writing to K&M, which responded in a letter signed by Kelly, dated October 23, 2009, stating that for a stipulation of discontinuance to be binding it must be signed by the attorney of record for all parties. Kelly noted that the stipulations of discontinuance as to the Demco Actions

were signed by K&M on February 9, 2007, approximately one month after it had been removed as attorneys of record for KBE, and that such stipulations of discontinuance were furnished to Haynes of HO&M, attorneys for KBE in February 2007. Kelly stated further that by letter dated November 17, 2006, Haynes had fully accepted the tender of KBE on behalf of Demco and Maryland as K&M had turned over its file materials in the Rought Action (Amended Complaint ¶ 55). Thus, K&M's position was that because it was not the attorney of record at the time of the execution of the discontinuances and HO&M were the attorneys of record for the defendants in the Rought Action the discontinuances of the Demco Actions were not binding and effective (*id.* ¶ 56).

After receiving Kelly's letter, Liberty Mutual and KBE, by letter to Haynes of HO&M dated October 30, 2009, advised HO&M of K&M's position and directed HO&M "to pursue the [Rought Action] Defendants' third-party claims against Demco and [Maryland] as necessary for the protection of the Defendants in the [Rought] Action. The letter further stated:

> While we recognize that the Court might determine that the claims were discontinued, all avenues must be pursued to protect the Defendants' interests.
>
> We also direct that you move to enforce the settlement agreement, as reflected in your November 17, 2006 letter. Specifically, Demco and [Maryland] must be directed and ordered, as per the agreement, to fully defend and indemnify the Defendants, without regard to limit.
>
> We trust that you understand our mutual clients' concern over this matter. The Defendants should not have to bear any costs with respect to this matter, as all liability should have passed through to Demco and its insurers. We need to make sure they are fully protected.

(Amended Complaint ¶ 56).

In a follow-up letter, dated November 11, 2009, sent to Greenberg of HO&M because Haynes was no longer with the firm, counsel for Liberty Mutual and KBE noted that Haynes had been an associate of HO&M who had been supervised by Monk. It referenced the October 30, 2009 letter and indicated that National Casualty was "refusing to honor the indemnification agreement and assume responsibility for this matter above [Maryland]" (*id.* ¶ 57). Liberty Mutual again urged that

HO&M "aggressively pursue the third-party claims, including enforcing Demco and [Maryland's] agreement to fully defend and indemnify the Defendants, without regard to limit" (*id.*).

Greenberg responded in a telephone call to counsel for Liberty Mutual and KBE advising that he would not pursue a claim that the stipulations discontinuing the Demco Actions were ineffective or attempt to enforce Demco's agreement to "fully accept" the tender of the Defendants in the Rought Action. Greenberg also advised that the Rought Defendants did not have a viable claim for contractual indemnification against Demco (*id.* ¶ 59).

Counsel for Liberty Mutual and KBE in a letter dated November 16, 2009, set forth its position that the November 17, 2006 letter from Haynes, as a representative of HO&M, advised that both Demco and Maryland had accepted the tender of Price Chopper and KBE to Demco and that such acceptance was based upon contractual indemnification and not simply as additional insureds under the Maryland policy. He further advised that if Demco's duty to indemnify the Rought Defendants remained an issue, HO&M had a duty to advise the Defendants of the inherent conflict of interest in undertaking their representation in the Rought matter. Given HO&M's failure to give such advisement and, thereby, inducing the Defendants to agree to a change of counsel based upon inaccurate information, Liberty Mutual and KBE's counsel advised HO&M to place its insurance carriers on notice of their potential legal malpractice claim (*id.* 61).

HO&M immediately replied that as a result of the filing of the Stipulations of Discontinuance with prejudice there was no longer a viable claim for contractual indemnification against Demco. HO&M took the position that K&M was counsel for the defendants in the Rought Action at the time such stipulations were prepared and executed. HO&M further contended that it could not comply with Liberty Mutual's demand to revive the contractual indemnification claim as it had previously been counsel to Demco in the Rought Action (*id.* ¶ 61).

**The Instant Action**

On December 18, 2009, this action was commenced by Liberty Mutual, as subrogee of Price Chopper, KBE and Golub, and by KBE against Demco, K&M, Kelly, Meenagh, HO&M, Monk, Greenberg, Haynes and Maryland by filing the summons and complaint. The complaint, amended as of right on or about December 22, 2009, seeks: (1) as against Demco a judgment declaring that Demco is required to defend and indemnify Price Chopper, KBE and Golub in the Rought Action

(first, second and third causes of action); (2) as against HO&M, Monk & Haynes, a judgment declaring that they are, jointly and severally, required to defend and indemnify Price Chopper, KBE & Golub in the Rought Action (fourth cause of action); treble damages and the costs of this action predicated upon their alleged breach of Judiciary Law § 487 (fifth cause of action); a judgment declaring that as a result of their legal malpractice they are responsible, jointly and severally, for any settlement or judgment against plaintiffs herein in the Rought Action (seventh cause of action); (3) as against HO&M, Monk and Greenberg a judgment declaring that as a result of their legal malpractice they are responsible, jointly and severally, for any settlement or judgment against plaintiffs herein in the Rought Action (eighth cause of action); (4) as against K&M, Kelly and Meenagh, a judgment declaring that by reason of their legal malpractice, they are responsible, jointly and severally, for any settlement or judgment entered against plaintiffs herein in the Rought Action (sixth cause of action); and (5) as against Maryland, a judgment declaring that by reason of its breach of good faith and fair dealing, it is responsible for any settlement or judgment against plaintiffs herein in the Rought Action without regard to policy limits (ninth cause of action).

