Rampart Brokerage Corp. v Ribs NY LLC
2014 NY Slip Op 30938(U)
April 8, 2014
Supreme Court, New York County
Docket Number: 652385/13
Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

RAMPART BROKERAGE CORP., Plaintiff, -against- RIBS NY LLC, RIBS NYC LLC, RIBS ONE LLC, RIEMER INSURANCE GROUP, INC., RIEMER INSURANCE AGENCY a d/b/a of Riemer Insurance Group, Inc., REGENCY INSURANCE BROKERAGE SERVICES, INC., STEPHEN L. RIEMER, GREGORY SCARPA, and JONATHAN HARTWELL, Defendants.	Index No. 652385/13 DECISION AND ORDER Motion Sequence Nos. 004 and 006

MELVIN L. SCHWEITZER, J.:

Motion sequence numbers 004 and 006 are consolidated for disposition.

In motion sequence number 004, defendant Riemer Insurance Group, for itself and as sued herein as Riemer Insurance Agency (Riemer Insurance), moves, pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint for failure to state a cause of action, or, alternatively, pursuant to CPLR 3024 (a), requiring plaintiff to serve a more definite statement of its claims.

In motion sequence number 006, defendants RIBS NY, LLC (RIBS NY), RIBS NYC LLC (RIBS NYC), RIBS One LLC (RIBS One), Regency Insurance Brokerage Services, Inc. (Regency), Stephen L. Riemer (Riemer), and Gregory Scarpa (Scarpa; collectively Seq. 006 Movants) move, pursuant to CPLR 3211 (a) (8) to dismiss the amended complaint as against RIBS NYC for lack of jurisdiction; pursuant to CPLR 3211 (a) (7), to dismiss the complaint in its entirety as against RIBS NYC, RIBS One, Regency, Riemer and Scarpa for failure to state a cause of action; pursuant to CPLR 3211 (a) (7) to dismiss the second (negligence), third

(negligent misrepresentation), sixth (General Business Law [GBL] § 349), seventh (declaratory judgment) and eighth (contribution) causes of action for failure to state a cause of action; pursuant to CPLR 3211 (a) (7) and 3016, to dismiss the fourth (breach of fiduciary duty) and fifth (fraud) causes of action for failure to state a cause of action and for failure to state the cause of action with the requisite particularity; and to dismiss the claims for attorneys' fees, punitive damages, and consequential damages.

The following facts are taken from the verified amended complaint (Complaint).

Plaintiff Rampart Brokerage Corp. (Rampart) is an insurance brokerage firm that has been incorporated since 1965, doing business in New York. Complaint, ¶ 2. RIBS NY is a Florida company authorized to do business in New York. *Id.* ¶ 3. RIBS NYC is also a Florida company authorized to do business in New York. *Id.* ¶ 6. RIBS One is a New York company, whose sublicensees are Riemer and Scarpa. *Id.* ¶¶ 8-9. Riemer Insurance is a Florida corporation, authorized to do business in New York. *Id.* ¶ 10.

Riemer owns and/or controls RIBS NY, RIBS NYC, Riemer Insurance and Regency (the Riemer entities). All the Riemer entities use the same letterhead, and refer consumers and customers to the same website, www.regencyinsurancebrokerage.com. RIBS is an acronym for Regency Insurance Brokerage Services. *Id.* ¶ 17. The Riemer entities use the same employees interchangeably, and their malpractice insurance is all under the same policy. *Id.* ¶¶ 18-19. They also all share email addresses. *Id.* ¶ 25. Rampart maintains that they were all dominated by Riemer and used by him to perpetrate a fraud upon plaintiff. *Id.* ¶ 20. Riemer and Scarpa were listed as licensee or sublicensee with the New York State Insurance Department with respect to all of the Riemer entities. *Id.* ¶ 27.

Defendant Jonathan Hartwell (Hartwell) ran the New York office of RIBS NY, and reported directly to Riemer and Scarpa. Riemer and Scarpa made the ultimate decisions as to with whom to place insurance, the premium to be charged, and the manner in which the various companies operated. *Id.* ¶¶ 32-33.

