

IDS USA, Inc. v Impac Logistic Serv., LLC

2012 NY Slip Op 33501(U)

April 30, 2012

Sup Ct, New York County

Docket Number: 650190/2009E

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN
Justice

PART 12

IDB USA, INC.

INDEX NO. 650190/09E

-v-

MOTION DATE

IMPAC, LOGISTIC

MOTION SEQ. NO. 004

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

DECISION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

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

Dated: 4/30/2012

[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

IDS USA, INC.,

Plaintiff,

Index Number

650190/2009E

Mot. Seq. Nos.

004, 005

-against-

IMPAC LOGISTIC SERVICES, LLC, IMPAC
ADMINISTRATIVE SERVICES INC., IMPAC
LOGISTIC SERVICES, INC., IMPAC LOGISTICS
SERVICES INC., S.D.S. MANAGEMENT &
CONSULTING SERVICES, INC., INNOVATIVE
METHODS PACKING AND APPAREL
CORRECTIONS LLC, STEVEN MOSES, and
RICHARD SAPIENZA,

Defendants.

-----X

IMPAC LOGISTIC SERVICES, LLC, IMPAC
ADMINISTRATIVE SERVICES INC., IMPAC
LOGISTIC SERVICES, INC., IMPAC LOGISTICS
SERVICES INC., S.D.S. MANAGEMENT &
CONSULTING SERVICES, INC., INNOVATIVE
METHODS PACKING AND APPAREL
CORRECTIONS LLC, STEVEN MOSES, and
RICHARD SAPIENZA,

Third-Party Plaintiffs,

Third-Party Index No. 592003/2010

-against-

ILLINOIS UNION INSURANCE COMPANY, a
division and/or affiliate of the ACE GROUP of
Companies a/k/a ACE USA, and USI
INSURANCE SERVICES, LLC,

Third-Party Defendants

DECISION AND ORDER

-----X

On the Motions:

For Third-Party Plaintiffs:
Abrams Garfinkel Margolis Bergson, LLP
By: Andrew W. Gefell, Esq.
237 W 35th St., 4th fl.
New York, NY 10001
(212) 201-1170

For Third-Party Defendant Illinois Union:
Traub Lieberman Straus & Shrewsbury LLP
By: Eric D. Suben, Esq.
Mid-Westchester Executive Park
Seven Skyline Dr.
Hawthorne, NY 10532
(914) 347-2600

For Third-Party Defendant USI Ins.

Farrell Fritz, P.C.
 By: Michael F. Fitzgerald, Esq.
 Matthew D. Donovan, Esq.
 370 Lexington Ave., ste. 800
 New York, NY 10017
 (212) 687-1230

For Plaintiff:

Salans LLP
 By: Anthony B. Ullman, Esq.
 Deric Gerlach, Esq.
 620 Fifth Ave.
 New York, NY 10020
 (212) 632-5500

E-filed papers considered in review of these motions to partially dismiss and dismiss:

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PAUL G. FEINMAN, J.:

Motion sequence numbers 004 and 005 are consolidated for purposes of decision.

In motion sequence number 004, third-party defendant Illinois Union Insurance Co. moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the fourth, fifth, and six causes of action of the first amended verified third-party complaint. In motion sequence number 005, third-party defendant USI Insurance Services, Inc. moves, pursuant to CPLR 3211 (a) (5) and (7), to dismiss the first amended verified third-party complaint in its entirety as against it. For the reasons which follow, both motions are granted in part and otherwise denied.