Plaintiffs allege in the amended complaint that Demco breached its obligation under the terms of the subcontract by which it was contractually obligated to indemnify Price Chopper, KBE and Golub for the claims alleged against them in the Rought Action. They further allege that in reliance on the November 17, 2006 letter of Demco's then counsel HO&M that Demco had agreed to indemnify Price Chopper, KBE and Golub for the claims alleged in the Rought Action, plaintiffs agreed to use counsel assigned by Demco and that Demco is, therefore, equitably estopped from refusing to indemnify Price Chopper, KBE and Golub in the Rought Action.

The basis of plaintiffs' legal malpractice claims against HO&M and the individually named HO&M attorneys is that HO&M, without due authority, entered into an agreement on behalf of Demco to indemnify Price Chopper, KBE and Golub for the claims alleged in the Rought Action; that by the November 17, 2006 letter, HO&M and its attorneys Monk and Haynes breached section 487 of the Judiciary Law by inducing the attorneys for Price Chopper, KBE and Golub to execute the stipulations discontinuing the Demco Actions; that HO&M and its attorneys breached their duty of care to Price Chopper, KBE and Golub by participating in the execution of the stipulations of discontinuance; failing to advise them that Demco was not agreeing to fully indemnify such parties

in the Rought Action; acting as counsel for Demco in executing the stipulation while already being counsel of record for KBE; failing to advise that they had a conflict of interest as a result of Demco's position that it did not have to fully indemnify Price Chopper, KBE and Golub; failing to advise them of the effect of discontinuing the claims against Demco; failing to protect their rights in pursuing and preserving their claims against Demco; acting in a manner inconsistent with their interests and for the protection of Demco and Maryland. Plaintiffs contend that as a result of such breaches of duty of care Liberty Mutual, Price Chopper, KBE and Golub are exposed to a judgment that may exceed the limits of the Maryland Policy and, therefore, they are entitled to recover any amounts they are required to pay toward any settlement or judgment.

Issue was joined as to Maryland by service of its answer to the amended complaint on or about February 22, 2010, in which it avers that Demco has no duty to indemnify Price Chopper, KBE or Golub in the Rought Action, interposes sixteen affirmative defenses, cross claims against all co-defendants, except Demco, for contribution, and asserts four counterclaims against Liberty Mutual seeking a declaration that Liberty Mutual has a duty to provide coverage above Maryland's $1 million dollar limit for any settlement, judgment or award in the Rought Action (first counterclaim); and compensatory damages predicated upon theories of breach of fiduciary duty to Price Chopper, KBE and Golub in its failure to exercise good faith and reasonable care in protecting the interest of the named defendants in the Rought Action (second counterclaim), negligence in failing to exercise reasonable care to ensure that Price Chopper, KBE and Golub were protected and received proper legal representation by K&M (third and fourth counterclaims).

***Discussion***

**1. <u>Harrinton Defendants' Motion to Dismiss</u>** (Motion Sequence No. 001)

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5

NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]). Thus, generally, if the Court determines that the non-moving party is entitled to relief on any reasonable view of the facts stated, the inquiry is complete and the claim must be declared legally sufficient (*see, Campaign for Fiscal Equity, supra*; *Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). However, bare legal conclusions, as well as factual claims, that are inherently incredible or flatly contradicted by documentary evidence are not presumed to be true (*see, McKenzie v Meridian Capital Group, LLC,* 35 AD3d 676 [1st Dept 2006]; *Gershon v Goldberg,* 30 AD3d 373 [1st Dept 2006]). Where the moving party offers evidentiary material, the court must determine whether the proponent of the pleading has a cause of action, not simply whether he, she or it has stated one (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Kantrowitz & Goldhamer, P.C. v Geller,* 265 AD2d 529 [2d Dept 1999]).