In December 2010, Riemer approached Robert Glenn Morris, Rampart's president, at a party and said he was interested in doing business with Rampart. After meetings between Rampart's marketing department and Riemer's representatives, Rampart entered into a "Producer Agreement" with RIBS NY, on the letterhead of Regency Insurance Brokerage Services, Inc., on August 1, 2011, executed by Scarpa. *Id.* ¶ 37, exhibit H. The written agreement was with RIBS NY only; Rampart contends that it had an oral agreement with all of the other Riemer entities, as well as with Riemer. *Id.* ¶¶ 38-39. Rampart dealt with all of the defendants, and received emails and quotes from all of them. *Id.* ¶ 40. Riemer assigned Hartwell to be Rampart's account representative, to represent all the Riemer entities. *Id.* ¶ 41.

Defendants misled Rampart and its clients as to which insurance policies had been issued, the nature of the policies, the premiums charged, and other terms. *Id.* ¶ 42. Some of the acts that defendants engaged in, which resulted in a "disaster" for Rampart and its clients, included: misrepresenting the premiums to be charged; issuing a policy without the proper endorsements; omitting insurance that was listed on the binder; including only one location for insurance although the binder listed two locations; claiming a policy had been issued although the insurance carrier never authorized the policy; having a policy issued for only $4 million instead of $6.36 million; allowing a policy to be canceled because defendants failed to forward the premium payments to the insurance carrier; failing to include an endorsement for hired and

nonowned automobiles; on several occasions, providing written confirmation of coverage and a policy number even though the policy was never issued, and neglecting to disclose the lack of coverage to Rampart; providing a fraudulent binder by signing an endorsement without authority; and obtaining policies with coverage deficiencies in terms of effective date, amount of coverage, and items to be covered. *Id.* ¶¶ 46-69.

Rampart contends that, prior to discovery, it does not know exactly which defendant was responsible for which acts. When Rampart confronted Riemer and Scarpa with what had taken place, Riemer and Scarpa assured plaintiff that they would correct any problems, but in fact did nothing. *Id.* ¶¶ 70-72.

Rampart also submits an affidavit of its president of commercial insurance, Yvonne M. Mojica (Mojica). She maintains that she was intimately involved with the transactions between Rampart and Riemer Insurance, which, she attests, operated under numerous names. It was her understanding that all the entities were one and the same. Mojica details the manner in which Rampart became aware of the problems with the policies and actions of defendants, and the many lies and misleading statements in which Hartwell, Riemer and Scarpa engaged. She also provides examples of the way that defendants' names were used interchangeably.

Rampart asserts causes of action for breach of contract (first cause of action), negligence and gross negligence (second cause of action), negligent misrepresentation (third cause of action), breach of fiduciary duty (fourth cause of action), fraud (fifth cause of action), violation of GBL § 349 (sixth cause of action), declaratory judgment (seventh cause of action), and contribution (eighth cause of action). Rampart also seeks attorneys' fees, punitive damages, and "all damages."

Discussion

Motion Sequence Numbers 004 and 006

Riemer Insurance moves to dismiss the Complaint as against it, stating that the breach of contract count fails with respect to it, and there is no basis on which to pierce the corporate veil; Rampart's negligence claim fails as to it; Rampart has not stated a negligent misrepresentation claim; Rampart has not stated a breach of fiduciary duty claim; Rampart's fraud claim is insufficient; Rampart has not pleaded a GBL § 349 claim; Rampart has not pleaded a declaratory judgment claim or a contribution claim; the request for punitive damages should be stricken; and discovery should be stayed as to Riemer Insurance.

The Seq. 006 Movants raise essentially the same issues in their motion to dismiss, adding that plaintiff is not entitled to attorneys' fees or consequential damages, that RIBS One is a fictitious entity that is an assumed name of RIBS NY, and should, therefore, be dismissed from the action as duplicative, and that RIBS NYC merged into RIBS NY and, therefore, no longer exists as a legal entity and should be dismissed.