The instant action grows out of several litigations pending in New Jersey concerning an October 2006 warehouse fire in Carlstadt, New Jersey. As this court has set forth previously,¹ the

¹IDS USA, Inc. v Impac Logistic Services, LLC, et al., 650190/2009 (March 23, 2011) (Doc. 117).

warehouse had been managed per written agreement by defendants Impac Logistics and/or SDS Management for a non-party lessee (a party in the underlying New Jersey actions). On December 1, 2006, that is, after the fire, Impac Logistics and/or SDS Management and the other defendants (hereinafter the Impac parties) entered into an Asset Purchase Agreement with plaintiff IDS USA, Inc., by which IDS USA purchased the assets of the Impac parties; the Agreement included a provision that IDS would be indemnified for any losses or damages it suffered by being named as a defendant in any of the New Jersey actions.² The New Jersey actions were consolidated, and IDS USA was named a defendant on the theory that it is the successor to Impac Logistics and/or SDS Management, and therefore responsible for any liabilities as to the complainants.

The crux of the plaintiff's complaint herein, commenced in April 2009, is that defendants have wrongfully refused their obligation as set forth in the Asset Purchase Agreement to indemnify it in the New Jersey actions (Doc. 119, Sec. Am. Compl. ¶ 1). IDS USA has twice amended its initial complaint. It currently seeks money damages based on the breach of the Agreement's indemnification provision, and alleges fraud based on defendants' misrepresentations that induced IDS USA to enter into the Asset Purchase Agreement (Doc. 119, Sec. Am. Compl. ¶ 1).

The Impac parties commenced a third-party action in November 2010 against their insurer, Illinois Union Insurance Company, a division of ACE USA (hereinafter ACE/Illinois Union), and the insurance broker, USI Insurance Company (Doc. 78). According to their first amended verified third-party complaint, ACE/Illinois Union issued a general liability insurance

²See Doc. 123, First. Am. Ver. 3d-Party Compl. ¶ 26.

policy on behalf of “one or more of the Impac [parties],” in effect from July 28, 2006 to July 28, 2007 (Doc.123, First. Am. Ver. 3d-Party Compl. ¶¶ 15-16, citing Policy D35943808),³ and USI Insurance was the insurance broker and agent for and on behalf of ACE/Illinois Union who procured and sold the particular policy to the Impac parties (Doc.123, First. Am. Ver. 3d-Party Compl. ¶ 17).

According to the amended third-party complaint, the insurance policy’s General Endorsement lists 13 additional named insureds, the first being IDS USA, then known as IDS Impac, Ltd. (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶ 18).⁴ The amended complaint also refers to certificates of insurance authored and produced by USI Insurance on behalf of ACE/Illinois Union listing IDS USA as an insured and stating expressly that the certificates serve as “evidence that insurance identified below has been issued, is in force, and conveys all the rights and privileges afforded under the policy” (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶ 19).

Following the commencement in October 2007 by the first of the New Jersey warehouse litigations against certain of the Impac parties, Impac Logistics allegedly submitted a claim to ACE/Illinois and USI Insurance seeking a defense and indemnity (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶¶ 21-22). Other entities also commenced suits in New Jersey claiming damages in the fire, many naming IDS USA or one of its affiliates, IDS Group, among the defendants (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶ 23). According to the third-party complaint, as each new action was commenced, those Impac parties served with notice notified ACE/Illinois

³Pursuant to the Insurance Policy, 13 separate warehouses were covered under the insurance plan (Doc. 147 at 16, Aff. in Opp. ex. B, Policy, “Schedule of Locations”).

⁴Other named insureds include certain of the other Impac party defendants (Doc. 147, Aff. in Opp. to Motion, ex. A, Policy [General Endorsement] p. 1).

and the insurance broker USI Insurance so as to allow the insurer and broker to submit a claim for defense and indemnity pursuant to the policy (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶¶ 22-24). Furthermore, each time an action was consolidated or a complaint was amended, the third-party defendants were notified (Doc. 123, First Am. Ver. 3d-Party Compl. ¶ 24). However, despite IDS USA being a named insured under the policy, and despite the third-party defendants being notified of the various actions in which claims were asserted against it, ACE/Illinois and USA Insurance never provided coverage or retained counsel to defend it, even though the claims asserted against it were “identical” to those asserted against the Impac parties (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶ 25). IDS USA thereafter defended itself. Because it did not receive coverage, although a named insured, it commenced this action alleging that the Impac parties breached the Asset Purchase Agreement’s provision that they would indemnify IDS USA for losses and damages associated with being named a defendant in the New Jersey actions ((Doc. 123, First. Am. Ver. 3d-Party Compl. ¶ 26).