**A. Judiciary Law § 487 Claim**

The fifth cause of action asserts a violation of Judiciary Law § 487 as against the Harrington Defendants. This statute, which is rooted in criminal law (*see generally Dupree v Voorhees,* 68 AD3d 807 [2d Dept 2009]), provides for treble damages and the criminal penalty of a misdemeanor against attorneys who engage in "deceit or collusion, or consent to any deceit or collusion, with intent to deceive the court or any party" (Judiciary Law § 487 [1]). "A violation of Judiciary Law § 487 (1) may be established 'either by the defendant's alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant'" [internal citations omitted] (*Boglia v Greenberg*, 63 AD3d 973, 975 [2d Dept 2009]; *see Rock City Sound v Bashian & Farber,* 74 AD3d 1168 [2d Dept 2010]). "[T] statute's evident intent [is] to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function" (*see, Amalfitano v Rosenberg,* 12 NY3d 8, 13 [2009]), with a related "concern for curbing and providing redress for attorney overreaching vis-a-vis clients" (*Liddle & Robinson, v Shoemaker,* 276 AD2d 335, 336 [1st Dept 2000]).

Plaintiffs base their proposed Judiciary Law § 487 claim on the Harrington Defendants' conduct in sending the November 17, 2006 letter [advising K&M that Demco and Maryland had "fully accepted the tender of [KBE] and Price Chopper to Demco, subject to the transfer of [K&M's] file to [HO&M]" and requested an executed Consent to Change Attorneys stipulation] and inducing

K&M, as attorneys for Price Choppers, Golub and KBE, to execute the stipulations of discontinuance (Amended Complaint ¶ 87).

The Harrington Defendants contend that the allegations of the amended complaint base such Judiciary Law § 487 claim upon a single event and argue that such conduct does not assert either an intent to deceive or an extreme pattern of legal delinquency.

In opposition, plaintiffs submit an affidavit of Marshall T. Potashner of the law firm Jaffe & Asher, LLP., attorneys for Liberty Mutual and KBE. Plaintiffs contend that the allegations of the complaint sufficiently allege an intent to deceive and that the Harrington Defendants engaged in an extreme pattern of legal delinquency. They contend that when the Harrington Defendants asserted that Demco and Maryland fully accepted tender of the Rought Action by Price Chopper, KBE and Golub they should have known that this representation was not true and they, thereafter, orchestrated the situation so that Price Chopper, KBE and Golub "would actually lose all of their rights against Demco" (Plaintiffs' Memo of Law in Opposition p. 21). Plaintiffs further note that the Harrington Defendants failed to disclose key facts evidencing their conflict of interest in representing KBE, Price Chopper and Golub, while Liberty Mutual, Price Chopper, KBE and Golub mistakenly believed that no such conflict existed because Demco had agreed to indemnify them. Plaintiffs state that the Harrington Defendants should have advised that Demco had not agreed to indemnify Price Chopper, KBE and Golub. In addition, plaintiffs contend that the Harrington Defendants recognized "the unseemliness" of signing stipulations for all the parties and, therefore, "drafted" K&M to re-assume their role as attorneys for Price Chopper, KBE and Golub and sign the stipulations (*id.* p. 22). Plaintiffs contend that the Harrington Defendants engaged in this conduct to protect Maryland "the party paying their bills" and the interests of their other client Demco, when they should have been protecting their clients Price Chopper, KBE and Golub.

Accepting the factual allegations of the complaint as true (*see EBC I,* 5 NY3d at19), as augmented by the affidavit submitted by the plaintiffs in opposition to the Harrington Defendants' motion (*see Nonnon v City of New York,* 9 NY3d 825, 827 [2007]; *Leon,* 84 NY2d at 88), the plaintiffs have sufficiently stated a cause of action under Judiciary Law § 487 for the Harrington Defendants' alleged intentional deceit during the course of the Rought Action. The Harrington Defendants emphasize the extreme pattern of legal delinquency element of the statute, while giving

little attention to the intent to deceive factor. The Appellate Divisions of both the First Department and the Second Department have recognized that a violation of Judiciary Law § 487 (1) may be established by either a defendant's alleged deception **or** by that defendant's alleged chronic, extreme pattern of delinquency (*see Rock City Sound,* 74 AD3d at 1172; *Pellegrino v File,* 291 AD2d 60 [1st Dept 2002]). Certainly, the allegations in the amended complaint that plaintiffs were deprived of their contractual indemnification claim in the Rought Action due to the intentional actions and failures of the Harrington Defendants, as well as the alleged failure to advise plaintiffs of the Harrington Defendants' potential or actual conflict of interest, are sufficient for an inference as to the deception element to be drawn, as well as the resulting damages proximately caused by the Harrington Defendants' alleged deceitful conduct, specifically the loss of a viable claim against Demco in the Rought Action (*see, Rock City Sound,* 74 AD3d at 1172; *Specialized Industrial Servs. Corp. v Carter,* 68 AD3d 750 [2d Dept 2009]; *Izko Sportswear Co., Inc. v Flaum,* 25 AD3d 534, 537 [2d Dept 2006]; *cf. Rozen v Russ & Russ, P.C.,* ___ AD3d ___, 2010 WL 3583090 [2d Dept 2010]; *Caso v Kessler,* 2010 WL 673702 [Sup Ct N.Y. Co. 2010]).