In view of the fact that both motions address almost entirely the same issues, they will be addressed together.

Breach of Contract

Defendants contend that the court should not allow plaintiff to create a cause of action and a relationship where none exists, arguing that it is not credible that, after contracting formally with RIBS NY, Rampart also entered into actual oral contracts with each of the remaining defendants. They further note that Rampart has not identified when the oral contracts were entered into, by whom, and what the terms of the contracts were. Defendants further argue that

Rampart has failed to allege facts sufficient to pierce the corporate veil and hold parties other than RIBS NY liable. Relying on *Billy v Consolidated Mach. Tool Corp.* (51 NY2d 152, 163 [1980]), defendants maintain that, even where companies are related, they are treated separately and one will not be held liable for the torts or obligations of the other. They further argue that Rampart's conclusory allegations are insufficient because it failed to plead any factual allegations that RIBS NY exercised complete domination of the other defendants with respect to the transactions at issue, and that such domination was used to commit a fraud or other wrong against Rampart, which caused Rampart's injury. *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 (1993).

Defendants set forth two different grounds for dismissing the breach of contract claim: that there was no oral contract with them; and that Rampart has not sufficiently set forth grounds to pierce the corporate veil.

Regarding the oral contract, defendants contend that the terms of the purported oral contract have not been set forth, and that it is not credible that Rampart entered into a written contract with RIBS NY, and an oral contract with the other entities. Addressing the latter argument first, defendants have highlighted the problem with their position in their very language. While defendants may find it incredible that Rampart would enter into a formal written agreement with one entity, and an oral agreement with the other entities, matters of credibility do not enter into the calculus in determining a motion to dismiss. *Carbillano v Ross*, 108 AD2d 776, 777 (2d Dept 1985). The question is only whether Rampart has stated a claim, not whether it can prove the claim. Thus, the question of whether Rampart can produce evidence to convince a fact finder that there was, indeed, an oral contract with all the various Riemer

entities is not one appropriately addressed at this juncture. *Aberbach v Biomedical Tissue Servs., Ltd.*, 48 AD3d 716, 717-718 (2d Dept 2008).

With respect to the terms of the alleged oral contracts, Rampart states in the Complaint that the agreement was with the Riemer entities, other than RIBS NY, to "provide services, including proper insurance policies, binders, quotes, and other insurance information, to the plaintiff and its clients." Complaint, ¶ 74. While it is true that Rampart failed to state when it entered into the oral contracts, or which individuals represented the entities who entered into the contracts, those are not questions which require dismissal of the Complaint, or even relief under CPLR 3024 (a). Rather, the approximate dates can be inferred from the allegations in the Complaint, and Rampart does state the names of the persons with whom it dealt. Further, defendants can seek such information in a bill of particulars. Therefore, the breach of contract claim can continue.

Rampart argues that it must only allege facts that lead to the conclusion that the corporate veil should be pierced, not prove them. Here, Rampart maintains that it has alleged facts to support a conclusion that the corporate entities abused the corporate form for the purpose of perpetuating a wrong or injustice. *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 (2011). Thus, even if piercing the corporate veil is necessary, Rampart contends that it has adequately pleaded facts to support such a finding.

At this juncture, Rampart does not need to produce evidence of abuse of the corporate structure, but only to make factual allegations to support such a finding. *Woss, LLC v 218 Eckford, LLC*, 102 AD3d 860, 860 (2d Dept 2013); *Pacific Carlton Dev. Corp. v 752 Pac., LLC*, 62 AD3d 677, 679-680 (2d Dept 2009). In determining whether Rampart has adequately pleaded

such factual assertions, affidavits submitted in opposition to the motion to dismiss can be used to salvage an otherwise inartfully pleaded complaint. *Leon v Martinez*, 84 NY2d 83, 88 (1994). Here, the court must look at both the Complaint and Mojica's affidavit in order to determine whether there are sufficient allegations to support a finding that the corporate veil should be pierced.