The first amended verified third-party complaint alleges six causes of action. The first seeks various declaratory relief (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶ 29). The second cause of action, against ACE/Illinois Union, seeks damages based on its alleged refusal to defend IDS USA pursuant to the insurance policy (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶¶ 37-45). The third cause of action is against USI Insurance and alleges that it breached its duty of care by not informing ACE/Illinois Union of the claims asserted against IDS USA as concerns the warehouse fire, or that it had a contractual duty to defend IDS USA under the policy (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶¶ 46-54). The fourth through sixth causes of action are against both ACE/Illinois Union and USI Insurance. The fourth alleges that they breached their fiduciary duties and implied covenants of good faith and fair dealing and loyalty owed to the

third-party plaintiffs Impac parties, and have acted in bad faith (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶¶ 56-57). The fifth cause of action alleges the insurer and insurance broker perpetrated a fraud upon the Impac parties by materially misrepresenting that IDS USA was a named insured under the general liability policy and would be provided a defense and indemnification in the event claims were asserted against the Impac parties or IDS USA, and that the third-party plaintiffs relied to their detriment on the false or misleading information provided by ACE/Illinois and USI Insurance or concealed by them (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶¶ 59-61) (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶¶ 59). The sixth cause of action alleges breach of contract and frustration of the third-party plaintiffs' enjoyment of the benefits of the contracts (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶63).

Motion Sequence 004

In motion sequence number 004, third-party defendant ACE./Illinois Union moves pre-answer to dismiss the fourth, fifth, and six causes of action of the first amended verified third-party complaint pursuant to CPLR 3211 (a) (1) and (7). It argues, generally, that the documentary evidence it provides in support of its motion refutes necessary elements of the three causes of action (Doc. 128, Memo of Law in Supp. p. 5). It further argues that the fourth cause of action should be dismissed because in New York, an insurer generally does not owe a fiduciary duty to its insured and in New Jersey, an insurer only owes a duty in certain circumstances. As to the fifth and sixth causes of action, it argues that the pleadings fail to set forth sufficient specific allegations to support the claim of fraud or breach of contract.

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit

within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001], citing *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The motion will be denied when, from the pleading's four corners, there are "factual allegations . . . discerned which taken together manifest any cause of action cognizable at law." (*Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence unequivocally contradicts the plaintiff's factual allegations and "utterly refutes" a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152; *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000]). Here, ACE/Illinois Union's reliance on the verified third-party complaint and the first amended verified third-party complaint to establish its argument is inapposite. These are not the kind of objective documents such as contracts, deeds, and so on which, assuming the truth of their contents and the validity of the execution, can support the ground on which the motion is based (see Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C3211:10). Therefore, defendant's motion will be considered solely based on its argument alleging failure to state a cause of action (CPLR 3211 [a] [7]).

In making their arguments, the parties cite both New York and New Jersey law. At issue is that the insurance policy was issued primarily to New Jersey residents⁵ and covered New

⁵The third-party plaintiffs are companies predominantly organized under the laws of New Jersey (with one in California and one in Florida); the two individual owners reside in New York, the insurer is based in Illinois, and the insurance broker is located in New York (Doc. 132, First Am. Ver. 3d-Party Compl. ¶¶ 1-10, 12). The insurance policy contains amendments that pertain to New Jersey, California, and Florida (see Doc. 148 at 1, 5, 10, 94, Gefell Aff. in Opp. ex. B, Policy). In addition, the third-party plaintiff IDA USA, is a Delaware corporation with its principal offices in New Jersey (Doc. 119, Sec. Am. Compl. ¶ 6). This