**B. Legal Malpractice Claims**

The standard governing legal malpractice claims is well-established. In order to prevail, a plaintiff must prove each of the following elements: (1) the attorney was negligent; (2) the attorney's negligence was the proximate cause of the injury to the plaintiff; and (3) the plaintiff suffered actual damages (*see, Bishop v Maurer,* 33 AD3d 497, 498 [1st Dept 2006], *affd* 9 NY3d 910 [2007]). Negligence or legal malpractice may be found to exist when an attorney fails to exercise that degree of skill and knowledge commonly exercised and possessed by an ordinary member of the legal community (*see Estate of Nevelson v Carro, Spanbock, Kaster & Ciuffo,* 259 AD2d 282, 283 [1st Dept 1999]). In order to establish causation, a plaintiff must demonstrate that it would have succeeded on the merits of the underlying action or would not have sustained some actual and ascertainable damage "but for" the attorney's negligence (*see AmBase Corp. v Davis Polk & Wardell,* 8 NY3d 428, 434 [2007]). The burden of proving such a 'case within a case' is a heavy one. The failure to demonstrate causation requires dismissal of the legal malpractice action regardless of whether the attorney was negligent (*see Acquino v Kuczinski, Vila & Assocs., P.C.,* 39 AD3d 216, 219 [1st Dept 2007]; *Leder v Spiegel,* 31 AD3d 266, 267 [1st Dept 2006]).

As to the seventh and eighth causes of action sounding in legal malpractice, the Harrington Defendants argue that the allegations of the amended complaint do not make out the element that "but for" the alleged legal malpractice plaintiffs would have obtained a more advantageous result. The Harrington Defendants contend that because the Rought Action is still pending, plaintiffs have not sustained any actual damages. They assert that plaintiffs can do nothing more at this stage than speculate as to the outcome of the Rought Action. Moreover, they contend that plaintiffs have failed to allege a breach of duty on their part as their contention that the Harrington Defendants' malpractice consisting of the refusal of their request to pursue the contractual indemnification claim against Demco, their client, does not constitute a breach of duty as compliance with the demand would have led to a conflict of interest.

Plaintiffs respond that they may properly invoke the court's equity jurisdiction and seek a declaratory judgment with respect to the Harrington Defendants' alleged malpractice and such claim is not premature even though the Rought Action has not yet been resolved and is ongoing. Plaintiffs contend that if they were to await the resolution of the Rought Action simply because their damages are not yet quantifiable, they would be left without a remedy as their malpractice claims would likely be barred by the applicable statute of limitations as computed from the time the claim arose, *i.e.*, when the stipulations of discontinuance with prejudice were executed permanently barring Price Chopper, Golub and KBE from pursuing their claims for indemnification and insurance coverage against Demco and Maryland.

At the center of plaintiff's malpractice claims is the Harrington Defendants' conflict of interest in representing both Demco and Liberty Mutuals' subrogors, Price Chopper, Golub and KBE. With respect to the "but for" causation element, plaintiffs contend that the Harrington Defendants, while acting as counsel for Price Chopper, KBE and Golub, caused them to lose their rights against Demco by filing stipulations of discontinuance with prejudice that ended the Demco Actions. They contend that the Harrington Defendants acted in a manner inconsistent with their interests and for the protection of Demco and Maryland. As a result of such conduct, plaintiffs assert that they lost a valuable right, namely, the contractual indemnification claim and "but for" such negligence they would have prevailed on their claims against Demco. Indeed, since the Harrington

Defendants placed themselves in the conflict of interest, they could not use such conflict as a reason for refusing to pursue the rights of Price Chopper, KBE and Golub against Demco.

Plaintiffs rely on two Appellate Division, First Department decisions involving actions against insurers in support of their argument that their claims are not premature. *Cabrini Medical Center v KM Insurance Brokers* (142 AD2d 529 [1988], *app. dsmd* 73 NY2d 785 [1988]) concerned the defendants' failure to obtain medical malpractice insurance for plaintiff hospital and their attending physicians, which had been contracted and paid for, and such failure forced the plaintiffs to obtain inferior policies elsewhere at higher rates. In their complaint, plaintiffs therein sought a declaration that they were entitled to indemnification for any uncovered claims that may arise. The court held that there was a justiciable controversy and a declaratory judgment action against the insurers was permitted prior to any judgment as the judgment likely to be recovered might well reach into the coverage contracted for.

Similarly, in *Booth Memorial Hospital & Medical Center* (162 AD2d 100 [1st Dept 1990]) plaintiff alleged a claim of professional malpractice and sought to recover premiums paid as a result of defendants' procurement of worthless excess insurance. Again the court held that a declaratory judgment was available based upon plaintiff's demonstration that potential liability might extend to the coverage contracted for.

While recognizing that the *Cabrini Medical Center* and *Booth Memorial Hospital & Medical Center* are not directly on point, plaintiffs contend that the holdings therein may be applied to the instant matter involving legal malpractice where, as in those cases, damages are not yet ascertainable but a judgment in the Rought Action would likely extend to the insurance covered by the contractual indemnification agreement.