Rampart alleges that Riemer and Scarpa ignored corporate formalities in dealing with the insurance policies. Rampart sets forth examples of defendants using each other's email addresses and letterhead, and the manner in which they seemed careless, if not oblivious, regarding which company was responsible for which policy. They shared office space, principals, and employees. They also appear to have communicated with Rampart without distinguishing which entity was communicating. While these allegations may not be conclusive, Rampart should be permitted the opportunity to conduct discovery in order to ascertain how intermingled the companies were. Keeping in mind that the decision to pierce the corporate veil involves a fact laden inquiry, it is not suited for summary disposition, especially prior to discovery. *Dromgoole v T–Foots, Inc.*, 309 AD2d 1186, 1187 (4th Dept 2003); *Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 (1st Dept 1996). Therefore, Rampart's claims based upon piercing the corporate veil may go forward.

Negligence and Gross Negligence

Defendants maintain that the negligence claim cannot stand because they owed no duty to Rampart independent of any alleged contractual duty.

Rampart contends that defendants had a duty not to make affirmative misrepresentations designed to cause pecuniary loss. They made affirmative misrepresentations and did not correct

those misrepresentations. They also had a duty not to sell objects or services under false pretenses, to supervise their employees, agents and associates, and a fiduciary obligation not to cause harm to plaintiff. Rampart also asserts that Riemer and Scarpa had fiduciary duties to the corporate defendants to protect them from legal liability. Their breach of that duty caused harm to Rampart.

Rampart fails to allege a basis for the duties that it asserts existed. While employers clearly have an obligation to supervise their employees, the failure to do so does not constitute negligence with respect to Rampart unless there were some duty to Rampart in that regard. Rampart has not alleged such a duty. Rampart has also failed to allege what duty was breached with respect to the misrepresentations concerning insurance policies that defendants were supposed to obtain for Rampart's clients.

The Court of Appeals has held, however, that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time, or inform the client of their inability to do so. *Chase Scientific Research v NIA Group,* 96 NY2d 20, 30 (2001); *Murphy v Kuhn*, 90 NY2d 266, 270 (1997). While defendants assert that this common-law duty does not apply to a broker dealing with another broker, they have not offered any support for that proposition,[1] nor have they made any convincing arguments as to why they should be permitted to mislead another broker about the coverage that they have obtained for a client. The same considerations that apply to a broker's duty to a consumer would seem to apply with equal force to a broker obtaining insurance for another broker for that broker's clients. The fact that Rampart

[1] Contrary to defendants' argument, the two cases cited do not state that the common-law duty does not apply to brokers dealing with other brokers, only that there is such a duty to the broker's clients.

is also a broker does not give Rampart an advantage with respect to knowing whether the policy promised was actually procured. Rampart was working through defendants in order to be able to obtain policies from underwriters that it did not deal with directly. Consequently, it was dependent on defendants for accurate information regarding the procurement of the policies. Thus, defendants have failed to demonstrate that the fact that Rampart is a broker is an adequate basis for dismissing the negligence cause of action.

Defendants point out that Rampart seeks to recover in tort for purely economic damages. Those damages are identical to those alleged in the breach of contract cause of action. Defendants argue that those economic damages are not appropriately the basis of a tort claim, but are precluded by the economic loss doctrine. That doctrine states that if there is no contractual relationship between parties, and there is no personal injury or property damage, a plaintiff may not recover for purely economic damage. 33 NY Prac, New York Construction Law Manual § 15:20 (2d ed). Rampart argues that the case upon which defendants rely, *532 Madison Ave. Gourmet Foods v Finlandia Ctr.* (96 NY2d 280, 288 n 1 [2001]), is about duty, not damages.