Jersey warehouses, the losses occurred in New Jersey, and the claims for those damages were litigated in New Jersey. In such a situation, the “center of gravity” or “grouping of contacts” choice of law theory discussed in *Allstate Ins. Co. v Stolarz*, 81 NY2d 219, 226 (1993), makes apparent that New Jersey law is more applicable to these claims concerning the insurance policy (see *Regional Import & Export Trucking Co. v North River Ins. Co.*, 149 AD2d 361, 361-362 [1st Dept 1989] [holding that New Jersey had the most contacts with the policy which was issued by a New Jersey insurer to a New Jersey corporation to insure against losses “happening anywhere during the policy period,” the loss occurred in New Jersey, and the plaintiff’s liability was litigated in New Jersey; the “mere fact that the policy was placed through a New York insurance broker which negotiated its terms” was an insufficient contact with the forum to hold otherwise]). Accordingly, the court will apply New Jersey law when analyzing the causes of action.⁶

The fourth cause of action alleges breach of fiduciary duty and bad faith. The “essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position.” (*McKelvey v Pierce*, 173 NJ 26, 57, 800 A2d 840, 859 [2002], quotation and citation omitted). It arises when one party is “under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship.” (*McKelvey v Pierce*, 173 NJ at 57, 800 A2d at 859, citations omitted).

ACE/Illinois concedes that New Jersey recognizes the existence of a fiduciary relationship and good faith by an insurer but argues that this is so only in certain circumstances,

action is venued in New York because of the forum selection clause contained in the Asset Purchase Agreement IDS USA signed with the Impac parties.

⁶ The court notes that an analysis under New York law would not result in a different outcome.

pointing to *Rova Farms Resort, Inc. v Investors Ins. Co. of Am.*, 65 NJ 474, 323 A2d 495 (1974), for the holding that the predicate for finding liability based on breach of fiduciary duty and bad faith is that the insurer has failed to settle the underlying claim within policy limits (Doc. 128, Memo of Law in Supp. pp. 6-7). However, this reading of *Rova Farms Resort* would appear to be overly narrow. That Court holds in part that bad faith is evidenced where an insurer tries to persuade its insured to participate in a settlement within policy limits rather than treating any settlement offer as if there were full coverage for whatever verdict might be recovered regardless of the policy limits (65 NJ at 487, 323 A2d at 502). *Rova Farms Resort* does not stand for the proposition that the *only* instances of bad faith by an insurer are found in the way it handles settlements. The New Jersey rule is broader, as seen in *Pickett v Lloyd's (A Syndicate of Underwriting Members)*, which reiterated the holding that “an insurance company owes a duty of good faith to its insured in processing a [] claim” (131 NJ 457, 467, 621 A2d 445, 455 [1993]). This is based on the fact that “every contract imposes on each party the duty of good faith and fair dealing in its performance and enforcement” (131 NJ at 467, 621 at 455). Furthermore, *Pickett* also holds that a principal of the insurer, as well as the agent, owes a fiduciary duty to its insured (*id.*, citing *Sobotor v Prudential Prop. & Cas. Ins. Co.*, 200 NJ Super 333, 337-341, 491 A2d 737, 738-741 [App. Div. 1984]). Moreover, pursuant to *Pickett*, New Jersey recognizes a cause of action for bad faith failure to pay an insured’s claim (131 NJ at 470, 621 A2d at 452).

Here, the first amended verified third-party complaint alleges that IDS USA was a named insured under the policy that covered the Impac parties’ various warehouses in New Jersey, was named as one of the defendants in several litigations involving a warehouse fire, but although the insurer was notified of the various claims, and proffered a defense to the other defendants named

in the policy, it did not defend IDS USA. This is sufficient to allege a breach of fiduciary duty and bad faith. Therefore, the motion to dismiss the fourth cause of action as against ACE/Illinois Union based on failure to state a cause of action is denied.