The court credits plaintiffs' arguments and finds that the seventh and eighth causes of action sounding in legal malpractice are sufficiently stated. "To survive a preanswer motion to dismiss pursuant to CPLR 3211 (a) (7), 'a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be inferred'" (*Felding v Kuperman,* 65 AD3d 437, 442 [1st Dept 2009] quoting *Lappin v Greenberg,* 34 AD3d 277, 279 [1st Dept 2006]). "Plaintiff 'is not obligated to show, at this stage of the pleadings, that [it] actually sustained damages . . . [it need only plead] allegations from which damages attributable to [defendant's conduct] might be

reasonably inferred'" (*InKline Pharm. Co. v Coleman,* 305 AD2d 151, 152 [1st Dept 2003] quoting *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg,* 199 AD2d 45 [1st Dept 1993]). The Harrington Defendants' alleged failure to perceive that they had a conflict of interest and to advise plaintiffs of same, together with their execution of stipulations discontinuing the Demco Actions, causing plaintiffs to lose a potentially viable claim of contractual indemnification, and their failure to properly inform plaintiffs with regard to the legal effect of such execution effectively state cognizable claims for legal malpractice. Under the circumstances, the court does not regard plaintiffs' claim of damages stemming from such conduct to be purely speculative.

**C. Claims Against Defendant Greenberg**

The only allegations against defendant Greenberg are stated in support of the eighth cause of action which alleges that Greenberg, together with HM&O and Monk, breached a duty of care to plaintiffs by declining to pursue their contractual indemnification claims against Demco in the Rought Action and acting in a manner inconsistent with protecting plaintiffs' interests for the purpose of protecting Demco and Maryland.

Plaintiffs correctly note that pursuant to section 26 (c) (i) of New York's Partnership Law, a partner in a registered limited liability partnership is personally liable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of the partnership. Greenberg, as one of the partners in HM&O, actively participated in representing plaintiffs. Therefore, Greenberg may be individually liable for his own negligent or wrongful acts relative to such representation and the complaint properly states a claim against him (*see Scarborough v Napoli, Kaiser & Bern, LLP,* 63 AD3d 1531, 1532 [4th Dept 2009]).

**D. Indemnity Claim Against HM&O, Haynes and Monk**

The Harrington Defendants also seek dismissal of the fourth cause of action on the ground that the amended complaint contains no allegations that the Harrington Defendants, acting as Demco's agent, intended to be personally responsible to indemnify plaintiffs for the claims asserted in the Rought Action.

Plaintiffs claim that the Harrington Defendants misapprehend the nature of the fourth cause of action. Plaintiffs state that the claim is not based upon the Harrington Defendants' intentional

assumption of Demco's contractual responsibilities, but rather is predicated upon a breach of an implied warranty of authority stemming from their entering into an agreement on Demco's behalf to fully indemnify Price Chopper, KBE and Golub for the claims asserted against them in the Rought Action.

The fourth cause of action states, upon information and belief, that: "HM&O, Monk and Haynes entered into an agreement on behalf of Demco to indemnify [Price Chopper, KBE and Golub] for the Claims alleged in the Rought Action without due authority from Demco" and further that "[a]s agents who entered into an agreement on behalf of a principal without due authority, HM&O, Monk, and Haynes are liable for the obligation to indemnify [Price Chopper, KBE and Golub] for the Claims alleged in the Rought Action" (Amended Complaint ¶¶ 80, 82). On the basis of these allegations plaintiffs seek a declaration that HM&O, Monk and Haynes are required to defend and indemnify Price Chopper, KBE and Golub in the Rought Action (*id.* ¶ 84).

As a general rule, an agent for a disclosed principal cannot be held liable for its actions taken as an agent (*see, Deutsche Bank Trust Co. of Americas v Tri-Links Investment Trust,* 74 AD3d 32 [1st Dept 2010]; *News Am. Mktg., Inc. v Lepage Bakeries, Inc.,* 16 AD3d 146 [1st Dept 2005]). "Under the doctrine of implied warranty of authority, a person who purports to make a contract, representation, or conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal (*see* Restatement (Third) of Agency § 6.10 [2006])" (*DePetris & Bachrach, LLP v Srour,* 71 AD3d 460 [1st Dept 2010]).

Here, the allegations of the amended complaint seek to hold the Harrington Defendants liable on the basis of the November 16, 2006 letter to K&M, as counsel for plaintiffs, stating that Demco and Maryland had fully accepted the tender of KBE and Price Chopper to Demco, subject to K&M's transfer of the file to them. Plaintiffs allege that the Harrington Defendants made this representation without authority from their principal Demco and, therefore, they are personally liable for such representation. Under the doctrine of implied warranty of authority the Harrington Defendants may be liable for representations they had no authority to make. Accordingly, the fourth cause of action states a viable claim against the Harrington Defendants.