532 Madison Ave. is not relevant to this case, although not for the reasons suggested by Rampart. That case states specifically:

> "The 'economic loss' rule espoused in *Schiavone Constr. Co. v Mayo Corp.* (56 NY2d 667 [1982], *revg on dissent at* 81 AD2d 221 [1st Dept 1981]) and relied on by defendants has no application here. That case stands for the proposition that an end-purchaser of a product is limited to contract remedies and may not seek damages in tort for economic loss against a manufacturer (*see also, Bocre Leasing Corp. v General Motors Corp.*, 84 NY2d 685 [1995]; *Bellevue S. Assocs. v HRH Constr. Corp.*, 78 NY2d 282 [1991])."

Rampart further argues that the economic loss doctrine is intended to protect tortfeasors from limitless liability with respect to unknown and unforeseeable claimants. Rampart contends

that the economic losses here were quite foreseeable to defendants, and that, therefore, economic loss theory is irrelevant to the considerations in this action.

While the economic loss doctrine is not limited to sellers or manufacturers of products, it also does not necessarily preclude all actions that seek economic damages. Where a cause of action for negligence, or negligent misrepresentation is asserted, in order for a plaintiff to recover for purely economic injury, the parties must have an underlying relationship that is contractual, "or the bond between them [must be] so close as to be the functional equivalent of contractual privity." *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419 (1989). Here, Rampart has alleged contractual privity, which suffices at this juncture. Further, even if there were no contractual privity between Rampart and the defendants other than RIBS NY, the factual assertions suffice to allege a relationship "so close as to be the functional equivalent of contractual privity." Rampart was a known party, not merely a member of a class of potential parties who could be injured by defendants' actions. *See Bri-Den Constr. Co., Inc. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355 (1st Dept 2008). Thus, the economic loss doctrine does not preclude the negligence causes of action at this juncture.

Defendants do not address gross negligence claim separately, and, in fact, Rampart's second cause of action is for both negligence and gross negligence, without differentiating between them. Rampart states that it adequately alleges a claim for gross negligence because it pleaded facts to support a finding that defendants acted intentionally or exhibited a reckless indifference to the rights of others by lying about the coverage it said it obtained. *See Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 683-684 (2012). Since defendants do not

address the gross negligence claim, and plaintiff has alleged that defendants acted intentionally, this portion of the cause of action shall also continue.

Negligent Misrepresentation

Defendants contend that there was no special relationship to support a negligent misrepresentation claim. They argue that even if Rampart pleaded an adequate cause of action for breach of contract, that alone does not suffice to create a special relationship. Rather, relying on *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.* (70 NY2d 382 [1987]) and its progeny, they maintain that a cause of action for negligent misrepresentation cannot arise within the context of a breach of contract action unless there is a special relationship between the parties and the alleged misrepresentation arises from circumstances extraneous to the contract, rather than constituting elements of the contract. *See Alamo Contract Bldrs. v CTF Hotel Co.*, 242 AD2d 643, 644 (2d Dept 1997).

Rampart contends that it has adequately alleged the existence of a privity-like relationship which imposed a duty on defendants to provide correct information to it, that the information provided was incorrect, and that it reasonably relied on the information. *See J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007). Thus, it concludes that it has stated a claim for negligent misrepresentation.

> "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information."

Id. In addition, the alleged misrepresentation must concern a matter which is extraneous to the contract itself. *Alamo Contract Bldrs. v CTF Hotel Co.*, 242 AD2d at 644. Nonetheless, there is

a duty to speak with care when one party has the right to rely on the other for information. *Kimmell v Schaefer*, 89 NY2d 257, 263 (1996). But liability is imposed "only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party . . ." *Id.*

Here, Rampart has not alleged any relationship with defendants other than the contractual relationship arising from parties in an arm's length relationship. Nor has it alleged that the misrepresentation concerned a matter extraneous to the contract. *Alamo Contract Bldrs. v CTF Hotel Co.*, 242 AD2d at 644. In fact, it is precisely the subject of the contract that is at issue in this cause of action. That does not suffice to create the special relationship necessary to support a cause of action for negligent misrepresentation. Thus, the negligent misrepresentation cause of action is dismissed against all defendants.