The fifth cause of action alleges fraudulent misrepresentation. Under New Jersey law, an action for fraud may be legal or equitable in nature, and the fraud may be actual or constructive, with the element of untruth between the parties being a necessary element only when alleging actual fraud (*Jewish Ctr. of Sussex County v Whale*, 86 NJ 619, 624, 432 A2d 521, 523 [1981]). To state a claim for legal fraud, a plaintiff must allege “a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment” (*Jewish Ctr.*, 86 NJ at 624, 432 A2d at 523). A claim for equitable fraud omits the elements of knowledge of the falsity and the intent to obtain an undue advantage (86 NJ at 625, 432 A2d at 524). Under R. 4:5-8 (a) of the New Jersey Court Rules, when alleging misrepresentation or fraud, “particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable. Malice, intent, knowledge, and other condition of mind of a person may be alleged generally.” The court will read the complaint “indulgently on a motion to dismiss,” and will dismiss a pleading only when it is devoid of the essential elements of the cause of action (*Rebish v Great Gorge*, 224 NJ Super 619, 626-627, 541 A2d 237, 240 [App Div 1988]). Where the essential elements are present but there is insufficient particularization as required under the statute, the proper course is to allow the plaintiff to amend its complaint (*Rebish*, 224 NJ Super at 626-627, 541 A2d at 240).

ACE/Illinois Union argues that the allegation that it did not provide a defense for IDS USA in the New Jersey property damage actions does not constitute a misrepresentation or false statement that would support a claim of fraud (Doc. 128, Memo in Supp. p. 8). It argues that the

complaint makes only conclusory, general claims, pointing to the third-party complaint's allegation that ACE/Illinois Union "perpetrated a fraud upon the Impac Parties by materially misrepresenting to the Impac Parties that IDS USA was a Named Insured under the Policy and would be provided a defense and indemnification under the Policy in the event that claims, like those in the [New Jersey] Actions, would be asserted against the Impac Parties and/or IDA USA" (Doc. 128, Memo of Law in Supp. p. 8, quoting First Amended Verified Third-Party Complaint [Doc. 123, First Am. Ver. 3d-Party Compl. ¶ 59]).

Although the Impac parties contend they have sufficiently alleged the elements of fraud, even an expansive reading of the complaint fails reveal any allegation that the insurer had knowledge that it would not offer a defense for IDS USA. The first amended verified third-party complaint alleges that the insurer "agreed and had a duty to defend IDS USA," and "knew, or should have known, that IDS USA was a named defendant," and that it "failed to defend IDS USA" (Doc. 123, First Am. Ver. 3d-Party Compl. ¶¶ 40-42). Although under the New Jersey Court Rules, knowledge is an element that may be alleged generally, here there is no allegation that at the time ACE/Illinois Union agreed to issue an insurance policy to the Impac parties, it knew that it was not going to defend or indemnify IDS USA. While the first amended verified third-party complaint alleges that ACE/Illinois Union did not defend IDS USA, it does not allege, or allege with any clarity, that there was actually a request made that the insurer provide a defense for IDS USA. Notably, the first amended verified third-party complaint only alleges that although ACE/Illinois union was notified of the various actions in which claims asserted against IDS USA were "identical" to the claims asserted against Impac parties, it "never provided coverage or retained counsel" (Doc. 123, First Am. Ver. 3d-Party Compl. ¶ 25). Thus, it cannot be found that the particularities of the fraud have been sufficiently alleged. Therefore,

third-party defendant's motion to dismiss the fifth cause of action as against it is granted.