**2. K & M Defendants Motion to Dismiss** (Motion Sequence No. 002)

The sixth cause of action in the amended complaint alleges a cause of action seeking a declaration that the K&M Defendants by reason of legal malpractice are liable to plaintiffs for any settlement or judgment in the Rought Action. The basis of the malpractice claim is the K&M Defendants' execution of the stipulations discontinuing with prejudice the Demco Actions without ensuring that Price Chopper, KBE and Golub would continue to have an enforceable right of indemnification against Demco or advising plaintiffs that discontinuing the Demco Actions with prejudice would preclude later indemnification necessary to limit their exposure if the value of the claims in the Rought Action exceeded the amount of coverage available under the Maryland policy; failing to protect their interests and rights against Demco; and failing to ensure that the "settlement" with Demco pursuant to which Demco agreed to indemnify Price Chopper, KBE and Golub, was enforceable (Amended Complaint ¶¶ 90-94).

The K&M Defendants seek dismissal of this cause of action on the ground that the amended complaint fails to state a cause of action upon which relief may be granted and that a complete defense to the claim is established by documentary evidence. The K&M Defendants raise a similar argument to one interposed by the Harrington Defendants, to wit, that any damages sustained by plaintiffs as a result of negligence by the K&M Defendants are entirely speculative. The basis of this argument is: (1) the damages sought are only available after the Maryland Policy limits are reached and damages stemming from K&M's alleged negligence will not be able to be calculated until such time as a judgment is entered or settlement reached in the Rought Action; (2) plaintiffs have not properly pleaded that "but for" K&M's negligence they would have achieved a different result in the Rought Action since the proof as to damages is speculative and conclusory; and (3) the stipulations of discontinuance are not legally binding as they did not bear the signatures of the attorneys for all parties and until plaintiffs make a motion to vacate the stipulations in the Rought Action and such motion is denied plaintiffs cannot establish causation.

Lastly, the K&M Defendants state that the Demco Actions were discontinued with plaintiffs' full knowledge and implied consent (in light of their failure to object to the discontinuance) and, therefore, plaintiffs will be unable to establish that any negligence by the K&M Defendants proximately caused plaintiffs to sustain actual damages. The K&M Defendants aver that the

documentary evidence submitted in support of the motion conclusively establishes that both Liberty and KBE were advised of the discontinuance of the Demco Actions and by their failure to instruct the K&M Defendants otherwise, impliedly consented to the discontinuances.

Plaintiffs oppose the motion. They contend that the issue of whether the stipulations discontinuing the Demco Actions are binding concerns the defendants. It "begs the question" upon which the legal malpractice claim against the K&M Defendants is based, namely, the K&M Defendants' negligent conduct in executing the stipulations discontinuing the Demco Actions with prejudice. Plaintiffs contend further that the documentary evidence does not conclusively establish that the K&M Defendants were aware that K&M was going to discontinue the Demco Actions with prejudice or that the K&M Defendants advised them of the effect and ramifications of stipulating to discontinue those actions with prejudice. Rather, the documentary evidence simply raises an issue of fact which cannot be determined on a motion to dismiss. With respect to the question of whether the claim is premature, plaintiffs raise arguments identical to their arguments in opposition to the Harrington Defendants' motion to dismiss, namely, that they may appropriately seek declaratory relief on the legal malpractice claim. This is based upon the loss of their indemnification claim against Demco which is necessary to limit their exposure should the value of the claims in the Rought Action exceed the amount available under the Maryland Policy.

Demco and Maryland also oppose the K&M Defendants' motion. They contend that the validity of the stipulations of discontinuance in the Rought Action is a complicated issue that should not be determined until such time as National Casualty has appeared and answered. Demco and Maryland challenge plaintiffs' position that vacatur of the stipulations of discontinuance will result in Demco owing contractual defense and indemnification to Price Chopper, KBE and Golub. Rather, vacatur of the stipulation will, at most, restore the parties to the status quo and Price Chopper, KBE and Golub will still have to litigate the third-party indemnity actions in the Rought Action. In this regard, Demco and Maryland assert that the issue of any indemnification owed by Demco can only be fully and fairly litigated in the Rought Action where the issue of fault for Rought's accident will be resolved.

In addition, Demco and Maryland contend that the arguments of the K&M Defendants are based, in part, on extrinsic documents rather than purely upon the sufficiency of the pleading such

that the appropriate standard of review is whether plaintiffs have a cause of action not whether one is stated. Demco and Maryland further contend that the November 16, 2007 letter does not state that Demco and Maryland agreed to contractually defend and indemnify Price Chopper, KBE and Golub and they emphatically state that they made no such promise or agreement. They annex to their opposition papers a letter from their claims adjuster dated November 9, 2006 to Melissa Egan at Liberty Mutual stating that the Maryland Policy "will respond to [Liberty Mutual's] request to defend and indemnify [their] client in [the Rought Action]" and advising Liberty Mutual to "arrange for [their] counsel to discontinue the third party action[s] against . . . DEMCO" (Affirmation of Steven I. Lewbel, Esq. In Opposition to K&M Defendants' Motion, ¶ 5, Ex. "B"). Demco and Maryland contend that such letter does nothing more than state an agreement to provide coverage to Price Chopper, KBE and Golub under the Maryland Policy issued to Demco up to the limits of the Maryland Policy and it makes no reference to contractual indemnification. They contend that both the K&M Defendants and Liberty Mutual were aware of the excess coverage provided by the National Casualty Policy prior to the execution of the stipulations of discontinuance and that neither Maryland nor the Harrington Defendants were in a position to bind National Casualty to any agreement to provide contractual indemnification.