Breach of Fiduciary Duty

Defendants maintain that plaintiff has failed to plead facts to support a finding of a fiduciary relationship, and that this cause of action is duplicative of the breach of contract cause of action. Plaintiff contends that defendants became its agents, acting on its behalf to purchase insurance on behalf of its clients. Since an agent is a fiduciary of its principal, plaintiff asserts that defendants' failure to protect its interests is a breach of the fiduciary duty.

While it is true that an insurance broker is, to an extent, an agent of its client (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 442 n 3 [1972]), a broker is also sometimes the insurer's agent as well, and has, therefore, a "dual agency status." *People v Wells Fargo Ins. Servs., Inc.*, 16 NY3d 166, 171 (2011). Further, a fiduciary relationship is "'grounded in a higher level of trust than normally present in the marketplace between those involved in

arm's length business transactions.'" *Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 (2012) (internal citation omitted). Unless the parties create a relationship of higher trust, the courts will not find such a relationship. *Id.* Here, Rampart has not pleaded any basis to find that defendants had any obligation greater than that of an arm's length business transaction. There is nothing in the Complaint that suggests that the parties created a relationship of higher trust that would support the finding of a fiduciary obligation.

Additionally, a breach of fiduciary duty claim cannot be based on the same facts as a breach of contract claim. *Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 449 (1st Dept 2008). Here, Rampart has alleged the identical facts to support the contract cause of action and the breach of fiduciary duty cause of action. Therefore, the cause of action for breach of fiduciary duty is dismissed.

Fraud

Defendants maintain that the fraud cause of action is duplicative of the breach of contract cause of action, and therefore must be dismissed. Rampart contends that it adequately pleaded that defendants acted intentionally, engaging in a fraudulent scheme to extract money by obtaining premiums for policies that it never procured.

In order to state a claim for fraud, a plaintiff must allege a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance and damages. *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 (2007). In addition, "the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties." *Americana Petroleum Corp. v Northville Indus. Corp.*, 200 AD2d 646, 647 (2d Dept 1994). Here, the claims "are entirely dependent upon the existence of the contractual relations between the

parties." *Id.* at 648. Further, plaintiff seeks damages that are the same as those that it seeks for its breach of contract claim. Therefore, the fraud claim is duplicative of the breach of contract claim and cannot stand. *Id.; see also Sokol v Addison*, 293 AD2d 600, 601 (2d Dept 2002).

Claims Against Riemer and Scarpa

Seq. 006 Movants maintain that the claims against Riemer and Scarpa individually cannot be maintained because Rampart does not allege any independently tortious acts committed by them. Nor has Rampart alleged that Riemer and Scarpa committed any acts for personal gain rather than for the benefit of the corporations they represented. Rampart does not address this issue.

There is no question that corporations exist independent of their owners, and that an owner or employee is not subject to individual liability when acting as a representative of the corporations. *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 (1st Dept 2002). In order to hold an individual personally liable, a plaintiff must meet an enhanced pleading standard, alleging that the corporate officials acted in other than their corporate capacity, or that they sought to obtain a personal benefit. *Id.* at 110; *see also Petkanas v Kooyman*, 303 AD2d 303, 305 (1st Dept 2003).

Rampart has not alleged any facts suggesting that Riemer or Scarpa was acting in any individual or personal capacity, or that either one sought a personal benefit rather than a benefit to the corporations they represented. Consequently, the pleading fails to state a claim against either of the individual defendants, and the Complaint is dismissed as against them.

General Business Law § 349

Defendants maintain that Rampart has not properly pleaded a GBL § 349 claim because it is not a consumer, nor were defendants' alleged actions consumer-oriented. Rampart relies on the language of GBL § 349 (h), which grants a right of action to "any person who has been injured by reason of any violation of this section."

The Court of Appeals has held repeatedly that in order to benefit from GBL § 349, the conduct "must have a broad impact on consumers at large," and cannot involve a private contract dispute that is unique to the parties involved. *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 (1995); *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 (1995). The acts and practices targeted by section 349 are deceptive acts or practices that are consumer oriented. *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 (1999).