The sixth cause of action alleges breach of contract (Doc. 123, First. Am. Ver. 3d-Party Compl. ¶63). In New Jersey, in order to sufficiently allege a claim of breach of contract, the complaint must allege that the parties entered into a valid contract, the defendant failed to perform its obligations under the contract, and the plaintiff sustained damages therefrom (*Murphy v Implicito*, 392 NJ Super 245, 265, 920 AD2d 678, 689 [App Div 2007]). The first amended verified third-party complaint sufficiently alleges a claim sounding in breach of contract, based on the existence of the insurance policy naming IDS USA as a named insured and the related duty of the insurer to defend and indemnify its insureds, the claim that it failed to defend or insure IDS USA, and the resulting damages to the third-party plaintiffs, namely that they are defendants in a law suit brought by IDS USA alleging breach of the Asset Purchase Agreement. The arguments by ACE/Illinois Union that the complaint does not provide sufficiently particularized allegations to give notice of the transaction and occurrences intended to be proved (Doc. 128, Memo of Law in Supp. p. 9), are not persuasive. The motion to dismiss the sixth cause of action as against ACE/Illinois Insured is denied.

Motion Sequence 005

Third-party co-defendant USI Insurance moves separately to dismiss the entirety of the first amended third-party complaint as against it. The crux of its motion is based on New Jersey's entire controversy doctrine which, USI Insurance argues, precludes this entire third-party litigation.

New Jersey Court Rule 4:30A provides that the failure to join a claim that was "required to be joined" results in the "preclusion of the omitted claims to the extent required." USI Insurance argues that the within claims brought by the Impac parties, namely that USI Insurance

should have notified ACE/Illinois Union of the claims against IDS USA, that it was negligent, breached its fiduciary duty, and breached its contract with respect to its alleged responsibility to offer a defense and indemnify IDS USA under the insurance agreement signed by the Impac parties, were ripe at the time the New Jersey warehouse matters were being addressed and resolved, and should have been addressed in that forum.

USI Insurance additionally points to New Jersey Court Rule 4:51-1 (2) which provides that parties in a litigation “shall include with the first pleading a certification as to . . . whether any other action . . . is contemplated; and, if so, the certification shall identify such actions and all parties thereto.” The rule further provides that the parties disclose “the names of any non-party who should be joined . . . or who is subject to joinder.” Where a party fails to comply, the court may “impose an appropriate sanction,” which may include dismissal of a successive action against a party whose existence was not disclosed, or imposition of litigation expenses that could have been avoided if the rule had been complied with (NJ Ct. R. 4:51-1 [2]). Dismissal of a successive action is not required unless the failure to comply was “inexcusable” and the right of the undisclosed party to defend the successive action is “substantially prejudiced by not having been identified in the prior action” (New Jersey Ct. R. 4:51-1 [2]). As explained in *Kent Motor Cars, Inc. v Reynolds and Reynolds Co.*, the goal of the doctrine is to avoid piecemeal litigation and create efficiency as related to parties, and the means to accomplish the goals of fairness and efficiency rests with the court (207 NJ 428, 444, 445, 25 A3d 1027, 1036, 1037 [2011]). The parties “may not choose to withhold related aspects of a claim from consideration . . . nor may they decline to reveal the existence of other parties in an effort to achieve an advantage” (*Kent Motor Cars*, 207 NJ at 446, 25 AD3d at 1037 [citations omitted]). Where dismissal is not appropriate, the court has broad authorization to impose an appropriate sanction (207 NJ at 445,

25 AD3d at 1037).

In support of its motion, USI Insurance points out that in the New Jersey actions, IDS USA asserted cross claims against the Impac parties for its damages in having to defend itself in those actions (Doc. 13-5, Fitzgerald Aff. in Supp. ex. D). The Impac parties' answers to the warehouse litigants' complaints indicated that "at this time," there were no parties that should be joined in the action, or that there were no parties who should be joined, and by December 2008, that there were none "other than" certain of the plaintiffs in the warehouse actions who were named as the third-party defendants by the Impac parties (Doc. 135-3 at 9, 16, 23, 44; Doc. 135-4 at 7-8, 16, 24, 31, 39, 46, 52, Fitzgerald Aff. in Supp. ex. C [Impac Answers, Certifications pursuant to NJ Ct. R. 4:5-1]).