In reply, the K&M Defendants urge the court to disregard the opposition of Maryland and Demco, claiming that such arguments are directed primarily to plaintiffs' arguments in opposition. They also contend that the cases of *Booth Memorial Hospital & Medical Center* (162 AD2d at 100) and *Cabrini Medical Center* (142 AD2d 529), upon which plaintiffs rely in arguing that their malpractice causes of action are not premature, are inapplicable and should not be considered.

The Court's analysis addressing the arguments raised by the Harrington Defendants is equally applicable here. Specifically, the fact that the Rought Action has not been finally resolved and, therefore, that actual damages on the malpractice claims may not be conclusively established does not require dismissal of the cause of action for declaratory relief on the malpractice claim against the K&M Defendants. Contrary to the contentions of the K&M Defendants, the documentary proof submitted on the motion does not conclusively establish a defense to the claim nor is plaintiff's malpractice claim against the K&M Defendants flatly contradicted by such documentary evidence. Rather, factual issues are raised thereby amongst which is whether the K&M Defendants advised

plaintiffs of the consequences of the stipulations of discontinuance. Resolution of such issue is inappropriate on a motion directed to the pleadings. In addition, the arguments raised by Demco and Maryland concerning the validity of the stipulations and the effect of any vacatur of such stipulations, while not explicitly directed to the K&M Defendants' arguments, are certainly addressed to a key issue regarding the viability of the malpractice claim. The K&M Defendants, in seeking dismissal based upon the initial failure to join National Casualty, appear to recognize that fact. Therefore, such arguments raised by Maryland and Demco are properly considered and provide further support as to the viability of the malpractice claim. Accordingly, the motion to dismiss the sixth cause of action against the K&M Defendants must also be denied.

**3. Plaintiffs' Motion to Dismiss Counterclaims**

Plaintiffs contend that the counterclaims asserted in Maryland answer are frivolous, they should be dismissed and sanctions and costs should be awarded for such frivolous conduct.

In the first counterclaim Maryland seeks a declaratory judgment that the Liberty Mutual Policy provides the next layer of coverage above the $1 million dollar limit of the Maryland Policy for payment of any judgment or settlement in the Rought Action. Plaintiffs contend that Maryland has no real legal interest as to the priority of coverage between the Liberty Mutual Policy and the National Casualty Policy since Maryland, as the primary insurer, must still pay the full limits of its policy before coverage under either the Liberty Mutual or National Casualty Policy would be implicated. On this basis, plaintiffs contend the counterclaim for declaratory relief must fail.

Maryland responds that the first counterclaim was styled specifically to answer Liberty Mutual's cause of action against Maryland in the amended complaint alleging that Maryland breached a duty of good faith and fair dealing in requiring Price Chopper, KBE and Golub to discontinue the Demco Actions with prejudice and requiring them to use HO&M as defense counsel as a condition of Maryland accepting its duty to defend Price Chopper, KBE and Golub and that, as a result of such breach, Maryland's obligation to indemnify Price Chopper, KBE and Golub for any settlement or judgment entered in the Rought Action should not be limited by the available policy limits under the Maryland Policy. Plaintiffs seek a declaration that Maryland, by reason of its breach of duty of good faith and fair dealing, is responsible for any settlement or judgment entered in the Rought Action without regard to policy limits. Maryland contends that since Liberty Mutual has not

restricted its claim against Maryland to the limits of the Maryland Policy, it has created a justiciable controversy with respect to damages above the limits of the Maryland Policy to which they may respond by seeking a declaration of their respective rights.

The position taken by Maryland has merit. Pursuant to CPLR § 3001, this Court may render a declaratory judgment as to the rights of the parties when there is a justiciable controversy. "The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination" (*Waterways Dev. Corp. v Lavalle,* 28 AD3d 539, 540 [2d Dept 2006]). Given plaintiffs' own claim against Maryland in which it seeks damages above the limits of the Maryland Policy, a dispute is presented which is ripe for judicial review and there is a justiciable controversy upon which the court may properly render a declaratory judgment (*see, Matter of Ward v Bennett,* 79 NY2d 394, 401 [1992]; *Ashley Builders Corp. v Town of Brookhaven,* 39 AD3d 442, 443 [2d Dept 2007]). Although the rights of the parties with respect to damages may be deemed to be partially contingent upon a future event, namely, the entry of a settlement or judgment in the Rought Action, declaratory relief is available here since the declaration will have an immediate and practical effect of influencing the parties' current conduct (*see, Buller v Goldberg,* 40 AD3d 333 [1st Dept 2007]; *Long Island Lighting Co. v Allianz Underwriters Ins. Co.,* 35 AD3d 253 [1st Dept 2006]).

Plaintiffs claim that the second, third and fourth counterclaims violate the antisubrogation rule. Maryland contends that it does not seek indemnity from Price Chopper, KBE or Golub nor does it seek coinsurance from Liberty Mutual. Maryland emphasizes that it only seeks to hold Liberty Mutual accountable for any amounts above the Maryland Policy. Thus, it argues that the antisubrogation rule does not apply.

It has long been recognized by New York courts that an insurer has an equitable right to bring a subrogation action against a third party whose wrongdoing has caused a loss to its insured (*see, ELRAC v Ward,* 96 NY2d 58, 76 [2001]; *Pennsylvania Ge. Ins. Co. v Austin Powder Co.,* 68 NY2d 465, 471 [1986]). An exception to the right of subrogation, known as the antisubrogation rule, provides that "[a]n insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*North Star Reins. Corp. v Continental Ins. Co.,* 82 NY2d 281, 294 [1993]; *Matter of Government Employees Ins. Co. v Hengber,* 66 AD3d 1020 [2d Dept 2009]). The rule would apply to bar indemnification up to the policy limits of the

comprehensive general liability policy at issue here (*see ELRAC*, 96 NY2d at 77-78; *Lodovichetti v Baez,* 31 AD3d 718, 719 [2d Dept 2006]; *Blanco v CVS Corp.,* 18 AD3d 685, 686 [2d Dept2005]). However, claims for contribution and/or indemnification beyond the limits of a common insurance policy are not barred under the antisubrogation rule (*see ELRAC,* 96 NY2d at 78; *DeJesus v Tyree Organization,* 307 AD2d 897, 898-899 [1st Dept 2003]). Thus, Maryland's second, third and fourth counterclaims against Liberty Mutual are viable to the extent that Maryland seeks to recover damages in excess of the Maryland Policy limits of $1 million.

Alternatively, plaintiffs seek dismissal of the second and third counterclaims on the ground that such counterclaims allege that Liberty Mutual breached a tort duty to Price Chopper, KBE and Golub. Plaintiffs observe that New York caselaw bars such tort claims under the proposition that there is no independent tort duty of care flowing to an insured separate and apart from the insurance contract.

Maryland replies that it is seeking additional damages independent of the insurance contract that were caused by Liberty Mutual's negligent claims handling procedures. Maryland relies upon the case of *Panasia Estates, Inc. v Hudson Ins. Co.* (10 NY3d 200 [2008]) in which the Court of Appeals held that consequential damages may be available in a claim for breach of the duty of good faith against an insurer. There plaintiff sought to recover under a policy of insurance for water damage to its property. Plaintiff claimed that it promptly notified defendant insurer which delayed investigating and adjusting the claim then improperly denied it. Plaintiff commenced an action alleging breach of the covenant of good faith seeking direct and consequential damages for the insurer's breach. The court held that consequential damages resulting from a breach of the covenant of good faith may be asserted in an insurance contract context where the damages were foreseeable.

Contrary to plaintiffs' contentions, Maryland has sufficiently pled at this early stage of the litigation that Liberty Mutual breached its duty to handle the claims under its policy of insurance in good faith and that consequential damages flowing therefrom may be said to have been contemplated as a probable result of any such breach.

Given that plaintiffs' motion to dismiss the counterclaims is being denied, that branch of plaintiffs' motion as seeks the imposition of sanctions against Maryland's counsel for frivolous litigation practice must fail.

***Conclusion***

Accordingly, it is

**ORDERED** that the motion of defendants Harrington Ocko & Monk, LLP, Glenn A. Monk, Adam G. Greenberg and Edward C. Haynes (Motion Sequence No. 001) for an order pursuant to CPLR § 3211 (a) (7) dismissing the amended complaint insofar as asserted against them is denied; and it is further

**ORDERED** that the motion of defendants Kelly & Meenagh, LLP, Thomas F. Kelly and John Meenagh, Jr. (Motion Sequence No. 002) for an order pursuant to CPLR § 3211 (a) (1) and (7) dismissing the complaint as against them and pursuant to CPLR § 1001 dismissing the amended complaint for plaintiffs' failure to add National Casualty Company as a party defendant is denied; and it is further

**ORDERED** that plaintiffs' motion for an order pursuant to CPLR § 3211 (a) (7) dismissing the counterclaims of Maryland Casualty Company (Motion Sequence No. 003) is denied.

This constitutes the decision and order of the Court.

**DATED:** September 30, 2010

**E N T E R:**

**O. PETER SHERWOOD**
**J.S.C.**