Plaintiff is not a consumer. It is a business, and therefore the cause of action does not meet the threshold requirement of being consumer oriented. *See also Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 (1st Dept 2000) ("section 349, is intended to protect consumers, that is, those who purchase goods and services for personal, family or household use"). Accordingly, this cause of action is dismissed.

Declaratory Judgment

In the declaratory judgment cause of action, plaintiff seeks a declaratory judgment that with respect to any claims or potential claims against it based on defendants' failure to obtain proper coverage, plaintiff is entitled to be indemnified by defendants. Defendants seek dismissal of this cause of action because plaintiff has an adequate remedy at law, and because it is premature.

"[A] request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur." *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 (1977). Here, Rampart has not stated that there is an ongoing case for which it seeks relief. Rather, it seeks a determination in advance that if such a case comes to court, defendants will be responsible to pay for its costs. That is precisely the type of advisory opinion which the courts decline to entertain. It is beyond the control of the parties whether any case will reach the courts, and, therefore, the question is not ripe for review. *Id.* at 531.

Furthermore, an action seeking indemnification is premature when the claim for indemnification has not accrued, and the cause of action accrues only when payment has been made by the party seeking indemnity. *Bay Ridge Air Rights v State of New York*, 44 NY2d 49, 54 (1978); *Alside, Inc. v Spancrete Northeast*, 84 AD2d 616, 617 (3d Dept 1981). Rampart has not alleged that any action has been commenced, much less that it has made any payment. If it had done so, a declaratory judgment would not be the appropriate vehicle in any event. Rather, Rampart would have an adequate remedy at law which it would be obligated to pursue rather than seeking a declaratory judgment. *Automated Ticket Sys. v Quinn,* 90 AD2d 738, 739 (1st Dept 1982), *affd* 58 NY2d 949 (1983); *Boyle v Kelley*, 42 NY2d 88, 91 (1977).

It also bears noting that the declaration that Rampart seeks is far too broad to allow for any declaratory relief. Consequently, this cause of action is also dismissed.

Contribution

Plaintiff purports to seek contribution from defendants. However, not only is such a claim premature because plaintiff has not alleged that it paid claims for which contribution is sought (*Schmutz v Fleet Bank*, 278 AD2d 19, 20 [1st Dept 2000]), but Rampart has not alleged

that it is a joint tortfeasor with defendants. Therefore, contribution does not lie. *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 (1st Dept 2003).

Punitive Damages

Plaintiff seeks punitive damages on its second (gross negligence) and fifth (fraud) causes of action.

In order to recover punitive damages, a party "must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 (1994). While Rampart maintains that defendants' conduct was directed at the public, it does not allege any facts to support a conclusion that it was part of a pattern of similar conduct directed at the public generally. It references only defendants' conduct with regard to its clients. Thus, punitive damages are not available.

Consequential Damages

Relying on *Atkins Nutritionals v Ernst & Young* (301 AD2d 547, 549 [2d Dept 2003]), Riemer Insurance maintains that Rampart failed to allege that consequential damages were contemplated by the parties when the contract was executed, and therefore the claim for consequential damages should be dismissed. Plaintiff does not address this issue, nor do Seq. 006 Movants. The Complaint does not specifically seek consequential damages, but states that it seeks "all damages," which could be construed to include consequential damages.

"In order to recover consequential damages, the plaintiffs were required to plead that those damages were the natural and probable consequences of the breach, and were contemplated

at the time the contract was executed." *Id.* The Complaint does not fulfill these requirements. Therefore, consequential damages are precluded.

RIBS One LLC

Seq. 006 Movants assert that Ribs One LLC is the assumed name of RIBS NY. They submit a "Certificate of Assumed Name" to support their allegation. Plaintiff expresses concern about the ramifications if it should come to light at some time in the future that RIBS One is a separate entity.