USI Insurance contends that the silence of the Impac parties in not identifying USI Insurance or ACE/Illinois Union to the courts handling the warehouse litigations is inexcusable because of the cross claims of IDS USA against the Impac parties for indemnification. USI Insurance argues that it is now substantially prejudiced because the specific individual broker who handled the Impac account has left USI Insurance and in fact is in an adverse position relative to his former employer.(Doc. 136, Dranginis Aff. in Supp. ¶¶ 4-6).

This court agrees that the Impac parties apparently failed in their standard obligation in the warehouse litigations to identify the two entities who are now the third-party defendants in this action. However, as argued by the attorney for the Impac parties, from near the beginning of the warehouse litigations, IDS USA had included a cross claim against the Impac parties that it sought a declaration that the contractual indemnity claims should be interposed in New York based on the forum selection clause of the Asset Purchase Agreement (Doc. 135-5, Fitzgerald Aff. in Supp. ex. D [IDS responsive pleadings in consolidated warehouse action, 08/17/2009]).

Ultimately, IDS USA and the Impac parties stipulated that the IDS USA cross claims for indemnification under the Agreement were withdrawn from the consolidated New Jersey action, and

“Any and all claims that IDS USA may have in this proceeding have against the Impac Defendants, or any of them, under, relating to or in connection with the APA, have been, and are to be, asserted and brought, if at all, in and only in the courts of New York.”

(Doc. 160, Stip of 11/17/2009). By decision and order dated March 10, 2011, the Superior Court of New Jersey in part dismissed with prejudice “all claims, counterclaims, crossclaims, third party claims, and any other claims asserted in the consolidated actions.” (Doc. 161, Consent Order, 03/10/2011).

The court need not rule on whether this litigation is subject to the New Jersey entire controversy doctrine, because dismissal of the complaint is not warranted under any analysis. That the New Jersey court issued a consent order dismissing with prejudice *all* cross claims, third party claims, and “any other claims asserted in the consolidated actions,” necessarily requires not only that the terms of the Asset Purchase Agreement be addressed in New York, but that the claims of noncompliance by the parties to the Agreement also need to be fully addressed in New York.⁷

Turning to the first cause of action seeking declaratory relief pertaining to the warehouse litigations, USI Insurance argues that the declarations sought as against it should be dismissed on the ground that they are merely repeating in a different form the other causes of action asserted. The declarations sought in the first cause of action are that USI Insurance had a duty to notify

⁷This necessarily raises the question of choice of law, but the court sees no difficulty in applying New Jersey law to the third-party claims ultimately growing out of the insurance policy, and New York law to the terms of the Asset Purchase Agreement.

ACE/Illinois Union of all claims asserted against IDS USA; it failed to do so; its failure has subjected Impac parties to damages, and if IDS USA obtains a judgment against the Impac parties, USI Insurance will be liable to the Impac parties.

In New Jersey, as well as in New York, it has been held that a declaratory judgment action should not be filed where there is another available, adequate remedy (*see Medical Socy. of N.J. v AmeriHealth HMO, Inc.*, 376 N.J. Super. 48, 56, 868 A2d 1162, 1167 [App Div 2005]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010] [purpose of declaratory relief is to declare parties' respective legal rights, "not to declare findings of fact"]; *see Apple Records, Inc. v Capital Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]). However, as argued by third-party plaintiffs, at this early stage of the litigation, alternative pleadings may be stated and allowed to stand, citing NY CPLR 3014. Such alternative pleading is permissible under New Jersey law as well (*see, e.g., Flomerfelt v Cardiello*, 202 NJ 432, 445, 997 A2d 991, 998 [2010] [discussing a complaint with alternative causes of action]; *Pickett v Lloyd's, supra*, 131 NJ at 465, 621 A2d at 449 [noting that the allegations of the tort claim supported an alternative cause of action in contract]). Accordingly, the motion is denied as to the first cause of action.

The second cause of action is not against USI Insurance. The third cause of action alleges that USI Insurance had a duty to notify ACE/Illinois Union of all claims under the policy and its failure to do so has subjected the Impac defendants to legal fees. In New Jersey the elements of negligence are a duty owed, a breach of that duty and damages proximately caused by the breach (*Siddons v Cook*, 382 N.J. Super 1, 13, 887 A2d 689, 696 [App Div 2005]). The third-party complaint sufficiently alleges a claim in negligence. Third-party defendant makes no explicit arguments in favor of dismissal. The motion to dismiss is denied as to the third cause of action

as against USI Insurance.

The fourth cause of action alleges breach of USI Insurance's fiduciary duty and actions in bad faith. The elements of this cause of action have been discussed previously. In New Jersey, insurance brokers and agents owe a fiduciary duty of care to the insureds (*President v Jenkins*, 180 NJ 550, 569, 853 A2d 247, 257 [2004], *affg* 357 NJ Super 288, 814 NJ Super 1173 [App Div 2003]).⁸ Here, the amended third-party complaint alleges that USI Insurance, as the broker who sold the policy naming IDS USA as an insured to the Impac parties, had a duty to notify ACE/Illinois Union of all claims under the policy, but failed to notify the insurer that IDS USA had been named a defendant in the consolidated warehouse actions. This is sufficient to allege a breach of fiduciary duty. Therefore, the motion to dismiss the fourth cause of action as against USI Insurance is denied.

The fifth cause of action, sounding in fraud, is dismissed as against USI Insurance based on the same reasoning the claim was dismissed against co-third party defendant ACE/Illinois Union. There are insufficient allegations to establish the necessary elements of a claim of fraud.

The sixth cause of action sounds in breach of contract, the elements of which have set forth above. Here, the Impac parties allege that there was an agreement with USI Insurance to obtain insurance which it did on their behalf, but that it breached the terms of the contract by not notifying the insurer of claims asserted against IDS USA, resulting in that party's action seeking indemnification.

Although the allegations are rather thinly expressed, even USI Insurance agrees that in

⁸USI Insured's reference to the holding in *People v Wells Fargo Inc.*, 16 NY3d 166, 169, 171 (2011), that an insurance broker has no common-law fiduciary duty to its customers, is overstating the holding which is that while a broker has "dual agency status," and owes a duty of care to both the insurer and the client, an insurance broker has no fiduciary duty to disclose "incentive" arrangements that it entered into with an insurance company where there is no fiduciary relationship between and broker and client, but not there is no fiduciary duty.

2006 it procured the insurance policy for the Impac parties (Doc. 136, Dranginis Aff. in Supp. ¶ 2). The nature of the agreement between the broker and its client the Impac parties is not specifically articulated as concerns the scope of USI Insurance's contractual duties. However, there are sufficient allegations to deny its motion for dismissal of the cause of action, as the third-party complaint sets forth allegations that, if true, would support a claim for breach of contract. Therefore, the branch of USI Insurance's motion to dismiss the sixth cause of action is denied.

Accordingly, it is

ORDERED that the motion to partially dismiss the first amended verified third-party complaint in Motion Sequence 004 is granted to the extent that the fifth cause of action is dismissed and is otherwise denied; and it is further

ORDERED that the motion to dismiss the first amended verified third-party complaint in Motion Sequence 005 is granted to the extent that the fifth cause of action is dismissed and is otherwise denied; and it is further

ORDERED that third-party defendants are directed to serve their answers to the third-party complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for their previously scheduled compliance conference in Room 212, 60 Centre Street, on May 2, 2012, at 2:15 PM.

This constitutes the decision and order of the court.

Dated: April 30, 2012
New York, New York



J.S.C.