In view of the Certificate of Assumed Name, it is clear that Ribs One is the assumed name of RIBS NY. Since defendants have acknowledged that to be the case, they cannot later deny it. Therefore, plaintiff's concern is unnecessary, and RIBS One is dismissed from the action as duplicative, it being a fictitious name for RIBS NY.

RIBS NYC, LLC

Seq. 006 Movants maintain that the Complaint must be dismissed as against RIBS NYC because it no longer exists as a legal entity. RIBS NYC and RIBS NY both existed under the laws of Florida. Pursuant to a "Certificate of Merger" filed with the Secretary of State of Florida on January 24, 2012, RIBS NYC merged with RIBS NY, and the surviving entity is RIBS NY. Defendants have submitted copies of the merger documents, which are stamped "filed" by the Florida Secretary of State. Sullivan affirmation, exhibit B. Under Florida law, the separate existence of the entity which merged into another entity ceases to exist, and the surviving entity is responsible for any debts of the entities that merged. Fla Stat Ann § 608.4383. Since RIBS NYC no longer exists, defendants maintain that it cannot be a party to the action and should be dismissed. *Corporate Express Office Prods., Inc. v Phillips*, 847 So2d 406, 413 (Fla 2003).

Rampart objects to dismissing RIBS NYC, saying that Riemer executed the merger agreement on behalf of both corporations, which makes the merger suspect. It also argues that there is no evidence that the Secretary of State of Florida accepted the merger. Rampart also maintains that the State of New York Department of State continues to recognize RIBS NYC as an active foreign limited liability company, and therefore the court cannot determine that the company no longer exists.

Despite Rampart's concerns about the validity of the merger documents, there is no question that Florida has accepted the merger, as evidenced by the filing stamp on the documents, as well as viewing the Florida Department of State website, which shows that RIBS NYC is inactive, the last event having been a corporate merger. The fact that Riemer, principal of both LLCs, executed the merger documents on their behalf does not invalidate them. Since, under Florida law, RIBS NYC no longer exists, it must be dismissed from this action.

Attorneys' Fees

In the Complaint, Rampart seeks attorneys' fees. However, Rampart has not pointed to any contract provision or statute that would enable it to recover attorneys' fees from defendants. *Hunt v Sharp*, 85 NY2d 883, 885 (1995); *Chase Manhattan Bank v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005,* 258 AD2d 1, 4 (1st Dept 1999). Therefore, it may not recover attorneys' fees.

Stay of Discovery

Riemer's request to have discovery stayed is moot since he is no longer a party, and is not subject to any party disclosure. He is, however, subject to nonparty disclosure should Rampart

seek such disclosure, and may be the logical person to depose as the representative of the Riemer entities.

Conclusion

Accordingly, it is hereby

ORDERED that Riemer Insurance Group Inc.'s motion (motion sequence 004) to dismiss the complaint is granted to the extent that the third, fourth, fifth, sixth, seventh, and eighth causes of action, and the request for punitive damages, consequential damages and attorneys' fees are dismissed as against it, and the motion is otherwise denied; and it is further

ORDERED that defendants RIBS NY, LLC, RIBS NYC, LLC, RIBS One, LLC, Regency Insurance Brokerage Services, Inc., Stephen L. Riemer and Gregory Scarpa's motion (motion sequence 006) to dismiss the complaint is partially granted as follows:

- the third, fourth, fifth, sixth, seventh, and eighth causes of action, and the request for punitive damages and attorneys' fees are dismissed as against them, and
- the complaint is dismissed as against RIBS One, LLC as an assumed name and therefore duplicative of defendant RIBS NY, LLC, and
- the complaint is severed and dismissed as against defendants Stephen L. Riemer and Gregory Scarpa, with costs and disbursements to said defendants as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly, and
- the complaint is severed and dismissed as against RIBS NYC LLC as that entity was merged into RIBS NY LLC and no longer exists,

and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the 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 a preliminary conference in Room 218, 60 Centre Street, on May 1, 2014, at 11:30 a.m.

Dated: April 8, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER